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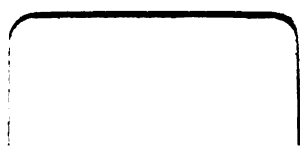
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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY.

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT
OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS,"

VOL. XLIX.

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AMERICAN STATE REPORTS.

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CASES
IN THE
SUPREME COURT
OF
ALABAMA.

BIRMINGHAM NATIONAL BANK v. BRADLEY.

[108 ALABAMA, 109.]

BANKING—CHECKS.—An indorser of a check who receives the amount thereon warrants the genuineness of the check, both as to the drawer's signature and as to the amount of the check.

BANK—RAISING OF ALTERED CHECK—LACHES.—The discounting bank and the drawee bank have a right to rely on the indorsement of a check by a person named as payee therein, and against him are not required to exercise any diligence to discover whether the check has been raised.

BANKING—RIGHT TO RECOVER MONEY PAID ON A FORGED OR ALTERED CHECK.—If a payee named in a check indorses it to a bank other than the one on which it was drawn, and receives the amount thereof, he is liable in an action of assumpsit for the moneys so received if the check has been forged, or, though genuine when issued, has been altered by changing the name of the payee and by raising the amount. That he paid over the moneys so received to another person does not constitute any defense to the action.

BANKING.—PAYEE OF A FORGED CHECK WHO INDORSES it and receives the money acquires no title to such moneys.

BANKING—CREDITING A FORGED CHECK, WHEN REVOCABLE.—If a person named as payee in a check indorses it to a bank, which in turn forwards it to the bank on which it was drawn for collection, and the latter credits it to the former, it may, on discovering that the check has been fraudulently altered after it was issued, by changing the name of the payee and raising the amount, cancel such credit, and the indorser, in an action by the discounting bank, cannot defend on the ground that such check has been paid by the drawee.

Mountjoy & Tomlinson, for the appellant.

Garrett & Underwood, Dan. S. Green, L. C. Bradley, and B. M. Allen, contra.

117 COLEMAN, J. This was an action brought by the plaintiff bank to recover money paid to the defendant, Bradley, upon a check. We think the pleadings unnecessarily prolix, and tended to hide the real issue involved in the case. The facts upon which the plaintiff relied for a recovery may be summarized as follows: On the 23d of February, 1892, the Gate City National Bank, of Atlanta, Georgia, drew a check, payable to the order of James Fix, for the sum of two dollars on the National Park Bank of New York. After this check was issued, without the knowledge or consent of the drawer, the name of the payee was changed to John G. Bradley, the defendant, and the amount changed from two dollars to four thousand dollars. One Gelham carried the check to Birmingham, where Bradley resided—who was well known to the plaintiff bank, and who was considered reliable and responsible by the bank. Bradley indorsed the check to the plaintiff bank and received from it the full amount of four thousand dollars in cash. The plaintiff bank forwarded the check immediately to the drawee bank in New York indorsed “for collection.” The check reached New York on the 27th of February, and on the same day the drawee telegraphed to the plaintiff that the check was paid, which information was immediately communicated to Bradley. On the 29th of February, Bradley, having his suspicions aroused, had the plaintiff to telegraph to the drawee bank to examine closely the check. In consequence of this telegram, the National Park Bank, on the same day, telegraphed **118** to the Gate City Bank, the drawer, from which it learned that the check had been altered as above stated. Thereupon, on the next day, March 1st, the National Park Bank, the drawee, and to which the check had been forwarded for collection, telegraphed to the plaintiff bank as follows: “The four thousand dollar Gate City National Bank check has been altered from two dollars. We charge it back and return to you to-day.” The contents of this telegram were at once made known to Bradley. There was no question as to the genuineness of the signature of the drawer. This is plaintiff’s case.

The case for the defense is substantially as follows: 1. That there had been no alteration of the check, but that it was drawn originally in his favor for four thousand dollars; 2. That if the check was raised from two dollars to four thousand dollars, and his name substituted for the original payee, that he was deceived and imposed upon by Gelham and induced to receive the check believing it to be genuine, and, without fault on his part, received the money for it from the plaintiff; that he applied about five hundred

dollars to the payment of a debt due himself from Gelham; that he retained about eight hundred dollars, at Gelham's request, for another creditor of Gelham, and the balance was paid over to Gelham; that the drawee, the National Park Bank, had been negligent in not detecting the forgery within a reasonable time and informing the defendant of the forgery; that in consequence of this neglect of the National Park Bank the defendant had been injured, in this, that Gelham was in the city of Birmingham on the 27th of February, on which day, if the defendant had been duly notified of the forgery, he would have arrested Gelham and recovered back the money; and 3. That the check was paid by the National Park Bank to the plaintiff bank, and, therefore, the plaintiff bank has no cause of action against the defendant.

The principles of law which govern this case are well settled.

Bradley was the payee of the check. When he indorsed it to the plaintiff bank and received the money on it, he warranted to the indorsee bank the genuineness of the check, both as to the drawer's signature as well as the amount expressed in the check. As to him there is ¹¹⁹ no obligation upon the plaintiff bank to know or to discover that the drawer's signature was forged or the amount raised. The drawee bank is held to a knowledge of the signature of the drawer, but the payee indorser is held to a knowledge of all other facts.

The discounting bank and the drawee bank in such a case have the right to rely upon the indorsement of the payee, and, as to him, are not required to exercise any diligence to discover the fact that the check had been raised. These facts are conclusively presumed to be within the knowledge of the payee. Under such circumstances, the money paid can be recovered back in assumption, unless possibly, from some subsequent arrangement or cause, the right is lost. Certainly the fact that the payee, who received the money as payee and ostensible owner, has disposed of it according to his own will cannot in any way affect this right. The authorities cited by appellee, to the proposition that if a bank pays a forged check to a holder without fault, who, in ignorance of the fraud, pays value for it, the money cannot be recovered back, are not applicable to the case at bar. Bradley was the payee, and by his indorsement obtained the money. He parted with nothing to get possession of the check. Its genuineness is conclusive as to him, and as indorser he guaranteed it to be genuine for the amount expressed in the check: *Carpenter v. Northborough Nat. Bank*, 123 Mass. 66; *National Park Bank v. Seaboard Bank*, 114 N. Y. 28; 11 Am. St. Rep. 612; *White v. Con-*

tinental Nat. Bank, 64 N. Y. 316; 21 Am. Rep. 612; *Susquehanna etc. Bank v. Loomis*, 85 N. Y. 207; 39 Am. Rep. 652.

The check was forwarded by the plaintiff to the National Park Bank for collection. The amount of the check was credited to the plaintiff on the day received, and the plaintiff notified that it was paid. As soon as the forgery was discovered, which was within three days after its reception, the National Park Bank charged the amount back to the plaintiff and returned the check. If the money, in fact, had been remitted to plaintiff, we do not doubt, under the facts disclosed in the record, the National Park Bank could have recovered the money in *assumpsit*. The check was forwarded "for collection." Funds of the drawer on deposit with the drawee were applied to its payment, by crediting the amount to the forwarding bank, and, if the check had been altered, the ¹²⁰ credit was without legal authority from the drawer, and under a mistake of facts for which, as between the drawee bank, if the money had been remitted, or the forwarding bank, which had paid the money, and the payee—indorser—the latter would be responsible, in an action for money had and received: *Young v. Lehman*, 63 Ala. 519; *National Park Bank v. Seaboard Bank*, 114 N. Y. 28; 11 Am. St. Rep. 612; *United States Bank v. National Park Bank*, 129 N. Y. 647. The payee of a forged check, who indorses it and receives the money, acquires no title as against the party or the owner of the money. It would seem unnecessary to cite additional authorities to this proposition: *National Park Bank v. Seaboard Bank*, 114 N. Y. 28; 11 Am. St. Rep. 612; *United States Bank v. National Park Bank*, 129 N. Y. 647.

The respective rights of the drawer and drawee, and their corresponding duties and liabilities to each other, and private rules existing between them for their mutual protection, do not arise in this case. Not having remitted the money, but simply having credited the amount to the plaintiff, the drawee bank had the right to charge it back. The undisputed proof establishes the fact that the demand has not been paid to the plaintiff by the defendant, Bradley.

The case cited by appellee (*Clews v. Bank of New York*, 114 N. Y. 70), is not applicable. In the authorities cited, *Clews*, before purchasing the certified check, inquired of the certifying bank if the certificate of the check was good, and, being assured that "the bill was correct in every particular," parted with valuable consideration for it. The check had been raised. The suit was maintained, not upon the ground that the certifying bank had been

negligent, but upon the contract of certification. If Bradley had been so assured by the drawee bank that the check was correct in every particular, and upon this assurance had parted with value to obtain the check, the case would be more in point. The relative obligation of the parties in the case at bar are the reverse. The drawee bank was assured by Bradley's indorsement, and by the plaintiff bank, that the amount expressed in the check was the real amount for which it was given.

We have held that the plaintiff owed the defendant no duty to discover the fraud and forgery, and the evidence is without contradiction that both the plaintiff ¹²¹ and the National Park Bank acted with all due diligence after the discovery of the alleged fraud and forgery. Under the facts of the record before us there is but one open question, and that is, whether the check was in fact altered after it was issued by the Gate City Bank and before it was indorsed by the defendant, Bradley. The statement of the principles of law applying to the case will enable the parties to shape the issues properly on another trial.

Reversed and remanded.

CHECKS—LIABILITY OF INDORSERS.—A bank or drawee of a check is not bound to know the signature of an indorser, and the holder, whether he indorses the instrument or not, warrants the genuineness of all prior indorsements: *Extended note to People's Bank v. Franklin Bank*, 17 Am. St. Rep. 898.

BANKS—RIGHT TO RECOVER MONEY PAID ON FORGED OR ALTERED CHECK.—A bank paying a check on a forged indorsement is entitled to recover the money so paid from the person receiving it, on making demand within a reasonable time after the discovery of the forgery: *First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 296; 43 Am. St. Rep. 247. See the thorough discussion of this subject in the extended note to *People's Bank v. Franklin Bank*, 17 Am. St. Rep. 892, 898.

LOUISVILLE AND NASHVILLE R. R. CO. v. MARKEE.

[108 ALABAMA, 160.]

PLEADING—NEGLIGENCE.—AN AVERMENT that the engineer in charge of the defendant's train ran it without care, and negligently, through a cut and around a curve and upon John S. M., and thereby killed him, and that his death was the result of the negligence of such engineer, sufficiently states the negligence of the defendant.

PLEADING—CONTRIBUTORY NEGLIGENCE.—A plea that the plaintiff was himself guilty of negligence in and about the discharge of his duties, which negligence contributed to his injury, is too general, and a demurrer to it should be sustained.

PRACTICE.—IF ISSUE IS FORMED UPON A PLEA, the defendant, if it is sustained, is generally entitled to a verdict, though it is an insufficient plea.

NEGLIGENCE—PLEADING.—A PLEA OF CONTRIBUTORY NEGLIGENCE IS NO ANSWER to a complaint charging willful and wanton negligence.

PLEADING WANTON NEGLIGENCE.—UNDER A COMPLAINT AVERRING SIMPLE NEGLIGENCE, the plaintiff should not be permitted to prove willful injury or wanton negligence.

NEGLIGENCE OR WANTONNESS.—The failure of the engineer of a railway train, after seeing a person on the track or in a position of danger, to do the act which if done would have avoided the injury, is not necessarily equivalent to an intentional wanton wrong. Such rule would require infallibility in selecting the best means to avoid an injury, while all the law requires is the adoption in good faith of the means believed by the person called upon to act to be the best adapted to prevent injury.

RAILWAYS.—THE REQUIREMENT THAT A WHISTLE BE BLOWN AT THE HIGHWAY CROSSING is intended to provide for the warning and protection at such crossing, and an omission to comply with this requirement cannot constitute negligence entitling an employee to recover for injuries received while operating a hand-car at a point nearly a half mile distant from such crossing.

RAILWAYS.—THE FAILURE OF AN ENGINEER TO BLOW A WHISTLE BEFORE entering a cut or curve, if required to do so by the rules of the corporation, is simple negligence and no more, when he has no knowledge of the presence of a person in or beyond such curve or cut to whom the blowing might have operated as a warning of danger.

NEGLIGENCE, CONTRIBUTORY.—IF THE RULES OF A RAILWAY COMPANY REQUIRE ITS EMPLOYEES, in running hand-cars over the road, to flag curves and other dangerous places, a foreman who neglects this duty and is run over and injured in consequence thereof is guilty of contributory negligence.

JURY TRIAL.—AN INSTRUCTION GIVEN AT THE REQUEST OF A PARTY cannot be complained of by him.

JURY TRIAL.—AN ABSTRACT INSTRUCTION inapplicable to any evidence in the case is likely to be misleading, and should not be given.

DAMAGES IN AN ACTION FOR DEATH.—In an action brought for the death of a person who is shown to have been capable of earning a small amount of money, all of which he had been appropriating to the comfort and support of himself and his family, such family have no pecuniary interest in his life, except by way of support and maintenance, and the jury should not be authorized in the instruction of the court to give damages based upon the probability that he might have accumulated an estate which would have gone to his family at his death.

Action by Mrs. Markee, as administratrix of her deceased husband, to recover compensation for injuries suffered by him, resulting in his death, and which were claimed to be due to the negligence of the employees of the defendant corporation. The averment of negligence in the complaint and the plea of contributory negligence, to which a demurrer was sustained, are shown in the syllabi. There were, however, pleas of contributory negligence, in which facts claimed to constitute such negligence were specifically averred, and the demurrers to these pleas were overruled. The court orally charged the jury that it was for them to deter-

mine whether the decedent had been guilty of negligence in violating the rules of the defendant, and whether or not, in view of all the circumstances, he contributed to his own death by his own negligence. At the request of the plaintiff the jury were further instructed that, while the decedent assumed the risks incident to his employment, yet the plaintiff could recover if he had been injured by a superadded risk, consisting of the negligence of the engineer, unless guilty of contributory negligence. The defendant asked that the jury be instructed that the failure of the engineer to use the utmost expedition, or to select the most available means of stopping the train on discovering the peril of the decedent, did not constitute willful, wanton, or intentional negligence, unless it manifested a willingness, on the part of the engineer, to inflict injury; that it was the duty of the decedent to have protected himself and his hand-car, and that the defendant owed no duty to see him until he was discovered on the track, nor to blow the whistle at the public crossing. All these requests were refused. The defendant excepted. The jury returned a verdict in favor of the plaintiff for three thousand dollars, and the defendant appealed.

J. M. Falkner, and Hewitt, Walker & Porter, for the appellant.

Bulger & Altman, contra.

¹⁰⁸ COLEMAN, J. This is an action, under the Employers' Liability Act, to recover damages sustained by the death of plaintiff's intestate, averred to have been caused by the negligence of the defendant railroad company. The case was tried upon two counts. The first count charges that the engineer in charge of the engine "ran said engine, without due care and negligently, through said cut and around said curve and on the said John S. Markee," etc., and that his death "was the result of the negligence of said engineer." The other count charges a defect in the ways, works, and machinery. The real contest was upon the first count.

Under former decisions of this court, the complaint was sufficient, and the court did not err in overruling a demurrer to the first or third count of the complaint: *South etc. R. R. Co. v. Thompson*, 62 Ala. 494; *Leach v. Bush*, 57 Ala. 145; *Ensley Ry. Co. v. Chewning*, 93 Ala. 24; *Mobile etc. R. R. Co. v. George*, 94 Ala. 199; *Savannah etc. R. R. Co. v. Meadors*, 95 Ala. 137.

The defendant pleaded the general issue, and also several pleas setting up contributory negligence as a defense. The first plea of contributory negligence was too general, and the demurrer to

it was properly sustained: *Tennessee etc. R. R. Co. v. Herndon*, 100 Ala. 451. The trial proceeded upon issue joined upon the plea of the general issue, and the pleas of contributory negligence. After the close of the evidence, the court, among other charges, instructed the jury, as matter of law, the plaintiff was guilty of contributory negligence. For the defense ¹⁰⁰ it is contended that, under the instructions of the court, holding as matter of law that the plea of contributory negligence was sustained, the defendant was entitled to a verdict, and this on the principle, often decided, that when issue has been joined upon a plea, even though it be an insufficient plea, the defendant has the right to support it by evidence, and, if sustained, he is entitled to a verdict: *Memphis etc. R. R. Co. v. Graham*, 94 Ala. 545; *Farrow v. Andrews*, 69 Ala. 97; *Mudge v. Treat*, 57 Ala. 1.

On the other hand, it is contended by the plaintiff that under many decisions of this court, although a defendant may show contributory negligence, yet the plaintiff may prove, if he can, that after the discovery of his danger, the defendant was culpably negligent in not using proper preventive effort to avoid the injury, and upon such proof the plaintiff may still recover, notwithstanding he may have been guilty of contributory negligence. The authorities relied upon to sustain this latter contention are collected in the case of *Louisville etc. R. R. Co. v. Webb*, 97 Ala. 308; *Louisville etc. R. R. Co. v. Hurt*, 101 Ala. 34; *Tanner v. Louisville etc. R. R. Co.*, 60 Ala. 621.

It has also been held that where the plaintiff counts upon willful or wanton negligence, and the proof shows only simple negligence, there is that variance between the allegata and probata which will defeat a recovery: *Louisville etc. R. R. Co. v. Johnston*, 79 Ala. 436; *Birmingham etc. R. R. Co. v. Jacobs*, 92 Ala. 187; *Kansas City etc. R. R. Co. v. Crocker*, 95 Ala. 432; *Highland Avenue etc. R. R. Co. v. Winn*, 93 Ala. 308.

It would also seem, on principle, if there is that variance between simple negligence and wanton or willful injury that proof of the former will not sustain a complaint charging the latter, that a replication to a plea of contributory negligence, averring willful and intentional injury, would be a departure from a complaint charging simple negligence: *Eskridge v. Ditmars*, 51 Ala. 245.

It has also been decided that a plea of contributory negligence is no answer to a complaint counting upon willful or wanton negligence: *Alabama etc. R. R. Co. v. Frazier*, 93 Ala. 45; 30 Am. St. Rep. 28; *Louisville etc. R. R. Co. v. Watson*, 90 Ala. 68;

Montgomery etc. R. R. Co. v. Stewart, 91 Ala. 421; Kansas City etc. R. R. Co. v. Crocker, 95 Ala. 412.

170 There is not necessarily that inconsistency in these several principles of law which will prevent their proper application in a single suit, if the complaint and pleas are properly framed. Their improper application to the pleadings have led to confusion. The practice which has obtained in this state, and to some extent justified by adjudications of this court, of proving willful injury, or wanton negligence as its equivalent, under a complaint averring only simple negligence, should no longer prevail. It is not correct in principle or practice, and leads to confusion or injustice. This court does not generally review assignments of error not properly raised and excepted to during the trial, and which are not necessary to a determination of the case. We think it very clear that a plea of contributory negligence is no answer to a charge of having intentionally or wantonly caused the death of another. If an engineer saw, or knew, that a person had placed himself upon a railroad track for the very purpose of being run over and killed, he could not be justified in running his engine upon such person, because of the willful or intentional misconduct of such person. The proper plea to such a charge is the general issue, and not of contributory negligence; for if the plaintiff counts upon such a charge, and proves it, he is entitled to recover, in cases where the principal is liable for such acts of its agents, notwithstanding the deceased intentionally contributed to his own death. A plaintiff is presumed to know his cause of action when he brings his suit, and has the right to state it in as many counts as he may deem it necessary to meet the varying phases of the evidence, and it is his duty to fully inform the defendant by his declaration of all the grounds of complaint relied upon for a recovery. Having done this, the defendant is in a condition to prepare his pleas in defense. It is not just for the parties to go to trial, and after having entered upon the trial, upon issues shaped by the pleading, to permit either party, against the objections of the other, unless specially authorized by statute, to inject a new issue, and allow the plaintiff to recover upon a cause of action not stated in his complaint, or the defendant to avail himself of a defense of which his adversary is not apprised by the plea. If, however, the parties go on without objection, this court will not consider the objection, ¹⁷¹ if first raised here. If, during the trial, it is developed that the pleadings are not suitably framed to meet the evidence, under our liberal system of pleadings, it is the duty of the court to permit, if desired, an

amendment of the pleadings, the court taking care to see that no undue advantage is obtained thereby, nor injustice done, and that the amendment does not go to the extent of changing "the form of the action, nor an entire change of parties, nor the substitution or introduction of an entirely new cause of action." These are the only limitations on the right of amendment: *Mahan v. Smitherman*, 71 Ala. 565; *Johnson v. Martin*, 54 Ala. 271; Code 1886, sec. 2833.

A declaration or complaint may in one count aver simple negligence, in another willful and intentional wrong, and proper issues may be made up under the pleas to each count; or, if the complaint charged either the one or the other, and the proof was such as to require an amendment of the pleadings by adding a new count, this should be allowed, and a plea to the complaint as amended filed. Justice might require a continuance under some circumstances, but the question of a continuance, to prevent injustice or undue advantage, would depend greatly upon the circumstances of each case.

We think what we have said will suffice on the questions considered.

One material question in the case is as to whether there was any evidence tending to show negligence on the part of the engineer after the discovery of the danger of plaintiff's intestate. We do not think a failure to do an act, which if done might or would have avoided the injury, necessarily constitutes it an intentional, or such a willful or wanton, wrong as to be the equivalent of intentional wrong. Such a rule would require infallibility in the selection of the means used to prevent the injury. No employer owes such a duty to his employee. Due care and reasonable diligence is all that the law requires: *Highland Avenue etc. R. R. Co. v. Sampson*, 91 Ala. 563. If the person charged with the duty consciously fails or refuses to exercise reasonable care to prevent an injury after the discovery of peril, or under circumstances where he is chargeable with a knowledge of such peril, and injury results, he will be guilty of willful injury, or such wanton negligence as to be its equivalent. If an employee¹⁷² or agent charged with the duty, after the discovery of the peril of a coemployee, in good faith exercises due diligence and care to prevent an injury, and injury results notwithstanding, it cannot be said he is guilty of simple negligence or of intentional and willful wrong.

The evidence shows that the deceased was a section foreman, riding on the track on a hand-car in the discharge of his duties

and at the time going south. The train which ran over him was also going south, heavily loaded with pig iron. The hand-car was about emerging from a cut, in which there was a curve which so obstructed the view that persons in charge of the train could not see the hand-car or deceased until they were within one hundred and fifty yards of him. The train was running twenty-five miles an hour, schedule time, and down grade. The evidence shows, without conflict, that as soon as the presence of the deceased was discovered, the alarm was given, the brakes were put on, and then the engine reversed. The engineer and the witness Rosser, who was an expert, testified that this was the most effective method of stopping the train. The conductor, who had never acted in the capacity of an engineer, but, from his long employment as conductor and familiarity with the manner by which engines are controlled, had acquired sufficient knowledge to render him competent to give expert testimony, testified that, in his opinion, the most effective way to stop a train is by first reversing the engine, and then to apply the brakes. Whether the one or the other be correct, we think it very clear that if the engineer, after discovering the peril of deceased, adopted the means he believed best adapted to stop the train, and in good faith did all he could to prevent the collision, it cannot be said he was guilty of intentional injury, or such wanton or reckless negligence as to be its equivalent, even though the jury might believe the conductor was right in his conclusion.

There was evidence tending to show that, on account of the speed of the train, its load, and the down grade, no preventive effort could have prevented the collision with the hand-car after it was seen. If the jury should believe this phase of the evidence, the engineer was not chargeable with simple negligence, or with willful or wanton injury, for a failure of duty arising after the discovery of the peril of plaintiff's intestate.

173 It is contended that the engineer was guilty in not blowing his whistle before reaching the curve. It would have been better pleading to have charged this negligence in the complaint, but we will consider the question upon its merits, as the court was requested to give instructions on this point. There was some evidence tending to show that a sign post with the letter "W" stood on the right of the road, just before reaching the curve, which required engineers to blow the whistle before entering the cut and curve. This fact was controverted. The proof showed also that there was a public crossing of the road about one-half mile north of where the injury occurred. The evidence was in conflict as to

whether the whistle blew at the public crossing. The defendant requested the court to instruct the jury that it owed deceased no duty to blow the whistle at the public crossing, which was refused. It has been decided that section 1144 "was intended to protect and warn persons who at a public crossing, pass across and directly on the track," "and for the benefit of the traveling public, who have a right to be warned of approaching trains, for their personal protection": Louisville etc. R. R. Co. v. Hall, 87 Ala. 718; 13 Am. St. Rep. 84; Nashville etc. R. R. Co. v. Hem-bree, 85 Ala. 481; Alabama etc. R. R. Co. v. Hawk, 72 Ala. 112; 47 Am. Rep. 403. The defendant owed plaintiff's intestate no duty to blow the whistle at the public crossing. If the post with the letter "W" was at the place testified to by some of the witnesses, and required the engineer to blow before entering the curve, his failure to blow would be negligence. The failure to blow at the public crossing or at the post, having no knowledge of the presence of plaintiff's intestate, would be simple negligence, no more: Georgia Pac. Ry. Co. v. Lee, 92 Ala. 262; Highland Avenue etc. R. R. Co. v. Sampson, 91 Ala. 560.

Was the plaintiff's intestate guilty of contributory negligence? On this point the following rules of the company were introduced in evidence: "As no signals are carried for extra trains, foremen must use the utmost care in running their hand-cars over the road. Curves and other dangerous places must be flagged. A constant lookout must be kept." "Extra trains may be expected at any moment, and section foremen must always be prepared to meet them." These rules were known to deceased, and without contradiction it is shown that the ¹⁷⁴ train was an "extra train," that deceased did not observe the rule and put out a "flag" at the curve, as required by the rule; that if the curve had been properly flagged the engineer would have had time and space within which to stop the train before reaching the point of collision. Under this evidence the deceased was guilty of negligence himself: Richmond etc. R. R. Co. v. Hammond, 93 Ala. 181.

Thus far we have not referred to the evidence by the witnesses for the plaintiff and defendant which shows that there were five persons on the hand-car, all of whom jumped safely off the hand-car. If it be true, as testified to by some of the witnesses, both for the plaintiff and defendant, that the deceased escaped the peril of a collision by jumping from the hand-car, and was in a safe position, and voluntarily returned to the hand-car, and, in an endeavor to get the hand-car from off the track, was caught by it and held until the freight train collided and ran over deceased,

and it was not possible, by the use of all reasonable preventive effort, to stop the train so as to prevent a collision after the deceased returned to the hand-car, under no principle of law can the defendant be held liable for a neglect of duty by the engineer.

The trial court cannot be put in error for not charging upon the effect of evidence *ex mero motu*. The statute is positive (Code, 1886, sec. 2754), and certainly the defendant cannot complain of a charge given at its request: *Louisville etc. R. R. Co. v. Hurt*, 101 Ala. 34.

The evidence shows that deceased left a wife and two children; that he was receiving forty dollars a month; "that he appropriated his wages to the comfort and support of his family." "It took all his wages to support himself and his family." "That it took about five dollars a month to clothe himself, and about ten or twelve dollars a month to feed himself." We believe this to be all the evidence on this point. We are of opinion that the case is brought fairly within the principle declared in *Louisville etc. R. R. Co. v. Trammell*, 93 Ala. 350; that it involves a dependent relationship and no pecuniary interest, except by way of support and maintenance. In the oral charge the court instructed the jury as follows: "If the case should appear to be one where the deceased would have, in addition to assisting in the support of the next of kin, accumulated an estate which would have gone to them ¹⁷⁵ at his death, that might be taken into consideration in measuring the pecuniary loss," etc. The principle of law here stated may be correct, but we fail to find any evidence to which it could be referred. It was abstract and misleading, and, though this court will not reverse a case for an abstract charge asserting a correct principle, unless it is manifest that injury resulted, it is the safe rule to omit or refuse instructions of this character.

Where there are so many exceptions as appear in the present record, we can do no more than declare general principles of law, which govern them, and leave their application to the trial court. This, in our opinion, has been done with sufficient care in the case before us.

Reversed and remanded.

NEGLIGENCE—PLEADING.—A complaint charging negligence in general terms is good on demurrer: *Mississinewa Min. Co. v. Patton*, 129 Ind. 472; 28 Am. St. Rep. 203; *Ohio etc. Ry. Co. v. Walker*, 113 Ind. 196; 3 Am. St. Rep. 638. See, also, the note to *Holland v. Barch*, 16 Am. St. Rep. 313.

NEGLIGENCE, CONTRIBUTORY—WHEN NOT A DEFENSE.—The contributory negligence of the plaintiff does not preclude his recovery when the conduct of the defendant is wanton and willful, or

where it indicates that negligence or indifference to the rights of others which must justly be characterized as recklessness: *McDonald v. International etc. Ry. Co.*, 86 Tex. 1; 40 Am. St. Rep. 803, and note with the cases collected.

RAILROADS—SIGNALS AT CROSSING—FAILURE TO GIVE, WHEN NOT LIABLE FOR.—Where the servants in charge of a train fail to ring the bell or blow the whistle, and such failure could not have been the cause of the accident, it is proper to so instruct the jury, and to tell them that the company cannot, because of such failure, be held answerable for the accident: *McDonald v. International etc. Ry. Co.*, 86 Tex. 1; 40 Am. St. Rep. 803, and note. The requirement that an engineer shall blow a whistle or ring a bell before reaching a public road or crossing is for the protection of persons who being at a crossing are about to pass across the track. Hence, a brakeman, injured at a crossing, cannot recover therefor on the ground that the failure to give such signals left him without warning of the approach of the train, and thereby caused him to be injured: *Louisville etc. Ry. Co. v. Hall*, 91 Ala. 112; 24 Am. St. Rep. 863. See the discussion of this subject in the extended note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 817, and the notes to *Quigley v. Delaware etc. Canal Co.*, 24 Am. St. Rep. 507; *Heddles v. Chicago etc. Ry. Co.*, 20 Am. St. Rep. 114; *Louisville etc. R. R. Co. v. Hall*, 13 Am. St. Rep. 93, 94.

INSTRUCTIONS—WHEN CANNOT BE COMPLAINED OF.—A party cannot complain of an instruction as erroneous when it was given at his request and contains the same vice: *Hazell v. Bank*, 95 Mo. 60; 6 Am. St. Rep. 22. Litigants cannot be deprived of their right to except to instructions by the court, unless they have expressly requested them: *Wilbur v. Stoepel*, 82 Mich. 344; 21 Am. St. Rep. 568. Instructions to the jury on abstract propositions of law are improper: *Bowen v. Clarke*, 22 Or. 566; 29 Am. St. Rep. 625.

PUGH v. DAVIS.

[108 ALABAMA, 316.]

UNLAWFUL DETAINER.—THE FACT THAT A LANDLORD HAS BEEN DEPRIVED OF HIS TITLE since the making of a lease, by the foreclosure of a mortgage previously executed, is not available as a defense to an action of unlawful detainer, though the tenant has attorned to the purchaser at the foreclosure sale.

Action by Davis against Pugh in unlawful detainer to recover possession of leased premises. Judgment for the plaintiff. Defendant appealed.

Caldwell Bradshaw and James E. Webb, for the appellant.

Sayre & Pearson, contra.

317 HARALSON, J. This was an action of unlawful detainer, commenced before a justice of the peace to recover possession of lands alleged to have been unlawfully withheld by a tenant from his landlord after the termination of his possessory interest. Judgment was rendered against the defendant.

The cause was carried by appeal to the circuit court, where the

defendant set up in his plea, as an answer and defense to plaintiff's action, the foreclosure of a mortgage, which was executed by the plaintiff and her husband, on the lands described in the complaint, before the date of the contract of renting between the plaintiff and the defendant, and the purchase of the premises by the mortgagee at the foreclosure sale, and the defendant's recognition of the purchaser's ownership of and right to the possession of the lands, and his attornment to him, the purchaser.

The plaintiff demurred to this plea on the ground that it raises the question of title to the lands, which cannot be inquired into in this action. The court sustained the demurrer. On the trial of the cause, on a plea of not guilty, judgment was rendered against the defendant, and the appeal here is to review the ruling of the court sustaining the demurrer to said plea.

There are two questions which have been so long and repeatedly settled by this court as to leave no room for their further discussion: 1. That in an action of this character the merits of the title cannot be inquired into; and 2. That the tenant, continuing in and withholding possession from the landlord, cannot dispute his possessory title, no matter who has a better one: ³¹⁸ *Nicrosi v. Phillipi*, 91 Ala. 299; *Houston v. Farris*, 71 Ala. 570; *Norwood v. Kirby*, 70 Ala. 397; *Womack v. Powers*, 50 Ala. 5; *Dwine v. Brown*, 35 Ala. 597; *Dumas v. Hunter*, 25 Ala. 714; *Clark v. Stringfellow*, 4 Ala. 353.

What was attempted to be set up in this plea was an invasion of both of these rules, and the demurrer was properly sustained.

The decision of this court in the *American etc. Co. v. Turner*, 95 Ala. 272, does not infringe these rules. That case, so far as it has any bearing on this one, decides no more than that, as between the mortgage company and the defendant, under the facts stated in this plea, the latter would be the tenant of the former, and could not dispute his title; but it does not touch the relations between this plaintiff as the original lessor, and this defendant as her tenant, holding possession under her, nor question anywise the right of such a plaintiff as this to oust a tenant such as this in an action of this character.

Affirmed.

LANDLORD AND TENANT—ESTOPPEL OF TENANT TO DENY LANDLORD'S TITLE.—A tenant cannot be heard to dispute the title of his landlord during the existence of the tenancy: *Williams v. Wait*, 2 S. Dak. 210; 39 Am. St. Rep. 768, and note with the cases collected.

RICH v. McINERNEY.

(108 ALABAMA, 245.)

FALSE IMPRISONMENT is an unlawful restraint of a person contrary to his will. Malice need not exist; though, if present, it may be considered in aggravation of damages.

FALSE IMPRISONMENT.—IF AN IMPRISONMENT IS UNDER LEGAL PROCESS, an action for false imprisonment cannot be sustained, and the remedy, if any exists, is by an action for malicious prosecution.

FALSE IMPRISONMENT.—To sustain an action for false imprisonment it is not necessary that the plaintiff should have been arrested and detained on a criminal charge preferred falsely, maliciously, and without probable cause.

FALSE IMPRISONMENT.—Though the code promulgates a form of complaint in an action for false imprisonment, it is not to be construed as taking away a right of action existing under facts different from those disclosed by such form.

FALSE IMPRISONMENT—PLEADING.—A plea that the plaintiff was arrested and imprisoned by a policeman having cause to believe him guilty of grand larceny is not sufficient where the complaint alleges such arrest to have been caused by the defendant acting maliciously and without probable cause. Though the circumstances were such that the officer might have lawfully made the arrest on his own volition, this will not exonerate the defendant if the officer did not do so, but acted by the defendant's command and request.

EVIDENCE—RES GESTÆ.—IN AN ACTION FOR FALSE IMPRISONMENT it is not error to admit evidence that the officers, when making the arrest, said that the defendant had accused the plaintiff of stealing a ring, especially when there is evidence tending to prove that the arrest was made at the command and procurement of the defendant.

PLEADING IMMATERIAL FACTS MAY MAKE THEM MATERIAL.—If, in an action for false imprisonment, the plaintiff charges the defendant with causing an arrest maliciously and without probable cause, both these allegations must be supported by the evidence, though neither need have been averred in the complaint, and, if not averred, need not have been proved.

JURY TRIAL—INSTRUCTION AS TO DOUBT.—In a civil action for false imprisonment, where the defendant denies causing the arrest of the plaintiff, it is not error for the court to refuse to instruct the jury that if their minds are in a state of doubt from the evidence whether the defendant ordered the police officers to arrest plaintiff, then their verdict should be for the defendant.

PROBABLE CAUSE FOR PROCURING AN ARREST is such reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party arrested was guilty.

FALSE IMPRISONMENT.—THE FACT THAT THE DEFENDANT COMMANDED the police officers to arrest the plaintiff cannot entitle the latter to recover of the former, unless the arrest was in consequence of such command.

FALSE IMPRISONMENT.—FALSELY ACCUSING A PERSON OF A CRIME, and giving the officers the facts upon which such accusation is based, maliciously and without probable cause, resulting in his arrest and imprisonment by such officers, will not sustain an action for false imprisonment against the informant, if the arrest was not based upon the command nor direction, and the officers acted upon their own volition.

Action by McInerny against Rich for false imprisonment. The plaintiff alleged that the defendant, maliciously and without probable cause, caused plaintiff to be arrested and deprived of his liberty on a charge of larceny. The defendant kept a jewelry store, which plaintiff entered for the purpose of looking at some rings. One of these was soon afterwards missed, when the plaintiff was arrested. There was a sharp conflict in the evidence. That on the part of the plaintiff was to the effect that the arrest was made by the direction of the defendant and upon the accusation by him that plaintiff had stolen the ring. The plaintiff, against the objection of the defendant, was permitted to testify that the officers, when making the arrest, told him that he was accused by the defendant of stealing a ring. The evidence on the part of the defendant, on the other hand, was that he merely told the officers of the circumstances attending the loss of the ring, and that they, without his direction or request, made the arrest, after he had expressly declined to authorize them to do so. Upon being arrested the plaintiff gave bonds for his appearance and afterwards appeared at the time specified in the bond, and he claimed that he then demanded of defendant the warrant of arrest, and that the cause was continued until the next day, at defendant's request, and was afterwards dismissed on his failure to prosecute. Instructions as follows were given to the jury at the request of the defendant, to all of which the defendant excepted: "1. If the jury believe, from all the evidence, that defendant procured, ordered, or directed the arrest of plaintiff, and that he was arrested, then I charge you that if the defendant did this merely upon suspicion that plaintiff had stolen a ring from his store, and without probable cause to believe plaintiff was guilty thereof, then defendant is liable in this action in such a sum as you may believe, from all the evidence, that he has been injured, not exceeding five thousand (\$5,000) dollars. 2. If you believe, from all the evidence in this case, that defendant procured, ordered, and directed the arrest of plaintiff, and that he was arrested at defendant's request, then, if you believe that in fact no ring was in fact stolen from defendant's store, and that consequently plaintiff was not guilty of having stolen the same, then I charge you that the defendant is liable in this suit, and your verdict should be for the plaintiff. 3. If you believe, from all the evidence in this case, that defendant appeared at the mayor's court upon the next day after the arrest of plaintiff, and stated to the mayor of the town of DeCatur that he would prepare, or have prepared, a warrant for plaintiff, upon a charge of stealing a ring from defendant's store, upon

the next morning, and that thereupon and because of this the mayor continued the examination or trial of plaintiff until the next morning; if you believe these facts, if facts they be, then this is some evidence to which you may look, in connection with all the evidence in the case, tending to show that the defendant authorized and directed the arrest of plaintiff; and if you believe that he did so procure, order, and direct the arrest of plaintiff without a reasonable cause to believe that plaintiff was guilty of the charge, then defendant is liable in this suit. 4. The burden of proof is on the defendant, Rich, to prove, to the satisfaction of the jury, that the ring was stolen. 5. I charge you that the 'probable cause' that will excuse the defendant in this case, if you believe defendant ordered and directed the arrest of plaintiff, there must have been a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the plaintiff was guilty; and even this 'probable cause' is not sufficient to avail the defendant in this cause, unless you believe that a ring was in fact stolen from the defendant's store. 7. If the jury believe from the evidence that no felony had in fact been committed, and that defendant maliciously and without probable cause directed the arrest of plaintiff by the policemen, they must find for the plaintiff, and, in assessing plaintiff's damages, may take into consideration the injury to his feelings caused by his arrest and imprisonment, and it is not necessary to prove by witnesses the amount of such damages. The jury may assess damages as they deem proper, not exceeding the amount claimed in the plaintiff's complaint. 10. Unless the jury are reasonably satisfied that the ring was in fact stolen, then it is immaterial whether Rich had probable cause for believing that the plaintiff had committed the theft." The following instructions were asked by the defendant, and he excepted to the action of the court in refusing to give them: "1. If the jury believe the evidence, they will find for the defendant. 2. Whether the ring was actually stolen or not, if you believe from the evidence that the defendant had probable cause for believing it was stolen by plaintiff, then your verdict should be for the defendant. 3. If the minds of the jury are in a state of doubt, from the evidence, as to whether the defendant, Rich, ordered the police officers to make the arrest of plaintiff, then the verdict of the jury should be for the defendant. 4. If you believe from the evidence that plaintiff took the ring mentioned out of the store without the knowledge of defendant, this would be felony, under the laws of Alabama, and if you believe from the evidence that the defendant had

probable cause for believing that plaintiff did take the ring, then, whether he took the ring or not, the defendant would not be liable. 5. If you believe from the evidence that the evidence of the witnesses, Turley, Griffin, Crass, Nelson, and Rich conflicts as to whether Rich told the officers, Griffin and Turley, that he would not make the charge of larceny against the plaintiff, and that he did not make such charge before plaintiff was arrested, and this was all the evidence upon this point, and that these witnesses are equally credible and worthy of belief, then your verdict should be for the defendant. 6. If you believe from the evidence that plaintiff was arrested by the officers without being instructed by the defendant to do so, then defendant is not liable; and, in determining this, you must look to the evidence of the witnesses, Griffin, Turley, Rich, Nelson, and Crass, and if you find theirs is all the evidence upon this question, and they are equally credible and worthy of belief, and that Turley and Griffin testified that they were instructed by defendant to arrest plaintiff, and that Rich, Nelson, and Crass testified that defendant did not instruct Turley and Griffin to arrest him, then your verdict should be for the defendant." Verdict for the plaintiff in the sum of one thousand dollars. Defendant appealed.

Harris & Eyster, for the appellant.

O. Kyle, contra.

³⁵¹ HEAD, J. False imprisonment is the unlawful restraint of a person contrary to his will. But two things are requisite, viz: Detention of the person, and unlawfulness of such detention: 7 Am. & Eng. Ency. of Law, 661, 662. Malice is not material, except in aggravation of damages. Nor is probable cause of guilt, on the part of the party imprisoned, when the imprisonment is under a criminal charge, material, except as it may be rendered so by the provisions of sections 4262 and 4266 of the code, in cases to which those sections are applicable: 7 Am. & Eng. Ency. of Law, 663, 664. If the imprisonment is under legal process, but ³⁵² the prosecution has been commenced and carried on maliciously and without probable cause, terminating in the discharge of the defendant, it is malicious prosecution, and not false imprisonment: 7 Am. & Eng. Ency. of Law, 663. The action for damages for false imprisonment is in trespass; for malicious prosecution, in case.

In *Ragsdale v. Bowles*, 16 Ala. 62, decided in 1849, the averments of the complaint were that the defendant "falsely, malici-

ously, and without probable cause, charged the plaintiff with the crime of felony, and upon said charge, falsely, maliciously, and without probable cause, caused the plaintiff to be arrested by his body, and to be imprisoned, and kept and detained in prison for a long time, to wit, for the space of one day then next following, and, at the expiration of which said time, he, the said defendant, caused the said plaintiff to be released and set at liberty, and wholly abandoned his said prosecution." The action was instituted and intended as one for malicious prosecution, and was prosecuted and defended in the court below, and in this court, as such. The defendant demurred to the declaration, on the ground that it did not sufficiently aver the termination of the prosecution. Dargan, J., began the opinion of this court with the statement that, "this was an action on the case for a malicious prosecution," and proceeded to dispose of the demurrer, above mentioned, to the declaration, and held that the averment touching the termination of the prosecution was insufficient, and that the count was, therefore, bad, considered as a count for malicious prosecution. But he proceeded further to say that the count was good for false imprisonment, and for this reason held that the demurrer was properly overruled. The idea underlying this conclusion manifestly was, that the descriptive words, "falsely, maliciously, and without probable cause," were sufficient to show that the acts of arrest and imprisonment charged were unlawful; and, there being no allegation that they were done under a valid warrant, the prosecution of which had terminated in the discharge of the defendant, the count was held to contain all the essentials of trespass for false imprisonment. It was clearly, however, not intended to affirm by this decision that, in order to give an action for false imprisonment, it was necessary that the arrest and detention should have been under a criminal ³⁵³ charge, preferred falsely, maliciously, and without probable cause. These characteristics, while they constitute unlawfulness in themselves sufficient to show trespass, and support an action of that nature when the arrest is not under legal process, are yet restrictive of the unlawfulness by which the action may be supported; and they were material to the action then before the court, only because they were alleged, and constituted the only character of unlawfulness which was alleged.

For instance, it was never intended to be decided that a wrongful imprisonment, not based upon a criminal charge, would not give an action of trespass for false imprisonment; or that an unlawful imprisonment, without legal process, based upon a crim-

inal charge, effected without malice and with probable cause, would not give such an action. Suppose the case of an arrest and imprisonment by a private person, in good faith, upon a charge of misdemeanor not committed in his presence, of one actually guilty of the offense; surely, in such a case, an action for false imprisonment would lie.

Shortly after the decision of *Ragsdale v. Bowles*, 16 Ala. 62, the code of 1852 was adopted, and in it a schedule of forms of complaints was promulgated. Among these forms is one headed: "For false imprisonment." With the case of *Ragsdale v. Bowles*, 16 Ala. 62, evidently before the codifier, he substantially conformed this form to the declaration in that case, and wrote it thus:

"A. B., Plaintiff,

v.

C. D., Defendant.

The plaintiff claims of the defendant — dollars, as damages for maliciously, and without probable cause therefor, arresting and imprisoning (or, if the case be so, causing the defendant [?] to be arrested and imprisoned) on a charge of larceny (or other felony as the case may be), for — days, viz., on the — day of —."

This form was carried into the codes of 1867 and 1876 without change and into the code of 1886 so changed as to correct the mistake, whereby the word "defendant" was used when "plaintiff" was intended, and to adapt the form to an arrest under any criminal charge, whether felony or otherwise. It thus appears, as we said of the declaration in *Ragsdale v. Bowles*, 16 Ala. 62, that the form of complaint prescribed by the code is highly restrictive of the nature and character of the wrongful acts which, under the general principles of law, will support an action ²⁵⁴ of trespass for false imprisonment. Pursuing that form, the action is maintainable only when the arrest and imprisonment are done or caused by the defendant, upon a criminal charge, with malice and without probable cause. We are of opinion it was not the intention of the legislature to make this form exclusive. We cannot suppose it was designed to abolish the probably graver offenses of false imprisonment, civilly actionable, which are not characterized by the elements the form makes essential. This question, however, is not now before us, since the present complaint pursues the form prescribed. It alleges arrest and imprisonment of plaintiff, by the procurement of the defendant, upon a charge of larceny, with malice and without probable cause. Being alleged,

these elements must be shown to have existed, to justify a recovery by the plaintiff.

By statute, a marshal or policeman of an incorporated city or town, as well as sheriffs and constables, may, within the limits of his county, arrest a person without a warrant, when he has reasonable cause to believe that such person has committed a felony, although it may afterwards appear that a felony had not, in fact, been committed: Code, secs. 4260, 4262. In making the arrest the officer must inform the person of his authority, and the cause of the arrest, except when he is arrested on pursuit: Code, sec. 4263. There are other cases, not necessary to mention, in which arrests may be made by officers without warrant: See Code, secs. 4260, 4262, 4263. The defendant interposed a special plea, setting up that the alleged arrest and imprisonment of plaintiff were had and made by a policeman of the town of Decatur, an incorporated town in Morgan county, Alabama, the said policeman having reasonable cause to believe that plaintiff was guilty of the offense of grand larceny. The plaintiff demurred to this plea, assigning as grounds, that it fails to deny that the arrest was done, caused, or effected at the instance, request, or command of the defendant, without reasonable cause or belief on the part of the defendant that the plaintiff was guilty of grand larceny, and that it fails to deny that defendant caused the arrest of plaintiff maliciously and without probable cause. These pleadings are aptly framed to present the question they are intended to present, which is, whether the facts stated in the plea, taken in connection with the ³⁵⁵ facts averred in the complaint and not traversed by the plea, do not show the injury complained of was consequential upon the defendant's wrong, by reason whereof the plaintiff's remedy is in case, and not in trespass. The argument in support of the plea is that as the arrest was by an officer, upon a charge of felony, who had reasonable cause to believe the plaintiff guilty, the act was lawful on the part of the officer; and the defendant, therefore, in procuring the arrest procured the commission of a lawful act, and his conduct being characterized by malice and want of probable cause, his wrongdoing consisted, not in causing an unlawful arrest, but a lawful arrest in an unlawful manner. The vice of the argument, we conceive, is that it erroneously supposes that the rightfulness or lawfulness of the officer's act, in arresting one without warrant who he has reasonable cause to believe has committed a felony, can be predicated upon the command or direction of another procuring him to do the act. Such lawfulness on the part of the officer is predica-

alone of information possessed by him, affording him reasonable cause to believe that a felony has been committed by the party arrested; hence the arrest must be of the officer's own volition, based upon this reasonable cause, and must not be induced by the command or direction of another. If he acts by the command or direction of another, and arrests and imprisons one upon a charge of a felony which has not been committed, or if committed, the party commanding the arrest had no reasonable cause to believe was committed by the person arrested, the act is unlawful on the part of the officer himself, as well as the person who procured it: Code, sec. 4266. And this is true, although, at the same time, he may have had reasonable cause to believe the party guilty. If he acted upon the command or request of another, without which he would not have made the arrest, the act cannot be legally considered as resulting from the reasonable belief of guilt. We do not mean to intimate that the officer's information, which will give him reasonable cause of belief, justifying the arrest on his part, may not be derived from another, who may, at the same time, command or request him to make the arrest. We wish it understood that the distinction we draw is, that the command or request must not be the moving cause of the officer's act, ³⁵⁶ but his act must proceed alone from his reasonable cause of belief of the party's guilt, based upon his information of facts touching guilt, howsoever derived. Whether he so acted will always be a question of fact to be determined upon a consideration of all the circumstances of the particular case. As a corollary, if the officer was not induced by the command or request given by another, but acted alone upon reasonable cause to believe the party guilty, then such command or request, though given, cannot be deemed a cause of the arrest, and the party giving it would be guilty of no trespass, without regard to the motive with which it may have been given. The plea in question in legal effect confesses that the act of the officer was caused by the command of the defendant, and seeks to avoid its consequences by the allegation that he, the officer, at the same time, had reasonable cause to believe that the plaintiff was guilty of the felony mentioned. It does not go so far, even, as to allege that this reasonable cause of belief concurred with the defendant's command in inducing the officer to act. The demurrers were properly sustained.

We have seen that the plaintiff took upon himself to allege that the defendant caused him to be arrested and imprisoned on a charge of larceny maliciously and without probable cause. We construe the larceny charged to mean grand larceny, under our

statutes, as the pleader has not alleged it to have been of a smaller grade. The pleas and replications, as we interpret them, do no more than put these allegations in issue.

On the trial, it appeared that the arrest was made by police officers of Decatur, and the plaintiff, while testifying, was permitted to state, against the objection and exception of defendant, that the officers said, at the time of the arrest, that Rich, meaning defendant, had accused him of stealing a ring. There was no error in this ruling. All that was said by the officers while making the arrest was admissible as *res gestae*. Besides, there was evidence tending to show that they acted by command and procurement of the defendant, and, if the jury believed that evidence, all that the officers said or did in furtherance of such command could be considered as evidence against him.

The court tried the case upon the theory that the existence of malice and want of probable cause, actuating ³⁵⁷ the defendant to cause the arrest, if he did cause it, were immaterial. We have shown that they were material by reason of being alleged. It was incumbent on plaintiff to satisfy the jury of both. All the charges, therefore, given for the plaintiff, except the seventh, were erroneous, in view of this principle. For like reason, the second charge requested by defendant ought to have been given.

All the other charges requested by the defendant were properly refused. The third exacts too high a measure of proof that defendant caused the arrest. The fourth incorrectly defines larceny, for reasons too obvious to require mention.

The fifth and sixth were properly refused because of their argumentative character.

The fifth charge, given at the instance of plaintiff, correctly defines "probable cause" to be "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the plaintiff was guilty." Under the complaint, as framed, if the defendant had such probable cause to believe that the felony had been committed, whether, in fact, it had been committed or not, and that the plaintiff was guilty thereof, the plaintiff was not entitled to recover.

The seventh charge given for the plaintiff, whilst it protects defendant against a recovery if he acted without malice or with probable cause, yet authorizes a recovery against him if he directed the arrest of plaintiff by the policemen, whether those officers acted in pursuance of such direction, or entirely of their own volition. As we have already said, if they were not moved

or induced to make the arrest and imprisonment by the direction or request of defendant, it is immaterial whether he gave such direction or request or not; or, if he did, how malicious may have been his motive in giving it, or how palpable the want of probable cause. We remark, further, that if the defendant did no more than accuse the plaintiff of the theft, and give information to the officers of the facts upon which he based the accusation, upon which accusation and information the officers acted of their own volition, without command, direction, or request of the defendant, then defendant is not liable in this action, although he may have acted maliciously ³³⁵ and without probable cause in making the accusation and giving the information. The seventh charge is also erroneous in assuming that the plaintiff suffered injury to his feelings. Whether he did or not was a question for the jury, not the court.

For the errors pointed out the judgment of the city court is reversed and the cause remanded.

Reversed and remanded.

BRICKELL, C. J., not sitting.

FALSE IMPRISONMENT—WHAT IS.—Every confinement of the person is imprisonment: *Floyd v. State*, 12 Ark. 43; 54 Am. Dec. 250. False imprisonment is "the wrong of arresting, confining, or detaining an individual without lawful authority to do so": Extended note to *Mitchell v. State*, 54 Am. Dec. 258.

FALSE IMPRISONMENT—MALICE.—Neither malice nor want of probable cause need be proved to support an action for false imprisonment: *Boeger v. Langenberg*, 97 Mo. 390; 10 Am. St. Rep. 322, and note. In an action for false imprisonment it is not necessary to allege in the complaint that the imprisonment was malicious and without probable cause: *Colter v. Lower*, 35 Ind. 285; 9 Am. Rep. 735; extended note to *Mitchell v. State*, 54 Am. Dec. 269.

FALSE IMPRISONMENT—PROBABLE CAUSE.—To constitute probable cause there must be such reasonable ground of suspicion, supported by circumstances sufficiently strong to warrant an ordinarily cautious man in the belief that the arrested person was guilty of the charge against him: Note to *Boeger v. Langenberg*, 10 Am. St. Rep. 327.

FALSE IMPRISONMENT—ABUSE OF LEGAL PROCESS.—An action for false imprisonment will lie for the misuse or abuse of regular legal process: *Wood v. Graves*, 144 Mass. 365; 59 Am. Rep. 95.

FALSE IMPRISONMENT—EVIDENCE. — ADMISSIONS AND DECLARATIONS made at the time of the arrest are admissible in evidence, and all must be received or the whole rejected: *Rogers v. Wilson, Minor*, 407; 12 Am. Dec. 61. See, also, the extended note to *Mitchell v. State*, 54 Am. Dec. 258.

BUCKLEY v. CUNNINGHAM.

[103 ALABAMA, 449.]

A LANDLORD IS NOT LIABLE FOR THE FREEZING AND BURSTING OF WATER-PIPES in the upper part of a building owned by him, whereby the lower part occupied by his tenant is flooded and his goods therein injured, there being no claim that the pipe itself was defective or not put in in a proper manner, and the fact being that the tenant had as much power to avoid the injury as the landlord.

LANDLORD AND TENANT.—A landlord is not answerable to the tenant for injuries resulting from water-pipes or from the mode of constructing the building or appurtenances, there being no latent defect, fraud, nor concealment.

Goodhue & Sibert, for the appellant.

Bilbro & Burnett, contra.

⁴⁵⁰ COLEMAN, J. The plaintiffs, Cunningham and Adersholdt, ⁴⁵¹ rented from Buckley the lower rooms of a building, in which they carried on a millinery business. There was a water-pipe, leading from the main of the waterworks of the city of Attalla, under ground to the rear of the building, and up through the room rented by plaintiffs to an upper room overhead, by means of which water was conducted to the upper story. On account of a freeze the pipe bursted in the upper room, and the water escaping therefrom leaked through upon the goods of the plaintiff in the room underneath and injured them. The upper room was unoccupied and was under the exclusive control of the landlord, Buckley. The precise negligence averred in the first count of the complaint is, "that the defendant negligently failed to cut the water off from said upper story," etc. The negligence averred in the second count is, "that the defendant negligently failed to provide a shut-off for said water-pipe, so that the water in said pipe could be shut off," etc. The case was tried by the court, without the intervention of a jury, upon the plea of the general issue and contributory negligence, and the trial resulted in a judgment for the plaintiffs.

The relation of landlord and tenant, that the water was not cut off, the bursting of the pipe from freezing in the upper room, the running of the water through the floor, and damage to the goods, were fully proven. There was no evidence that the pipe itself was defective or that it was not put up in a proper manner. There was no cut-off to the pipe except the city stop-cock in front of the building. Rule 5, established by the board of commissioners of the waterworks, provided that, "in

addition to the stop-cock near the curbstone furnished by the city, each attachment, at the expense of the consumer, must be provided with a stop and waste cock conveniently placed inside the premises under the control of the occupant, to be used in case of leakage of the pipe or fixtures, or for making repairs and to prevent freezing." There was no stop or waste cock attached, as provided in the foregoing rule. It was also in evidence, without conflict, that one Prickett "was employed by the waterworks to turn on and shut off water"; "that it was his duty to cut off the water when parties requested it." It was also in evidence that plaintiffs were not informed, when they rented the lower room, that a water-pipe passed up through it, but this information was ⁴⁵² not intentionally withheld, and the pipe was open to be seen by ordinary examination, and its existence and position was, in fact, known to plaintiffs several days before the damage. Plaintiffs never requested either the landlord or Prickett to cut off the water. One of the plaintiffs testified that "she supposed the water had been turned off, and had no idea there was any water in the pipe." From these facts the court declared, as matter of law, that the landlord was liable. Our opinion is, that, under the evidence, the plaintiffs had as much authority over the city stop-cock as the defendant, and the defendant owed them no duty to see that the water was cut off, at least until notified and requested to do so. The testimony is full that it was the duty of Prickett "to cut off the water when parties requested it." Plaintiffs were themselves negligent in merely "supposing the water had been turned off." It was their duty to know, and it was within their power, and was their privilege, to have guarded against the cause of damage. It follows that the plaintiffs were not entitled to recover under their first count.

The second count charges that "the defendant negligently failed to provide a shut-off for said water-pipe, so that the water in said pipe could be shut off." If it be conceded that the defendant was negligent in the matter alleged, there is no evidence to show that it proximately contributed to the damage. Plaintiffs made no complaint on this account, made no attempt to cut the water off, made no request to have it done. There was a city shut-off convenient to plaintiffs, and, according to the evidence, there was an employee whose "duty it was to cut off the water when requested." Moreover, we are of opinion that every man has a perfect right, in the matter of water-pipes or other conveniences, to construct his own buildings, according to his own preferences, either with or without them. There being no latent

defects, or fraud or concealment, a tenant takes a building as it is, regulating the price according to the value, increased or diminished by its condition and conveniences. If the building or room has a water-pipe through it, and there is no stop or waste cock, the tenant knows it when he rents the building, fixes its rental value accordingly, and, unless it is provided otherwise by contract, he assumes the risk incident to its condition: *Jaffe v. Harteau*, ⁴⁵³ 56 N. Y. 398; 15 Am. Rep. 438; *Cowen v. Sunderland*, 145 Mass. 363; 1 Am. St. Rep. 469; *Doupe v. Genin*, 45 N. Y. 119; 6 Am. Rep. 47; *Gill v. Middleston*, 105 Mass. 477; 7 Am. Rep. 548; *Davidson v. Fischer*, 11 Col. 583; 7 Am. St. Rep. 267; *McCarthy v. York etc. Sav. Bank*, 74 Me. 315; 43 Am. Rep. 591.

We fully realize the maxim, "*Sic utere tuo ut alienum non laedas*," when this rule applies, and also the liability of an upper tenant, or a landlord who controls an upper story, for all damages sustained by one occupying an under story or room, caused by any culpable negligence of such landlord or upper tenant. The fact that the landlord controlled the upper room in which the pipe bursted adds nothing to his responsibility in this case. If the upper room had been occupied by a tenant with absolute control, to the exclusion of the landlord, such tenant, under the evidence, would not be liable for the damage; neither would the liability of the landlord by reason of such tenancy be lessened. There was no defect in the pipe, and there was no neglect of duty pertaining to the upper story, where the break occurred. The neglect, if any, was in not shutting off the water, if a duty—one the landlord owed to the occupants of the lower rooms as much as to an occupant of the upper room. The cases of *Jones v. Freidenberg*, 66 Ga. 505, 42 Am. Rep. 86, and *Rosenfield v. Arral*, 44 Minn. 395, 20 Am. St. Rep. 584, and others of like import do not apply. Here the liability, if it exists, lies behind—farther back than—the occupancy or control of the upper story; it is in the negligent failure to cut off the water from the pipes, a duty owing to plaintiffs, if it be such, without reference to the ownership or occupancy of the upper story.

To declare as matter of law, growing out of the relationship of landlord and tenant, independent of contractual obligation, that the landlord owed a duty to his tenants, in anticipation of a freeze, to see, for the protection of his tenants, that the water was cut off from the pipes, when the facts show that the tenants have equal authority and privilege to shut the water off, or cause it to be shut off at their request, as the landlord, would be to lay down a rule of law unwarranted by any just principle or any precedent which

we have discovered. Under the evidence the verdict should have been for the defendant. A judgment will be here rendered to that effect.

Reversed and rendered.

LANDLORD AND TENANT—LIABILITY OF LANDLORD FOR DEFECTS IN PREMISES.—In the absence of fraud and deceit a landlord is not liable to a tenant for obvious defects in the leased premises which do not constitute a nuisance: *Eyre v. Jordan*, 111 Mo. 424; 33 Am. St. Rep. 543, and note. See, also, the notes to *Poor v. Sears*, 26 Am. St. Rep. 278, and *Lindsey v. Leighton*, 15 Am. St. Rep. 201.

LANDLORD AND TENANT—LIABILITY OF LANDLORD FOR WATER-PIPES ON UPPER FLOOR.—A landlord rented a room on the fifth floor of a building with a bathroom and water-closet appurtenant thereto and appurtenant also to another room which remained in the landlord's control. Injury occurred to lower tenants by the careless use of the bathroom. It was held that the landlord was liable, though not personally negligent: *Jones v. Freidenburg*, 66 Ga. 505; 42 Am. Rep. 88, and note. The lessee of an upper floor of a building is responsible for the proper use and care of the water and water fixtures thereon, and is liable for damages sustained by the tenant of a lower floor by reason of his failure to exercise proper care in the use of such fixtures: *Rosenfield v. Arrol*, 44 Minn. 395; 20 Am. St. Rep. 584, and note.

INDUSTRIAL TRUST, TITLE, AND SAVINGS COMPANY v. WEAKLEY.

[103 ALABAMA, 458.]

A BANK CHECK IS PAYABLE IMMEDIATELY on presentation and demand.

BANKING.—THE DRAWING OF A CHECK ON A BANK PRESUPPOSES A DEPOSIT of a sum in bank to the credit of the drawer sufficient to pay it, and amounts to an absolute appropriation by the drawer of so much money in the hands of the bank to the holder of the check which he cannot properly withdraw.

A BANK CHECK SHOULD BE PRESENTED FOR PAYMENT within reasonable time. Otherwise the delay is at the peril of the payee.

A BANK CHECK SHOULD BE PRESENTED FOR PAYMENT within bank hours on the day on which it is received, or on the day following if the bank on which it is drawn is in the same place where the payee receives it. If, within that time, the bank fails, the loss must be borne by the drawer.

BANKING.—IF A CHECK IS NOT PRESENTED WITHIN A REASONABLE TIME, and the bank fails, the payee must suffer the loss if the drawer has moneys on deposit sufficient to pay it.

BANKING.—THE DRAWER OF A CHECK IS LIABLE THEREON WITHOUT PRESENTMENT or notice if he had not moneys on deposit to meet the check when drawn, or, if then having them on deposit, he subsequently withdraws them.

BANKING.—LACHES IN THE PRESENTMENT OF A CHECK DO NOT DISCHARGE the drawer from liability thereon, except to the extent he has suffered injury thereby.

BANKING.—IF A CHECK IS DRAWN IN EXCESS OF THE AMOUNT WHICH THE DRAWER HAS ON DEPOSIT at the bank, this deficiency excuses the drawee for want of presentment for payment, and renders the drawer liable on such check without any demand or notice, unless he was authorized to make overdrafts.

BANKING—OVERDRAFTS—LACHES IN NOT PRESENTING. If, when a check is drawn, it is in excess of the amount which the drawer has in bank, but he has made arrangements with the bank to be permitted to overdraw, and the check, if presented in due time, would have been paid in full, the payee is answerable to the drawer for all damages which he may have suffered from the laches in the presentment of the check.

OVERDRAFT—DAMAGES FOR LACHES IN PRESENTING. If a check is drawn in excess of the amount which the drawer has on deposit under an agreement that the bank will pay the overdraft, and the payee fails to present it within a reasonable time, and the bank becomes insolvent and suspends business, he must accept the check as payment of the full amount named therein, though it exceeds the amount which the drawer had on deposit when it was drawn.

Action against Weakley upon a check drawn by him on the Florence National Bank in favor of W. J. Nelson. The plaintiff asked for several instructions, all tending to inform the jury that if, when the check in question was drawn, the defendant did not have in the bank upon which it was drawn sufficient money to meet it in full, the plaintiff was entitled to recover. All these requests for instructions were refused, and the defendant recovered judgment. Plaintiff appealed.

C. E. Jordan and Nathan Parkins, for the appellant.

Simpson & Jones, and Cabanniss & Weakley, contra.

463 HARALSON, J. 1. A bank check is payable immediately on presentation and demand. Its drawing presupposes the deposit of a sum in bank, to the credit of the drawer, sufficient to pay it, and amounts to an absolute appropriation by the drawer of that much money, in the hands of his banker, to the holder of the check, to remain on deposit, so appropriated, until called for, and it cannot afterwards be properly withdrawn: Tiedeman on Commercial Paper, sec. 433; 3 Kent's Commentaries, 104, note; 2 Daniel on Negotiable Instruments, sec. 1597; Morse on Banks and Banking, sec. 373; In the Matter of Brown, 2 Story, 511-518; Conroy v. Warren, 3 Johns. Cas. 259; 2 Am. Dec. 156; Kinyon v. Stanton, 44 Wis. 479; 28 Am. Rep. 601.

So strong is this presumption of a check being drawn against an existing deposit that when one is presented and paid, it has been held not to be evidence of money lent or advanced by the banker to the customer, but, on the contrary, it is *prima facie* evidence of the repayment to the customer by the banker, to the amount of

the check, of money previously deposited by him in the banker's hands: *Lancaster Bank v. Woodward*, 18 Pa. St. 357; 57 Am. Dec. 620; *Fletcher v. Manning*, 12 Mees. & W. 571.

2. A check being payable instantly on demand, and on funds which are represented, by the bare fact of drawing, to be on deposit in bank with which to pay it in full—and which funds, in the eye of the law, are appropriated by the drawer for that purpose—it follows, as a correct principle of business dealing, that the holder should present it for payment within a reasonable time; otherwise the delay is at his peril. What is reasonable time will depend upon circumstances; but it is a principle of general recognition, that if the bank on which the check is drawn be in the same place where the payee receives it, it should be presented for payment within banking hours on the day it is received, or on the following day. If, in the meantime, the bank fails, the loss will fall on the drawer: 3 Am. & Eng. Ency. of Law, 213, and cases cited; 2 Daniel on Negotiable Instruments, sec. 150; 2 Morse on Banks and Banking, sec. 421; Boone on Banking, sec. 172; *Taylor v. Wilson*, 11 Met. 44; 45 Am. Dec. 180; *Morrison v. Bailey*, 5 Ohio St. 13; 64 Am. Dec. 632; *Smith v. Janes*, 20 Wend. 192; 32 Am. Dec. 528.

3. The payee takes a check with the legal obligation to ⁴⁰⁴ present it for payment within reasonable time, and failing so to do, if the drawer has funds on deposit sufficient to pay it, he must suffer all the loss which arises from such failure; but, if the drawer has no funds in bank at the time of drawing the check, or, having them, subsequently withdraws them, he cannot be said to suffer any loss or damage from the holder's delay or failure to present or give notice of nonpayment. He is liable in such case, without presentment and notice, and may be sued immediately: 2 Daniel on Negotiable Instruments, sec. 1590; *Culver v. Marks*, 122 Ind. 554; 17 Am. St. Rep. 377; Boone on Banking, secs. 172, 181.

And the drawer is not discharged by the laches of the holder in not making due presentment of the check, or in not giving due notice of its dishonor, unless he has suffered some loss or injury thereby, as by the intermediate failure of the bank, and then only pro tanto: 3 Am. & Eng. Ency. of Law, 215, and authorities cited; Morse on Banks and Banking, 421 d; 2 Daniel on Negotiable Instruments, sec. 1587; Boone on Banking, secs. 172, 181.

4. But it sometimes happens, as in the case at bar, that the drawer has a portion only of the amount in bank necessary to pay his check, and the question then presents itself, whether the deficiency of his deposit is an excuse for want of presentment and no-

tice. Mr. Daniels says: "We should unhesitatingly say that the drawer of an overcheck is bound without demand or notice. A check is intended to be the representative of cash. It is the business of the drawer to know the state of his accounts with the bank, and whether through fraud or carelessness he makes the representation that he has cash to meet it, as he does by the act of drawing it, it would put a premium upon looseness in commercial transactions to permit him to shield himself behind the plea of want of presentment or notice": 2 Daniel on Negotiable Instruments, sec. 1597.

The bank, says Judge Story, "is not bound to pay unless it is in full funds; and it is not obliged to pay, or to accept to pay, if it has partial funds only; for it is entitled to the possession of the check on payment; and, indeed, in the ordinary course of business, the only voucher of the bank for any payment is the production and receipt of the check, which the holder cannot safely part with, unless he receives full payment, nor the bank ⁴⁶⁵ exact, unless under the like circumstances. The holder is not bound to accept part payment, even if the bank is willing to pay in part; for he has a claim to the entirety": In the Matter of Brown, 2 Story, 519; Morse on Banks and Banking, secs. 294, 446, 450, 455; Dana v. Third Nat. Bank, 13 Allen, 445; 90 Am. Dec. 216; Murray v. Judah, 6 Cow. 490.

5. Subject to some exception, it is a correct general proposition that a bank has no right to allow drawers of checks to overdraw their balances, and pay checks out of funds of other depositors or the money of the stockholders. Overdrawing, even to persons of good standing with the bank, does not find sanction in sound usage, except under special conditions: Culver v. Marks, 122 Ind. 554; 17 Am. St. Rep. 377; Lancaster Bank v. Woodward, 18 Pa. St. 357; 57 Am. Dec. 620.

As to overdrafts, Mr. Morse says, there is power in the bank to allow them; that a customer, by negotiating with the authorized and proper officials, may make a legal and binding agreement by which his overdrafts, to a certain amount named, and under the circumstances agreed upon, shall be honored; that such a dealing is in the nature of a loan, and is placing money at his disposal or control: 1 Morse on Banks and Banking, sec. 358.

6. Upon the same subject, Judge Story, after stating the rule, which seems to be everywhere admitted, that the drawer is liable in all cases for the dishonor of a check, whether it has been duly presented or not, or whether he has had due notice of the dishonor or not, where he has sustained no damage on account of

the omission, and after giving his dissent to the proposition that if the drawer has any funds in the hands of the drawee, he is entitled to due presentment and notice of failure to pay, says that he understands the true doctrine to be, "that if the drawer has a right to draw, in the belief that he has funds, or in the expectation that he shall have funds at the time of the presentment for acceptance, by reason of arrangements with the drawee, or putting his funds in transitu, then, and in such cases, he is entitled to due notice: In the Matter of Brown, 2 Story, 511. In this case the principle seems to be recognized, that when the drawer, from any arrangement he may have made with the bank for him to draw, or where, as between him and the bank, there was ⁴⁰⁰ an open account, with a fluctuating or shifting balance between them, and he did not know that he was drawing without any right to draw, and had the right to believe his check would be paid, and, especially, if the payee had assurances that the check would be paid, then the drawer would be entitled to due presentment and notice." As supporting his view he refers to the cases of Thackray v. Blackett, 3 Camp. 163, Orr v. McGinnis, 7 East, 359, and Legge v. Thorpe, 12 East, 171. These expressions of Judge Story find approval with the Virginia court of appeals in the case of Purcell v. Allemong, 22 Gratt. 739; Smith's Mercantile Law, 237.

7. In the United States, says Mr. Daniel, although it was at one time decided to the contrary in England, an agent, holding a bill or note for collection, would act at his peril in delivering it up on receipt of a check for the amount; and that if the debtor did not pay the amount in money, and the drawer or indorser were not duly notified, they would be discharged, and the loss would fall on the collecting agent: 2 Daniel on Negotiable Instruments, sec. 1625; Whitney v. Esson, 99 Mass. 308; 96 Am. Dec. 762; Turner v. Bank of Fox Lake, 3 Keyes, 425; Fifth Nat. Bank v. Ashworth, 123 Pa. St. 212; Smith v. Miller, 43 N. Y. 171; 3 Am. Rep. 690; Rathbun v. Citizens' Steamboat Co., 76 N. Y. 376; 32 Am. Rep. 321; Chontean v. Rowse, 56 Mo. 65.

In the case of Smith v. Miller, 43 N. Y. 171, 3 Am. Rep. 690, the court of appeals in New York hold that when a check is taken instead of money by one acting for others, a delay of presentment for a day, or for any time beyond that within which, with proper and reasonable diligence, it can be presented, is at the peril of the party thus retaining the check and postponing presentment. This, says Mr. Daniel, seems to be the correct doctrine, for the agent exceeds authority in taking the check, and therefore acts at

his peril: 2 Daniel on Negotiable Instruments, sec. 1625; 2 Morse on Banks and Banking, sec. 421.

8. The evidence in the case before us is without conflict. One Moore was indebted to the appellant, plaintiff below, in the sum of \$229, due by note, which had been sent by plaintiff to Mr. W. J. Nelson of Florence, Alabama, as agent for plaintiff, for collection. John B. Weakley, the defendant and appellee, of the same town, was the agent and attorney of said Moore. Said Moore had sent this sum of money to defendant, with which to pay said note. All of Mr. Nelson's transactions for the collection ⁴⁶⁷ of the note were with the defendant. On the 16th of June, 1891, the defendant gave his check on the Florence National Bank for \$229, payable to the order of W. J. Nelson, "for payment of Moore notes." On the same day, said Nelson indorsed the check, "Pay to the Industrial Trust, Title & Savings Co., of Phila.," and sent it to plaintiffs in the mail, and it was forwarded by them, when received, through various banks for collection. The Florence National Bank suspended and closed its doors on the 22d of June, 1891, at about 10 o'clock A. M. On the 23d of June, the check was presented to the defendant, who refused to pay, and it was duly protested.

The plaintiff examined the defendant as a witness, who testified that he drew and delivered the check about 10 o'clock of the day it bears date, and, when he handed it to Mr. Nelson, he asked him to take it to the Florence National Bank and get his money; that the bank was located in the town of Florence, and he and Nelson both resided there at the time the check was given; that said bank was located almost opposite to the witness's office across the street; that at the time of the suspension of said bank, there appeared, by the books of the bank, to his credit, out of moneys deposited by him in the bank and not drawn out by check, the sum of \$154.64; that, in addition thereto, the bank was indebted to him at the time in the sum of \$75, for legal services rendered by him to the bank, and was also indebted to him in the sum of \$60, due by check drawn in his favor by a depositor of said bank on the 10th of June, 1891; that he proved his claims against the bank, after its suspension, before the receiver, and in the account he charged the bank with the sum of \$154.64, due him on deposit account, with the amount due him for legal services, and the unpaid check for \$60, and gave it credit for the \$229, being for the check given to said Nelson, and \$25, which had been paid to him on account of services rendered, and there remained due to him the sum of \$60.64,

for which he holds a receiver's certificate, and this sum, besides the other amounts specified, the bank owed him at the time he gave said check to Nelson; that at that time his account with said bank, as stated, was unsettled, and what it owed him for services and for the unrepresented check had not appeared on its books, and a ⁴⁶⁸ balance ascertained. About the time of drawing this check, or a short time before, he went to the bank and stated to the cashier, Mr. Tice, that in the course of a few days he would check upon his account rather heavily, and that it might appear overdrawn on the books, but that the bank was indebted to him for services rendered, and that he had some checks on hand against the bank, and he would in a few days come in and have a settlement, but in the meantime, he desired him to pay his checks as they were (would be) drawn against the sum the bank owed him, and Mr. Tice consented to do so. He further testified that from the time the check was delivered to Mr. Nelson till the suspension of the bank, it was indebted to him in an amount greater than the amount of said check, and that the bank still owes him, after crediting it with the amount of said check, the sum of \$60.64.

It thus appears that there was an unsettled account between the defendant and the bank at the date of the giving of said check; that the bank, at that time, did owe him an amount greater than a sum sufficient to pay said check; that he did not draw the same without knowing he had funds in the bank with which to pay it, but had the assurance of the cashier of the bank that his check would be paid, and, therefore, the most reasonable expectation that it would be paid. He acted with commendable caution in reference to the matter, that he might do neither the payee nor the bank any injury, and Mr. Nelson had every reason to believe that the check was good and would be paid, for the defendant did what is not usual when ones give another a check on the bank—requested him to take it to the bank and get his money; and this is just what he ought to have done, and failing, took all the peril of a failure of the bank before the presentment of the check. Can any one doubt, if Mr. Nelson had gone to the bank, the day he received this check, or the following day, he would have been paid by the bank? He, himself, had every reason to believe it, and had no suspicions, even, to the contrary, for he received a check which acknowledged payment of the notes he had in hand for collection. He must, therefore—and so must his client, the appellant, so far as appellee is concerned—suffer the consequences of a disobedience of defend-

ant's request to present the check, and ⁴⁶⁹ his failure to do so till after the bank had failed. As to when giving a check will operate as a payment of the debt for which it was given, see Boone on Banking, section 181, and authorities cited.

9. It remains to be considered what damage did defendant suffer from a failure of the holder to make due presentment of said check for payment. He can be shielded from the consequences of the holder's neglect, as we have seen, only to the extent he was damaged. It is contended that defendant owes at least the difference between what he had in the bank—\$154.36—and the amount of the check he gave—\$229—which is \$74.36. But we are unable to see that defendant was damaged by the failure of the drawee to present his check only to the extent of \$154.36—the amount to his deposit account at the time. He had the right, under the circumstances, to draw for the \$229, and the failure to present the check in time canceled it as to him, and made it a payment of the Moore note in full. We cannot divide the \$229. Defendant must be regarded as having paid the whole or no part of it. The bank got the benefit of it, and owes it to some one, certainly not the defendant, against whom it was properly charged by the receiver in his ascertainment of the balance due by the bank to defendant.

We fail to see that the \$74.36 has anything to do with the case, or that there was any pro tanto or other damage to defendant, less than the whole amount of the check, growing out of the holder's failure to present it.

The charges requested by plaintiff, as applicable to the evidence, were properly refused, and the general charge in favor of the defendant was properly given.

Affirmed.

CHECKS payable to order are bills of exchange payable to order on demand: *First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 296; 43 Am. St. Rep. 247. A check is an order to pay the holder a sum of money at a bank on the presentation of the check or demand of the money: *Minot v. Russ*, 156 Mass. 458; 32 Am. St. Rep. 472, and note.

CHECK AS APPROPRIATION OF FUND.—A check drawn upon an existing fund in bank is an absolute transfer or appropriation to the holder of the amount designated in the check, then in the hands of the drawee: *Fonner v. Smith*, 31 Neb. 107; 28 Am. St. Rep. 510, and note.

CHECKS—PRESENTMENT—REASONABLE TIME.—The presentment for payment of a check payable on demand must be within a reasonable time: *Parker v. Reddick*, 65 Miss. 242; 7 Am. St. Rep. 646, and note; *Anderson v. Gill*, 79 Md. 312; 47 Am. St. Rep. 402, and note; *Scroggin v. McClelland*, 37 Neb. 644; 40 Am. St. Rep. 520, and note.

CHECKS—PRESENTMENT—WHEN MUST BE MADE.—The holder of a check has until the close of banking hours on the next secular day in which to present it, where it is received in the same place as the bank on which it is drawn is located, and if the bank in the meantime fails, the loss will fall on the drawer: *Anderson v. Gill*, 79 Md. 312; 47 Am. St. Rep. 402, and note. The question as to the diligence required in presenting checks for payment is fully discussed in the extended note to *Holmes v. Briggs*, 17 Am. St. Rep. 810.

CHECKS—LACHES IN PRESENTING—EFFECT ON LIABILITY OF DRAWER.—Delay in presenting a check for payment, though sufficient to release the indorser thereof, will not relieve the drawer from liability, unless he shows that he was injured thereby: *Parker v. Reddick*, 65 Miss. 242; 7 Am. St. Rep. 646, and note; *Compton v. Gilman*, 19 W. Va. 312; 42 Am. Rep. 776. See, especially, the extended note to *Holmes v. Briggs*, 17 Am. St. Rep. 810.

CHECKS—NECESSITY FOR PRESENTMENT.—The holder of a check, in order to recover against the drawer or indorser, must prove due presentment for payment to the bank, its refusal to pay, and notice of nonpayment to the drawer or indorser, or some legal excuse for the absence thereof: Extended note to *Holmes v. Briggs*, 17 Am. St. Rep. 807.

DONEGAN v. DONEGAN.

[103 ALABAMA, 488.]

ENTIRETIES, ESTATE BY.—A DIVORCE CONVERTS an estate which the purchasers held by entireties into a tenancy in common.

ENTIRETIES, ESTATE BY.—IF A STATUTE INVESTS MARRIED WOMEN with capacity to acquire and hold estates, a conveyance to a husband and wife vests title in them as tenants in common, and not as tenants by the entireties.

Suit for a sale for the purpose of partitioning land which had been conveyed to plaintiff and defendant while they were husband and wife, that relation between them having been subsequently terminated by divorce. Decree as prayed for, defendant appealed.

D. D. Shelby and S. S. Pleasants, for the appellant.

D. I. White and Tancred Betts, contra.

⁴⁸⁹ HARALSON, J. 1. The deed under which the parties to this suit hold the property sought to be sold for division, on the ground that it cannot be partitioned in kind, conveyed the property to the husband and wife without any declaration in the instrument as to what their interest or tenancy should be. There is no doubt that, under such a deed, at common law, the husband and wife acquired an estate, not as joint tenants or tenants in common—not one which they acquired by ⁴⁹⁰ moieties, but by entirety. For a full discussion of an estate by entirety,

with a collection of the English and American authorities on the subject, reference may be had to 1 Devlin on Deeds, secs. 117, 118; Stewart on Husband and Wife, secs. 303-309.

2. But there are two reasons why the complainant and defendant do not hold this property by entirety. After they acquired the property under the deed to them, in a proceeding instituted for that purpose in the chancery court of Madison county, the complainant was, on the 13th of September, 1892, by the decree of said court, regularly and legally divorced from the bonds of matrimony with the respondent. This destroyed the common-law fiction of unity—the two in one—of the two persons on which the doctrine of estates by entirety rested, and rendered them tenants in common: Stewart on Husband and Wife, sec. 309; Stewart on Marriage and Divorce, secs. 441-444; Bishop on Marriage and Divorce, sec. 716; Hinson v. Bush, 84 Ala. 368; Baggs v. Baggs, 55 Ga. 590, 591; Harrer v. Wallner, 80 Ill. 199, 204; Lash v. Lash, 58 Ind. 526, 528; Depas v. Mayo, 11 Mo. 314; 49 Am. Dec. 88.

3. And however it may be elsewhere, this court has decided that such a conveyance, under the statutes of this state creating and regulating the separate estates of married women—such as existed at the date of this deed—creates the same estate in the parties as if it had been made before the coverture; that, being invested with the capacity of taking by moieties, the reason of the rule of the common law, that they should take by entirety—per tout, not per my—has ceased to exist. This doctrine since first announced has been recognized by repeated subsequent decisions: Walthall v. Goree, 36 Ala. 728; Sloan v. Frothingham, 72 Ala. 589, 603; Holt v. Wilson, 75 Ala. 59, 66; Whitlow v. Echols, 78 Ala. 209; Houston v. Williamson, 81 Ala. 482.

The only error assigned against the decree of the court below, insisted on in argument of counsel for the defendant, is that the complainant is not entitled to the relief granted, on the ground that the deed by which she and the defendant hold the property created in them an estate by entirety, not subject to sale for partition or division. But, as we have seen, there is no error in the decree on that account, and it is affirmed.

HUSBAND AND WIFE—ESTATE BY THE ENTIRETIES—EFFECT OF DIVORCE.—Estates by entirety are dissolved by divorce; they then become tenancies in common: Russell v. Russell, 122 Mo. 235; 43 Am. St. Rep. 581, and note.

HUSBAND AND WIFE—ESTATES BY THE ENTIRETIES, WHETHER ABOLISHED BY MARRIED WOMEN'S ACTS.—Tenancy by entirety continues to exist in New York when a conveyance

has been made to a husband and wife, notwithstanding the separate property acts relating to the rights of married women: *Hiles v. Fisher*, 144 N. Y. 306; 43 Am. St. Rep. 762, and note. See the extended note to *Hulett v. Inlow*, 26 Am. Rep. 66.

SLATER v. ALSTON.

[108 ALABAMA, 605.]

IF EXECUTIONS ARE ISSUED TO DIFFERENT COUNTIES ON THE SAME JUDGMENT, THE SATISFACTION OF ONE WITHOUT PAYING THE COSTS accrued upon the other does not divest the officer having it in his hands of the power to proceed thereon to sell property previously levied upon, and a purchaser having no notice of such satisfaction acquires title to the property purchased.

R. P. Roach, for the appellant.

W. F. Glover, contra.

605 COLEMAN, J. The appellant, Slater, brought suit in ejectment to recover certain lands described in the complaint. The plaintiff's title depends upon the validity of the sheriff's deed. The material facts are substantially as follows: George E. Crawford & Co. recovered a judgment against the defendant Alston in the circuit court of Sumter county, on the 17th day of October, 1889, and on the 7th day of November afterwards, the clerk of the circuit court issued two executions, one of which was placed in the hands of the sheriff of Sumter ⁶⁰⁷ county, and the other sent to the sheriff of Choctaw county. On the 20th day of December, 1889, the sheriff of Sumter county returned the execution received by him, "satisfied in full," and on that day paid the money into court. Before the return of the execution "satisfied," by the sheriff of Sumter county, the sheriff of Choctaw county levied the execution received by him, on the lands in controversy, and had the same advertised for sale in a newspaper, published in Choctaw county. Before the day of sale the sheriff of Choctaw county was notified that the judgment and costs recovered by the plaintiffs in execution had been fully satisfied, but the additional costs which accrued, in consequence of the levy and advertisement by the sheriff of Choctaw county, not being included in the bill of costs, indorsed on the execution delivered to the sheriff of Sumter county, was not paid, and this additional cost not having been paid by the day advertised for the sale by the sheriff of Choctaw county, he proceeded to sell the lands, for ~~an~~ unsatisfied costs. Slater, the plaintiff, became the purchaser at the sheriff's sale, and, upon payment of the purchase

money, the sheriff executed to him a deed. It was admitted as true that the proceedings of the levy under the execution, the advertisement and the sale by the sheriff and the deed from the sheriff, were regular on their face, and that the purchaser, Slater, had no knowledge of the satisfaction of the judgment and cost by the sheriff of Sumter county.

In the case of *Boren v. McGehee*, 6 Porter, 432, 31 Am. Dec. 695, it was held "that an execution issued upon a judgment which had been satisfied, but of which satisfaction no entry is made on the record, is not void, but voidable merely." This rule has been declared in the subsequent cases of *Steele v. Tutwiler*, 68 Ala. 110, and *Cowan v. Sapp*, 74 Ala. 44, 47. "To authorize a recovery on a sheriff's title there must be a judgment, execution, levy and sale, and the execution of a sheriff's deed": *Carrington v. Richardson*, 79 Ala. 101, 104; *Ware v. Bradford*, 2 Ala. 676; 36 Am. Dec. 427.

The question recurs, as to whether the return and satisfaction of the judgment by the sheriff of Sumter was in fact a satisfaction of the execution in the hands of the sheriff of Choctaw county, by whom the sale was made. We think not. It is not denied that the land had been levied upon by the sheriff of Choctaw county, ⁶⁰⁸ and duly advertised, and the cost of advertising had accrued prior to the satisfaction of the execution in the hands of the sheriff of Sumter county, and had not been paid. Section 2908 of the Code requires the advertisement of land for sale under execution, and section 666 regulates the price to be paid for such advertisement. It was the duty of the sheriff to levy and advertise, and the charges which accrued were legitimate costs. If the sheriff of Sumter county had made the levy and advertised the lands, any payment to him, which did not include such cost, would not have satisfied the execution, so as to prevent a sale for that purpose. The court in which the judgment was obtained and to which the execution was returnable, upon motion and notice and proper showing, was fully authorized to set aside the sale and quash the execution, but unless this was done, the authority of the sheriff of Choctaw county to sell the land, to satisfy the cost not paid, continued in force: *Cowan v. Sapp*, 74 Ala. 44; *Ray v. Womble*, 56 Ala. 32; *Mobile Cotton Press etc. Co. v. Moore*, 9 Porter, 679. The sale of the land was voidable upon motion of the defendant in execution, seasonably made in the court to which the execution was returnable, or he might obtain relief in a court of equity, upon proper averments sustained by proof.

Without some order or decree vacating the sale, the title of the purchaser entitled him to recover the lands. This is the rule in this state, although a different rule prevails in some other courts.

The court erred in giving the affirmative charge for the defendant.

Reversed and remanded.

EXECUTION—SATISFACTION.—Levy exhausted by sale is satisfaction pro tanto, and execution will issue for the residue if any remain: *Trapnall v. Richardson*, 13 Ark. 543; 58 Am. Dec. 338, and extended note. See, also, the note to *Boos v. Morgan*, 30 Am. St. Rep. 246.

LANIER LUMBER COMPANY v. REES.

[108 ALABAMA, 622.]

A CORPORATION CANNOT SUBSCRIBE FOR OR INVEST its capital in shares in other corporations either directly, as by becoming in its own name the incorporator of another corporation, or indirectly, by subscribing in the names of persons acting as its agents or trustees, unless expressly authorized by its charter.

CORPORATION, EQUITABLE TITLE OF IN STOCK OF OTHER CORPORATIONS—CREDITOR'S BILL.—Where a stockholder subscribes for stock in another corporation, intending to act as trustee for his own corporation, and pays for such stock out of the property of the latter, it being incompetent to acquire stock in another corporation, it has no interest in such stock which can be reached by a creditor's bill. The court will not, at the demand of the creditor, enforce a contract which the corporation had no power to make.

C. C. Whitson, and Browne & Dryer, for the appellant.

Knox & Bowie, and Cooke, Frazier & Swaney, contra.

626 McCLELLAN, J. Robert Morrison, owning nine hundred of the one thousand shares of stock in, and being president of, the Morrison Lumber Company, subscribed in his own name, and had issued to him individually, three hundred and thirty-three shares, of the aggregate face value of thirty-three thousand three hundred dollars, of the capital stock of the Lanier Lumber Company, and paid therefor with property belonging to the Morrison Lumber Company. These shares, it is averred, he held as trustee for said Morrison Lumber Company, and all along recognized the beneficial ownership of said company; and before the filing of the present bill two hundred and twenty of these shares of stock were transferred on the books of the Lanier Lumber Company, and assigned by Robert Morrison to Frank Rees in payment of a debt the Morrison

Lumber Company owed him, and the certificates for the remaining shares, one hundred and thirteen in number, were delivered to the First National Bank of Chattanooga, and are now held by it—though no transfer of them has ever been made on the books of the lumber company—presumably as security for debts of either the Morrison Lumber Company or Robert Morrison, though the bill does not disclose for what purpose or in what supposed right these certificates are in the hands of the bank; and it is immaterial in the view we take of the case. While all this stock was so held by, and all of it stood in the name of, Robert Morrison for the Morrison Lumber Company, that corporation became indebted to the Lanier Lumber Company in a large sum of money, and the present bill is filed by the latter company for the purpose of collecting its said debt. This is sought to be done by having said shares of stock declared and decreed to be the property of the Morrison Lumber Company, the transfer of a part thereof to be set aside and avoided as fraudulent, and, this being done, by a further decree declaring and enforcing, by sale, etc., the lien which section 1674 of the code gives to corporations on the interest of shareholders in its capital for the security and payment of debts due from the shareholders to the corporation.

There is no averment in the bill that the Morrison Lumber Company was authorized, by its charter or otherwise, ⁶²⁷ to subscribe for and hold or own stock in other corporations, but, to the contrary, it is virtually admitted that it had no such statutory power. And it is too well settled to require discussion that without such authority one corporation cannot subscribe for, or invest its own capital in, the shares of other corporations, either directly, as by becoming in its own name an incorporator of a new corporation, or indirectly by subscriptions in the names of persons acting as agents and holding as its trustees. And it is equally clear, upon principle and authority, that all such attempted subscriptions or contracts of subscription are not voidable, but utterly void: 1 Morawetz on Corporations, secs. 431, 433; 4 Am. & Eng. Ency. of Law, 249, note 2; Marble Co. v. Harvey, 92 Tenn. 115; 36 Am. St. Rep. 71; Central R. R. Co. v. Pennsylvania R. R. Co., 31 N. J. Eq. 475; Commercial Fire Ins. Co. v. Board of Revenue, 99 Ala. 1; 42 Am. St. Rep. 17.

It is, therefore, obvious, indeed counsel for appellant do not controvert, that the contract disclosed by the bill, considered as a contract by which the Morrison Lumber Company became the

beneficial subscriber to the stock of the Lanier Lumber Company, was and is wholly void and entirely inoperative to invest property in the said shares in the former company. But it is insisted that the contract was wholly executed by the payment of the subscribed value of the stock in the property of the Morrison Lumber Company, and the issuance of certificates of stock to Robert Morrison in his individual name, but to be held by him as trustee for said company, and that on the familiar principles announced in the case of *Long v. Georgia Pac. Ry. Co.*, 91 Ala. 519, 24 Am. St. Rep. 931, the stock should now be treated as the property of the Morrison Lumber Company, and subjected to complainant's lien as such notwithstanding, and without at all looking to, the illegal means by which it was acquired by that company. The infirmity of this position lies in its assumption, or the proposition underlying it, that the void contract of subscription had been fully executed to the investiture of the property in the Morrison Lumber Company. The averments and prayer of the bill demonstrate that this is not the case. The stock was subscribed for by Robert Morrison; the name of the Morrison Lumber Company nowhere appears in that connection. The stock was issued to him individually, and not to his company, and it stood on the books of the Lanier Lumber Company in his name and not in the ⁶²⁸ name of the Morrison Lumber Company. As his stock the Lanier Lumber Company has no lien on it, for he is not that company's debtor. To get the title to the stock out of him and vest it in the debtor corporation, so that it could be subjected to the lien against the debtor, or, in other words, to show any sort of ownership, technical or beneficial, in the debtor corporation, reliance would be had upon the void contract of subscription. That contract must be proved, as it has been alleged, and when proved there must be, as prayed in this bill, a decree of the court executing and directing or adjudging performance of it before relief could be granted, even were the contract a perfectly valid one; and relief cannot be granted at all upon the contract as it is, because courts will not intervene to the enforcement of void contracts. As is said by counsel, complainant's right to enforce a lien on this stock as the property of the Morrison Lumber Company, the legal title to the stock not being in that company, but in Robert Morrison, depends upon whether the Morrison Lumber Company has any rights it could enforce against Robert Morrison, the complainant having only a lien upon such property interest in the stock as its debtor could assert and effectuate against Robert Morrison. And it being most clear that the

debtor corporation could have no standing in any court to establish and secure, by judgment or decree against said Morrison, any interest in the stock, since to that end the court would have to find the existence, and decree the performance, of an illegal and utterly void contract, it follows that the complainant is equally, and for the same reason, without right to reach and subject this stock as the property of the Morrison Lumber Company. The relief prayed cannot be granted without the establishment and execution of an illegal and void contract. It, therefore, cannot be granted at all, because no court will decree the performance or grant relief depending upon proof of such a contract.

The demurrers to the bill which were addressed to the point we have discussed were properly sustained. This destroys the supposed equity of the bill, and the other questions presented by other assignments of demurrer need not be considered. The decree of the chancellor is affirmed.

CORPORATIONS—SUBSCRIBING FOR STOCK IN ANOTHER CORPORATION.—A corporation of any nature cannot, either directly or indirectly, through its agents, in the absence of express statutory authority, become an incorporator by subscribing for shares in a new corporation: *Commercial etc. Ins. Co. v. Board of Revenue*, 99 Ala. 1; 42 Am. St. Rep. 17, and note.

CAPEHART v. FURMAN FARM IMPROVEMENT Co.

[108 ALABAMA, 671.]

SALE OF CHATTELS, WHEN COMPLETE.—If goods are sold to be delivered f. o. b. at a place designated, and they are so delivered, consigned to the purchaser, property therein at once vests in him, and the vendor cannot maintain an action for injuries subsequently occurring to the goods through the negligence of the carrier.

CARRIERS, TO WHOM LIABLE FOR LOSS OF GOODS.—If goods are sold to be delivered by a vendor f. o. b. at a place designated, such delivery terminates the title of the vendor, and he cannot sustain an action for subsequent injury to the goods through the negligence of the carrier.

PLEADING.—ONE WHO SUES AS OWNER of property to enforce the common-law liability of a carrier upon his failure to deliver it, cannot recover on the proof that he had a mere lien thereon.

Lusk & Bell, for the appellants.

Amos E. Goodhue, contra.

⁶⁷³ **HEAD, J.** An important question in this case is whether or not the plaintiff (appellee) has shown such ownership of the goods lost or injured as entitles it to maintain an action against

the carriers for the loss or injury sustained. The goods were purchased by Scott & Ray, who reside near Guntersville, Alabama, from the plaintiff, doing business in Atlanta, Georgia, from which point they were to be shipped to Guntersville, consigned to the purchasers. The purchase was evidenced by a written instrument, wherein it was stipulated that the goods were to be "delivered f. o. b. at Guntersville, Ala." The shipment was made by plaintiff, in Atlanta, by delivery to the Western and Atlantic Railroad Company, under a bill of lading issued by that company, showing consignment, freight prepaid, to Scott & Ray, Guntersville, Alabama, care of S. D. Weather, per steamer R. T. Coles at Chattanooga. The bill of lading was forwarded to and received by the consignees. The goods were safely carried by the railroad company to Chattanooga, and there delivered to defendants, common carriers by Tennessee river transportation, to be carried to Guntersville, a point on the river. Defendants loaded these, with other goods, on a barge at Chattanooga, on which, towed by the steamer R. T. Coles, they were safely transported to Guntersville, where the barge was landed and moored. Several days after this landing, the barge nor the goods thereon having been removed, the loss or injury complained of occurred. It is gravely controverted by the parties whether or not, under the peculiar facts shown in evidence, the liability of defendants, as common carriers, had terminated at the time the loss or injury occurred; but defendants contend that, howsoever that may be, whether there had been or not such a constructive delivery to the consignees as destroyed the liability of the carriers, as such, yet, under the contract between the plaintiff and Scott & Ray, the contingency had happened upon which all title and ownership in the goods had passed out of the plaintiff, the consignor, and into Scott & Ray, the consignees; whereby, under the rule obtaining in this state, the consignees only can sue as owners. We think this contention is sound. We have seen that the contract of the consignor was "to deliver f. o. b. at Guntersville, Ala." It is admitted that f. o. b. means "free on board." Indeed, we judicially know the fact: *Sheffield Furnace Co. v. Hull Coal etc. Co.*, 101 Ala. 446. The effect of the stipulation is that the consignor will place the goods loaded on the car or vessel wherein transported, at the designated point of destination, free of all expense to the consignee: *Sheffield Furnace Co. v. Hull Coal etc. Co.*, 101 Ala. 446. When, therefore, the plaintiff paid the freight charges and caused the boat to be landed at Guntersville, with the goods safely thereon, properly

consigned to Scott & Ray, it completely fulfilled its contract; the carriers ceased to be its agents for the custody and care of the goods, and immediately became the agents of the consignees. The relations of the parties then became precisely the same, in effect, as if the contract of the plaintiff ⁶⁷⁵ had been to deliver f. o. b. at Atlanta, and the loss or injury had occurred en route, before reaching Guntersville. In such case, the carriers would have been regarded as the agents of the consignees, and the delivery to them f. o. b. at Atlanta would have passed the title to the consignees. This contract is not susceptible of any other construction. To hold that delivery of the goods by the carrier to the consignee was essential to terminate the ownership and responsibility of the consignor would be to change the contract of the parties. The whole theory of the plaintiff in support of this action is, that the mere arrival of the boat at the landing, with the goods on board, and its stay there for several days, did not terminate the liability of defendants as common carriers, for the reason that, on the undisputed evidence, as between carrier and owner, delivery was not to be made by carrier on board the boat; and hence the goods were not ready for delivery while they remained thereon, by reason of which consignees were under no duty to be there to receive them. If, then, there could be no delivery by the carrier to the consignee whilst the goods were on board the boat, it follows, logically, that plaintiff did not bind itself to cause an efficacious delivery, as between carrier and consignee, to be made, because, confessedly, its obligation was to deliver only on board the boat at Guntersville. Suppose the consignment had been entirely by rail, under obligation of consignor to deliver f. o. b. car, at Guntersville; and, at that point, the railway company had its depot and warehouse, wherein it was essential to store goods received, and give the consignee a reasonable time to take them away, before he could be charged with a constructive delivery which would terminate the common-law liability of the carrier, would counsel contend that the consignor must not only see that the goods are delivered at Guntersville, on board the car, free of all expense, but go farther and see that they are unloaded and placed in the warehouse, and a reasonable opportunity given the consignee to take them away? We think not, with any show of legal authority. The question under discussion may be fairly tested by supposing an action by the plaintiff against Scott & Ray for the price of the fertilizer. Could its right of recovery be doubted when it showed the boat, with the goods on board, safely landed at the proper place at

Guntersville, ^{etc} and all expenses prepaid? In the present condition of the record, the defendants were entitled to the general charge which was refused, because of the views above expressed.

There is one phase of the contract under which the goods were purchased upon which the plaintiff might maintain an action properly framed to meet it. By the contract the plaintiff retained a lien on the goods for the security of the purchase money. Is it only a lien? So long as the purchase money remains unpaid, an action on the case lies in favor of the plaintiff against any one negligently or willfully destroying the lien. We have examined the record to see if the proceedings of the court below can be sustained upon this phase of the contract, and find they cannot. There are five counts in the complaint. The first four show no connection whatever of the plaintiff with the goods or their carriage. Under them it is the merest stranger to the whole transaction. Under several decisions of this court such a complaint shows no cause of action. It will not support a judgment: *Montgomery etc. R. R. Co. v. Edmonds*, 41 Ala. 667; *Douglas v. Beasley*, 40 Ala. 142; *Browder v. Gaston*, 30 Ala. 677; Code, sec. 2835. We leave these counts out of view. The fifth count is by the plaintiff as owner of the goods, to enforce the common-law liability of the carriers for failure to deliver. It is manifest it cannot recover under this count, as a mere lienholder, for a destruction of its lien. There is neither sufficient pleading nor proof to warrant such a recovery. We will not undertake to point out the essentials of pleading and evidence to support such an action, or indicate any opinion, upon what we find in the present record, touching the rights of the parties therein. We merely call attention to this phase of the contract to show that it cannot support the proceedings of the lower court.

Reversed and remanded.

SALES—DELIVERY TO COMMON CARRIER AS PASSING TITLE.—If goods are delivered to a common carrier for transportation to the purchaser without any condition, such delivery passes the title: *State v. Wingfield*, 115 Mo. 428; 37 Am. St. Rep. 406, and note; *Dyer v. Great Northern Ry. Co.*, 51 Minn. 345; 38 Am. St. Rep. 506, and note. See, also, the extended note to *McNeal v. Braun*, 28 Am. St. Rep. 451.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

WHOLEY v. CALDWELL.

[108 CALIFORNIA, 95.]

▲ RIPARIAN OWNER'S RIGHT TO WATER is not confined to having it enter his land by its accustomed channels without regard to the quantity which they are wont to carry. As against any wrongful act of another proprietor, he has the right to have each channel carry its due amount of water.

RIPARIAN OWNER'S RIGHT TO RESTORE STREAM TO ITS FORMER CHANNEL.—If, by natural causes, such as extraordinary freshets, the channel of a watercourse is changed so that it ceases to flow upon or through the lands of a riparian proprietor, he has no right to enter upon the lands of another for the purpose of restoring such stream to its former channel.

L. F. Coburn, for the appellants.

James F. Farragher, for the respondent.

97 HENSHAW, J. Appeal from the judgment. Plaintiff is a lower, defendants are upper, riparian proprietors. Parks creek for many years had flowed over the land of defendants to a point on that land known as Batterton crossing, where it divided into two branches called the North Channel and the South Channel. About one-third of the waters of the creek passed onto the plaintiff's land through the North Channel, while the remaining two-thirds flowed down the South Channel. A third waterway, seemingly an ancient course of Parks creek, left the main stream about one-half a mile above Batterton crossing, and entered upon and extended over the land of plaintiff in a direction parallel with that of the North Channel. This last waterway was known as the Spring Branch Channel. There was no direct surface flow from

Parks creek into it, the point of separation being dammed by gravel, bowlders and debris, but its bed was lower than the bed of the North Channel, and from North Channel, by percolation and by small but defined surface streams, water rose in this Spring Branch Channel and flowed over plaintiff's lands. The amount of water so rising bore direct relation to the amount of water flowing through the North Channel. Plaintiff relied upon the waters of the Spring Branch and North Channels for all beneficial purposes.

Such were the conditions until the winter of 1890-91, when an extraordinary freshet deposited a bar of bowlders, gravel, and debris at the head of the North Channel, and thus prevented the waters from flowing into it as had been their wont. At the same time the waters cut a new bed for themselves. This New Channel (so named) left the original stream from the south about a mile above Batterton crossing, extended in a general course parallel with it, and joined the South Channel, still on the lands of defendants, above the point where South Channel entered plaintiff's property, and thence flowed on by the accustomed South Channel. During the first year after this change some of the water passed down the old way to Batterton crossing. The rains of ⁹⁸ the following year deposited a bar in the main stream at the point where the New Channel had been cut, and thereafter all the waters of the creek flowed down this New Channel into the South Channel, and so onto defendants' lands, leaving dry the original watercourse down to Batterton crossing, and, consequently, also the North Channel and the Spring Branch Channel.

Plaintiff then commenced this action, averring that these changes were occasioned wholly by natural causes, and asserting the right to enter upon defendants' land and to take such necessary and proper steps as might be required to return the water to the channels wherein it flowed prior to the year 1889, and asking that defendants be enjoined from preventing him from entering upon their land and doing such proper and necessary acts. He also pleaded a grant to himself from defendants' predecessor of his land and of "the waters accustomed to flow in the Spring Branch Channel." Defendants denied the asserted rights, and by cross-complaint pleaded the construction and maintenance for thirty years last past of a dam across the head of the North Channel sufficient to divert all the water thereof, during ordinary low stages, from the North to the South Channel, and also their prescriptive right to divert two-thirds of the water of the creek by

ditches. They pleaded defendants' interference with these rights, and asked damages accordingly.

Plaintiff was denied an injunction, but, as riparian proprietor and as grantee under the deed above mentioned, was decreed the right of "restoring and restraining the waters of Parks creek to the following channels: 1. From the point where the New Channel cut from and left the former channel (original bed of the stream) down said former channel in a single body to the Batterton crossing; 2. From the Batterton crossing in two channels in the following proportions, to wit: One-third through the said North Channel and the remainder through said South Channel."

We cannot see that the rights of the parties in this ⁹⁰ action are in any way affected by the grant to plaintiff "of the waters accustomed to flow in the Spring Branch Channel." *Aqua cedit solo*. This grant accompanied the grant of the land bordering upon that channel. Whether the waters which flowed in it came from the North Channel by percolation and seepage or by well-defined subterranean or surface channels can here make no difference. For, in either case, the utmost that could be claimed for the grant would be that it gave plaintiff full right to the waters against any asserted right of the defendants to them, and protected him from any use which defendants might make of the waters of the creek after the grant, to the injury of their right in these waters.

But the complaint of plaintiff does not declare upon any such invasion or infringement by defendants. It asserts the right to go upon the land of an upper riparian proprietor and return a stream to its original channel which has been diverted therefrom suddenly and sensibly by natural causes. And plaintiff's warrant in doing this rests not upon any contractual relations with defendants, but upon his prerogatives as a lower riparian proprietor.

We do not attach importance to the contention of appellants that the right of the lower riparian proprietor is merely to have the water enter his land by its accustomed channels, without regard to the quantity which these channels are wont to carry. The lower proprietor, as against the unwarranted acts of the upper, is entitled not only to have the water enter his land by its accustomed channels, but to have each channel carry its due amount of water. Any other rule would lead to untold hardship and oppression.

But we are here concerned only with the rights of the lower proprietor where the change in the channel has been caused not

by the act of man, but by the act of God. Does the right of the riparian proprietor to have the water enter his land by its accustomed channels stand superior to changes wrought in the flow of a ¹⁰⁰ stream by the act of Providence? Has such a proprietor a paramount right over the forces of nature, as well as over the acts of man, to insist that water which has once flowed upon his land shall always flow upon it?

A somewhat extended examination leads to the conclusion that the assertion of such a right is new to jurisprudence. The right finds no recognition by the commentators of either the civil or common law, and no case has come under our observation in which the question is considered. Even Sir Matthew Hale, whose *De Jure Maris* is declared by Chancellor Kent to have exhausted the learning on the subject, makes no mention of so important a topic. This silence is itself significant. For it is not easily to be believed that if this important right exists it would not have been asserted and announced in numerous instances.

While thus lacking in authority it is certain that the contention cannot find better support from principle or reason. The foundation of the riparian proprietor's rights rests upon the universally accepted maxim adopted by the common law from the civil law: *Aqua currit, et debet currere ut currere solebat ex jure naturae*. These rights thus draw their support from the laws of nature, but they do not rise superior to those laws. When, by their operation, the flow is lost, the right is lost with it. The new channel itself becomes the natural channel. Otherwise a riparian proprietor would hold all lands above him in extraordinary and perpetual servitude. If, by the forces of nature, the stream should change its course at a point miles above him, he would still be empowered to subject any and all of the intermediate territory to operations requisite to enable him to turn the water back upon his own premises, and this power would be his to the very fountain-head of the stream. Such a doctrine could not be tolerated.

If it be needed, however, the reasoning of the foregoing finds abundant support in analogous principles of the law which are firmly established. Says Sir Matthew Hale (*Hale's De Jure Maris*, c. 1): "A watercourse ¹⁰¹ running between the lands of A and B, which leaves its course and suddenly and sensibly makes its channel wholly upon the land of A, belongs wholly to A." This rule has been reannounced by all the later text-writers, and has been adopted by the courts without suggestion of dissent: 3 Kent's Commentaries, 428; 2 Blackstone's Commentaries, 262;

Angell on Watercourses, sec. 57; Gould on Waters, sec. 159, and cases thereunder. True, it has usually been invoked in cases of boundaries and of the accretion and reliction of land, but nevertheless, by necessary implication, it defines the riparian proprietor's right in the matter under consideration. Because, if the stream belongs wholly to A, thus depriving B of all his riparian rights, this can only result because B has no right to go upon another's land and restore to the old channel the water which has been diverted therefrom *ex jure naturae*.

For the foregoing reasons the judgment is reversed and the case remanded.

McFarland, J., and Temple, J., concurred.

Hearing in Bank denied.

WATERCOURSES—CHANGE IN LOCATION OF.—If, for many years, and as a result of natural causes, a watercourse has flowed across the lands of the plaintiff, though it formerly flowed upon the lands of the defendant, and the change in its course came so gradually that it is not easily traced in its history, it must be regarded as a watercourse upon the lands of the plaintiff which defendant has no right to divert, so that it will again flow upon his lands: *Hinkle v. Avery*, 88 Iowa, 47; 45 Am. St. Rep. 224, and note.

TEBBE v. SMITH.

[108 CALIFORNIA, 101.]

ELECTION CONTEST.—BALLOTS, when their integrity is satisfactorily established, are the best evidence in an election contest of how the electors voted.

ELECTION CONTEST, BURDEN OF PROOF RESPECTING BALLOTS.—One who relies upon overcoming the *prima facie* correctness of an official canvass by a resort to the ballots must first show that the ballots presented to the court are intact and genuine.

ELECTION CONTEST.—TO SHOW THAT THE BALLOTS ARE INTACT AND GENUINE it is sufficient to prove that the mode of preservation enjoined by the statute has been substantially pursued.

ELECTION CONTEST.—BURDEN OF PROOF AS TO BALLOTS, WHEN SHIFTS.—When a substantial compliance with the statute in respect to the preservation of ballots has been shown, the burden of proof shifts to the contestee to establish that, notwithstanding such compliance, the ballots had in fact been tampered with, or that they had been exposed under such circumstances that a violation of them might have taken place. This proof is not made by a naked showing that it was possible for one to have molested them.

ELECTION CONTEST—QUESTION OF FACT.—Whether ballots which are offered in evidence in an election contest have been kept in substantial compliance with the law and remain so unchanged that they should be received in evidence by the jury or trial judge, is a

question of fact, the finding upon which the appellate court will not disturb, unless the evidence does not warrant it.

AUSTRALIAN BALLOT LAW.—PROVISIONS OF THE STATUTE AS TO THE MARKING OF BALLOTS are in their nature mandatory, but all statutes tending to limit the citizen in the exercise of his right of suffrage should be liberally construed in his favor.

AUSTRALIAN BALLOT LAW.—THE FACT THAT THE VOTER PUTS A CROSS AT THE RIGHT of the name of the person voted for, instead of in the space at the right of such name, does not invalidate the ballot nor constitute a distinguishing mark, when the only direction of the statute upon the subject is that the clerk, in printing the ballot, shall place upon it a direction to the voter that, to vote for a person, stamp a cross in the space at the right of his name.

AUSTRALIAN BALLOT LAW.—DISTINGUISHING MARKS.—The writing of a letter in a blank space left for the insertion of the name of a candidate, though such letter was probably written by the voter with the intention of making it part of a name, such intention being subsequently abandoned, is a distinguishing mark rendering the ballot void.

ELECTIONS.—FOR THE MISCONDUCT OF ELECTION OFFICERS IN NOT OPENING THE POLLS until 10 o'clock, when the law requires them to be open at sunrise, and the taking of the ballot boxes with them when they adjourned for dinner to a house some hundred yards distant, when the law required that such boxes must not be removed from the balloting places, or the presence of bystanders, is a departure from the provisions of the statute in so substantial a respect that the ballots must be rejected, though there is no evidence of fraud, or that the result of the election at the precinct had been altered by such misconduct.

AUSTRALIAN BALLOT LAW.—If all the ballots cast at a precinct have on them the name of a candidate written by some person, and but one person in the precinct is lawfully assisted in the making of his ballot in the mode required by law, only the ballot of the voter thus lawfully assisted should be counted.

T. M. Osmont, Warren & Taylor, and L. F. Coburn, for the appellant.

Gillis & Tapscott, and James F. Farragher, for the respondent.

¹⁰⁵ **HENSHAW, J.** Appeal from the judgment, taken within sixty days after its rendition. The evidence is brought up for review by bill of exceptions.

¹⁰⁶ By the official canvass of the supervisors Smith was declared elected over Tebbe to the office of county superintendent of schools of Siskiyou county at the last general election by a plurality of one vote. Tebbe then instituted this contest. The result of the judicial count was to increase contestant's total vote by three, no change being made in the number of votes accredited to contestee, and accordingly the judgment of the court declared contestant to be duly elected.

1. The first point urged is that the court erred in overruling contestee's objection to receiving the ballots in evidence.

The evidence showed that the ballots and returns reached the

county clerk through the proper channels. The sealing-wax on some of the packages was broken when they were received from the express office; other seals were broken in handling. The packages were placed on top of a large case in the clerk's office, and there remained in the condition in which they had arrived until the completion of the canvass by the supervisors, when they were put into three gunnysacks, each sack securely bound and sealed, and placed under the clerk's desk, where they remained until produced in court. Upon being opened they were found to be in the same condition as when they were sealed by the clerk. There had been no opportunity for any one to tamper with the ballots, and in fact they had not been disturbed. They were left alone only when the office was closed and locked. During office hours they were never left alone, excepting upon one occasion, when the deputy stepped out for "a minute and a half," leaving one Robertson in the office. At that time the ballots were in the gunnysacks, and neither the sacks nor the ballots had been disturbed. Tebbe, the contestant, was a deputy clerk during this time, but he was never left alone in the office, and was given no key to it. We cannot see anything suspicious in this last circumstance. Upon the contrary, it reflects credit upon the prudence of the clerk and the fair dealing of all concerned. ¹⁰⁷ Knowing of the impending contest, they took all reasonable precautions to avoid exposing either the ballots or contestant's connection with them to any suspicion.

The principles of law and the rules of evidence governing cases such as this have been so often declared that a review of the many authorities is unnecessary. Those curious or interested in pursuing the subject will find in the reporter's notes, preceding, many instructive cases collated by the industry of counsel. Suffice it here to say that, while the ballots are the best evidence of the manner in which the electors have voted, being silent witnesses which can neither err nor lie, they are the best evidence only when their integrity can be satisfactorily established. One who relies, therefore, upon overcoming the prima facie correctness of the official canvass by a resort to the ballots must first show that the ballots, as presented to the court, are intact and genuine. Where a mode of preservation is enjoined by the statute, proof must be made of a substantial compliance with the requirements of that mode. But such requirements are construed as directory merely, the object looked to being the preservation inviolate of the ballots. If this is established, it would be manifestly unjust to reject them merely because the precise mode of reaching it had not been followed.

So, too, when a substantial compliance with the provisions of the statute has been shown, the burden of proof shifts to the contestant of establishing that, notwithstanding this compliance, the ballots have in fact been tampered with, or that they have been exposed under such circumstances that a violation of them might have taken place. But this proof is not made by a naked showing that it was possible for one to have molested them. The law cannot guard against a mere possibility, and no judgment of any of its courts is ever rendered upon one.

When all this has been said it remains to be added that the question is one of fact, to be determined, in the ¹⁰⁸ first instance, by the jury or trial judge; and, while the ballots should be admitted only after clear and satisfactory evidence of their integrity, yet, when they have been admitted, this court will not disturb the ruling, unless we in turn are as well satisfied that the evidence does not warrant it. In this case we do not think the ruling was erroneous.

2. Nine ballots were received and counted by the court for contestant, which were marked with a cross, not in the square at the right of his name, but in the marginal space to the right, thus:

120	George A. Tebbe...X...Democrat
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It is urged against the ruling that the ballots were not marked as required by the statute, and that the marks so placed served as distinguishing marks, and rendered the ballot void: Pol. Code, secs. 1211, 1215.

The provisions as to the marking of ballots are in their nature mandatory: Attorney General v. McQuade, 94 Mich. 439; People v. Board etc., 129 N. Y. 395; Taylor v. Bleakley, 55 Kan. 1; post, p. 000; Attorney General v. May, 99 Mich. 538; Lay v. Parsons, 104 Cal. 661; Whittam v. Zahorik (Iowa, May 15, 1894), 59 N. W. Rep. 57; but, as is said in Bowers v. Smith, 111 Mo. 45, 33 Am. St. Rep 491, "all statutes tending to limit the citizen in his exercise of the right of suffrage should be liberally construed in his favor."

If we should find a provision in our statutes requiring the voter to mark the cross in the square to the right of the candidate's name we would feel constrained to adopt the rule and reasoning of the supreme court of Indiana, where such a provision exists, construing which the court said: "If we hold this statute to be directory only, and not mandatory, we are left without a fixed rule by which the officers of election are to be guided in counting the ballots."

But our statutes contain no such mandatory provision. So far as they are pertinent to this discussion ¹⁰⁰ the provisions are that "there shall be a margin on the right-hand side of the names, at least one-half of an inch wide, so that the voter may clearly indicate, in the way hereafter to be pointed out, the candidate and candidates for whom he wishes to cast his ballot." The clerk is, in printing the ticket, to place upon it the following: "To vote for a person, stamp a cross (X) in the square at the right of the name": Pol. Code, sec. 1197.

The mandatory provisions as to voters are found in sections 1205 and 1215 of the same code. "He shall prepare his ballot by marking a cross after the name of the person or persons for whom he intends to vote, . . . and, in case of a constitutional amendment or other question submitted to the vote of the people, by marking in the appropriate margin a cross (X) against the answer he desires to give": Pol. Code, sec. 1205.

"No voter shall place any mark upon his ballot by which it may be afterward identified as the one voted by him": Pol. Code, sec. 1215.

It will be noted that these sections make no mention of the square, and that there is not even an express direction to the clerk to place a square opposite the names of the candidates. The voter is only commanded to place the cross in the marginal space to the right of the candidate's name, and when he has done this he has complied with the mandatory provisions of the law. True, the statute contemplates, at least inferentially, the making of a square, and that the square is the proper place for the marking of the cross; but it has not made the doing of this a prerequisite to the casting of a legal ballot. The intentio of the voter is as plainly indicated by the one marking as by the other, and, as was said by the supreme court of Rhode Island, in construing a similar law: "Our opinion is, that a cross placed in the margin of the ballot, on the right of the names of the candidates, opposite a candidate's name, should be counted as a vote for the candidate opposite whose name it is placed, whether the margin have any square in it or not, and if there be a square in it, even though ¹¹⁰ the cross is without, or partly without, the square. All that chapter 731 requires to make the cross effective as a vote is that it shall be inscribed in the right-hand margin, opposite the name of the person intended to be voted for": *In re Vote Marks*, 17 R. I. 812.

As to the last contention upon this point, that the marks served to distinguish the ballots, it need but be suggested that it would

not require much ingenuity or intelligence to place the cross even within the square in such a manner as would enable the ballot to be distinguished. When a legal mark is placed upon the ballot in a legal place the ballot cannot be rejected because the mark, as placed, may serve some ulterior purpose. Section 1215 of the Political Code, in forbidding marks does not include the cross legally placed. The ballots were, therefore, properly received.

3. The ballot from Sawyer's Bar precinct (Exhibit F) should have been rejected. It bore upon it the letter "J" written in pencil in the blank space left for the insertion of the name for justice of the peace. Doubtless it may have been the intention of the voter to write a name, and he may have abandoned his intent after setting down the initial letter; but doubtless, also, the mark could serve as a distinguishing mark, and, being one having no lawful right upon the ballot, it renders it void.

The case differs from *Rutledge v. Crawford*, 91 Cal. 526, 25 Am. St. Rep. 212, where this court held that the impression (of printer's ink) upon the back of the ballot was as attributable to accident as design. Here the writing of the letter was an affirmative act of the voter. He had his remedy, having improperly marked his ballot, by calling for the issuance to him of a fresh ticket: Pol. Code, sec. 1207.

4. The account of the election at Lake precinct is a breeze from Arcady. The polls should have opened at 6:31, A. M. Smith received thirteen votes in this precinct, Tebbe twenty. William Otey, called for contestant, testified: "On November 6th last I was at the ¹¹¹ polls of Lake election precinct on the Fairchild ranch. . . . I got there between 8 and 9 o'clock in the morning. Served on the election board in my father's place. When I got there Fairchild, Henry Seale, and the hands working on the ranch were there. I do not remember anyone else. The polls were opened, I should judge, some time near 10 o'clock. We took an adjournment when we went to dinner. Took the ballot-box with us. Fairchild, the old gentleman, carried it; he was one of the election officers. . . . The other materials, ballots and everything, we left in the poll-room when we went to dinner. We left the ballot-box on the table while eating dinner—on same table. That ballot-box did not pass into the hands of other persons. I think there were bystanders around the polls at the time we went to dinner. . . . The house is about a hundred yards from the polling-place. Between the house and schoolhouse there were some men. Some had voted, and some were working on the ranch. I think some other people took dinner with the

board. When we were through Fairchild carried the box back. No person was deprived of voting because the polls were not opened earlier. I know that no one came there without voting that was entitled to vote."

The law provides that the polls must open at sunrise, and be kept open until 5 P. M., and that the ballot-box must not be removed from the polling-place or presence of the bystanders: Pol. Code, secs. 1160, 1162.

It is the rule that mandatory provisions for the holding of an election must be followed, or the failure will vitiate it, while the departure from the terms of a directory provision will not render it void, in the absence of a further showing that the result of the election has been changed or the rights of the voters injuriously affected thereby: Code Civ. Proc., sec. 1112; *Russell v. McDowell*, 83 Cal. 70. But the rule as to directory provisions applies only to minor and unsubstantial departures therefrom. There may be such radical omissions and failures to comply with the essential terms of a directory ¹¹² provision as will lead to the conclusive presumption that the injury must have followed. A substantial compliance with the terms of directory provisions is, after all, required. And such a substantial compliance is not had by strictly following some provisions, while essentially failing to observe others. There must be a reasonable observance of all the prescribed conditions.

It is the duty of the courts so far to adhere to the substantial requirements of the law in regard to elections as to preserve them from abuses subversive of the rights of the electors. And under this view the question becomes a broader one than can be disposed of by answering that in the individual case no harm resulted. Thus, in *Knowles v. Yates*, 31 Cal. 82, the contention of appellants was that, admitting that there was no fraud, and that the votes were cast by qualified electors, still the fact that in certain precincts the polls were opened, without reason, at long distances from the appointed places, was enough in itself to call for the rejection of the votes, and this court so held. Likewise, in the case of *People v. Seale*, 52 Cal. 71, where no question of fraud or injury was involved, but where at an election, called for voting a school tax, the polls were opened at 1 o'clock P. M., and closed at 6, instead of being opened at one hour after sunrise, and kept open until sunset, as the law then required, this court, without hesitation, declared the election invalid.

In this case we are quite willing to believe that the miscon-

duct of the officers of Lake precinct was prompted by nothing worse than ignorance and lack of appreciation of the responsibilities of their positions, and we may say further, for such is the evidence, that no harm is shown to have resulted from their conduct; but, looking to the purity of elections and integrity of the ballot-box, we are constrained to hold that conduct like this amounts in itself to such a failure to observe the substantial requirements of the law as must invalidate the election. And, while reluctant so to hold in this instance, we are confirmed in the opinion by consideration ¹¹³ of the fact that any other interpretation would add grave perils to the safe conduct of our elections which are already harassed by dangers enough. The votes of Lake precinct should, therefore, have been rejected.

5. Upon all the ballots cast in Cecilville precinct there appeared the following, written in the blank space under the office of justice of the peace: "G. G. Brown ——— Republican." The evidence discloses that this writing was all done by the same person, and, further, that there was but one person in the precinct lawfully assisted in the making of his ballot under the provisions of the code: Pol. Code, sec. 1208. The record, unfortunately, does not disclose who did the writing, nor whether it was upon the tickets when they were put into the voters' hands. Left, then, to the presumption of the performance of duty by public officers, it must be held that the officers put legal tickets into the hands of the electors, and that the writing was afterward put upon them. But an elector unable to write can, under our present laws, have a name inscribed upon his ballot in only one legal way, and that is by pursuing the method prescribed by section 1208 of the Political Code. This requirement is clearly mandatory, since it is further declared that "any ballot which is not made as provided in this act shall be void, and shall not be counted": Pol. Code, sec. 1211. In *Attorney General v. May*, 99 Mich. 538, the supreme court of Michigan, construing a similar statute, held that inspectors of election had no right to assist in the marking of ballots, except in the manner provided by law, and that ballots marked in any other than the prescribed manner were void. In the present state of the evidence only the ballot of the voter lawfully assisted should be counted. It must be held, therefore, that the other ballots of Cecilville precinct should not have been counted. What is here said is addressed to the evidence as it appears in the record. It may be that upon a new trial additional evidence will remove the objections now found.

The other points do not require consideration. They ¹¹⁴ are either covered by what has been said, or do not involve error. But for the foregoing reasons the judgment is reversed and the cause remanded.

Temple, J., Van Fleet, J., Harrison, J., McFarland, J., and Garoutte, J., concurred.

ELECTIONS—BALLOTS AS EVIDENCE.—An election is for the purpose of ascertaining the will of the electors, and it is well settled that in an election contest the ballots themselves, if they are actually preserved, constitute the highest and best evidence of the will of the electors: Extended note to Hartman v. Young, 11 Am. St. Rep. 798; also the notes to Brown v. McCollum, 14 Am. St. Rep. 234, and Kreits v. Behrensmeyer, 8 Am. St. Rep. 377.

ELECTIONS—BALLOTS—BURDEN OF PROOF AS TO VALIDITY OF.—In an action to contest the right to an office, the burden of proof is on the plaintiff when he seeks to introduce the ballots to overturn the official count, to show affirmatively that the ballots have not been tampered with, and that they are the identical ballots cast by the voters: Fenton v. Scott, 17 Or. 189; 11 Am. St. Rep. 801, and note. See, also, the extended note to Hartman v. Young, 11 Am. St. Rep. 798, and the notes to Boyer v. Teague, 19 Am. St. Rep. 567, and Kreits v. Behrensmeyer, 8 Am. St. Rep. 378.

ELECTIONS.—WHAT ARE DISTINGUISHING MARKS such as will invalidate ballots under the Australian ballot law is the subject of the monographic note to Taylor v. Bleakley, post, p. 233.

ELECTIONS—CONSTRUCTION OF STATUTES.—Statutes tending to limit a citizen in the exercise of his right to vote should be liberally construed in his favor: State v. Saxon, 30 Fla. 668; 32 Am. St. Rep. 46; Bowers v. Smith, 111 Mo. 45; 33 Am. St. Rep. 491, and note.

FREEMAN v. BELLEGARDE.

[105 CALIFORNIA, 179.]

BOUNDARIES.—IF A BOUNDARY LINE IS DESCRIBED AS RUNNING TO THE MOUTH OF A CREEK AND THENCE ASCENDING SUCH CREEK, giving a large number of courses and distances, and then as crossing the creek, the thread of the stream is the boundary, and the calls for courses and distances must be disregarded, if they do not follow such thread.

BOUNDARIES UPON TIDAL STREAMS.—If the owner of lands in which a tidal stream is included makes a grant of land, describing the boundary as ascending the stream, such boundary extends to the thread of the stream.

BOUNDARIES.—A GRANT OF RIPARIAN TIDAL LANDS by the owner must receive the same construction as the grant by him of any other riparian lands.

BOUNDARIES.—THE MEANDERING OF A STREAM by a surveyor, and the giving of the courses and distances of such meanders in a conveyance, do not prevent the title of the grantee from extending to the thread of the stream.

BOUNDARIES—CROSSING A STREAM.—The fact that in a conveyance, after mentioning several courses and distances in ascending a creek, the line is described as crossing the creek, does not show that the true boundary is at the side or bank of the stream nor elsewhere than in the thread thereof.

BOUNDARIES.—THE TERM "SHORE" ordinarily indicates lands periodically covered and uncovered by the tide, but is sometimes applied to a river or pond as synonymous with "bank."

BOUNDARY, SHORE AS A.—In the absence of any qualification, a grant bounded by the shore of a river or other stream, when the grantor is the owner of the bed thereof, conveys the land to the lowest point of the shore at any time, in order that the grantee may at all times have access to the stream. If, in the conveyance, any point is designated as being on the shore, this shows what point the parties understood to be designated by that term, and the boundary must be run accordingly, though to do so requires the disregarding of specified courses and distances.

Warren Olney, Harding & Forbes, William Grant, C. S. Cushing, and Charles F. Hanlon, for the appellants.

Freeman & Bates, for the respondents.

¹⁸³ **HARRISON, J.** Action to quiet title to certain lands in San Francisco. The lands described in the complaint are a portion of the Bernal rancho, and the controverted question in the action is the title of the plaintiffs to that portion of the lands described in the complaint which lies between the south shore of Islais creek and the thread of the stream. Islais creek empties into the bay of San Francisco, and the tidal waters of the bay ebb and flow in the creek for some distance above its mouth. At the line of the land claimed by the plaintiff nearest the bay the creek is, at ordinary high tides, three hundred feet wide, and the ground at that point that is covered and uncovered by the ebb and flow of the tides has a width of one hundred and fifty feet between the bank of the stream and the line of ordinary low-water mark. At high tide the water nearest the bay is about three feet deep, and at a point below the lands in controversy there is at low tide no water in the creek, thus rendering the creek a mere basin which is filled and emptied by the ebb and flow of the tide. The patent for the Bernal ranch covers the bed of Islais creek and the land on both banks thereof, and includes all the lands described in the complaint. The title of the plaintiffs to the land in controversy is derived through the foreclosure of a mortgage given by the Bernals to J. Mora Moss, and a subsequent conveyance from the grantees under the Moss foreclosure to John Hewston, and depends upon the construction to be given to the description in the mortgage and sheriff's deed thereunder ¹⁸⁴ and to the description in the conveyance from Moss' grantees to Hewston. The plaintiff had judgment in the court

below, and defendants have appealed therefrom and from an order denying a new trial.

1. The description of the property in the mortgage to Moss, so far as the same affects the present action, is as follows: "Thence along margin of the bay (giving four courses and distances) . . . 11 chains to mouth of creek; thence ascending said creek (giving thirteen courses, with their distances) . . . N. 45° W. 9 chains 50 links, crossing the creek to the end of the old wall on N. side of marsh . . . containing area of 1958 acres, more or less, according to a survey by N. Scholfield, deputy U. S. surveyor general." This description in the mortgage was carried into the sheriff's deed issued upon the sale under the foreclosure, and the title to the land thus conveyed afterward became vested in Pioche and Robinson.

In *Spring v. Hewston*, 52 Cal. 442, the description in this mortgage was before the court, and it was held that the creek, rather than the line determined by the courses and distances, was the true boundary of the land embraced in the mortgage. The call in the mortgage "to mouth of creek" rendered the thread of the creek the boundary of the land mortgaged. In the absence of any qualifying term the designation in a conveyance of any physical object or monument as a boundary implies the middle or central point of such boundary; as, for example, if the boundary be a road or highway, or a stream, the thread of the road or stream will be intended; if a rock, a heap of stones, or a tree be the boundary, the central point of such tree or rock or heap of stones will be intended. A private grant is to be interpreted in favor of the grantee, and, if the grantor is the owner of the monument or boundary designated in his grant, his conveyance will be held to extend to the middle line or central point of such monument or boundary. This rule is not changed by reason of the fact that a stream which is designated as the boundary is a tidal stream, ¹⁸⁵ if the grantor of the land is the owner of the bed of such stream. "When riparian estates are conveyed the owner may reserve the land under water, but the general presumption is that the purchaser's title extends as far as the grantor owns, in both tidal and fresh waters": *Gould on Waters*, sec. 195. The title to the beds of tidal streams is ordinarily vested in the sovereign, and in such case a grant from the sovereign which is bounded by tidal waters will be construed to extend only to high-water mark: *Long Beach Land etc. Co. v. Richardson*, 70 Cal. 206. A grant from the sovereign is to be interpreted in favor of the grantor, contrary to the rule for-

interpreting grants between private individuals; but if, as in the present case, the sovereign has parted with the title to the land beneath the stream, a grant of the riparian tidal lands by the owner must receive the same construction as a grant by him of any other riparian lands. It is unnecessary to determine whether the provisions of section 880 of the Civil Code, and of section 2077 of the Code of Civil Procedure, were intended to change the rules of construction then existing, inasmuch as the mortgage to Moss, and the conveyances by which the lands in question became vested in Pioche and Robinson, were executed prior to the enactment of the codes.

The further call in the mortgage and subsequent conveyances, "thence ascending said creek," must prevail over the courses and distances. The creek is the boundary of the land conveyed, and the courses and distances, being only approximate estimates of the direction and length of the boundary, must yield to the actual line of the creek. When a meandering stream is a boundary it is impracticable for a surveyor to fix monuments in the channel of the water, or to define the actual line of its windings and courses; and in attempting to define its banks it would be impossible for two surveyors to give the courses and lengths of its several meanders alike: *Yates v. Van de Bogert*, 56 N. Y. 526; *Angell on Watercourses*, secs. 29, 30; *Middleton v. Pritchard*, 3 Scam. 510; 38 Am. Dec. 112; *Railroad Co. v. Schurmeir*, 7 Wall. 272.

This construction is not overcome by the fact that, after "ascending the creek" for several courses, the next course is given as "crossing the creek to the end of the old wall." This call is not inconsistent with holding that the previous call, "ascending the creek," follows the thread of the stream, but merely shows that in going from that point the next course is in a direction which crosses the creek from the thread of the stream toward the end of the wall. Nor is the construction to be given to these calls in the mortgage qualified by the subsequent reference therein to a survey by Scholfield. The defendants offered in evidence a plat of a survey made by Scholfield and approved by the United States surveyor general September 23, 1853, and it was testified that this was a preliminary survey of the Bernal rancho, made under instructions from the land commission. A comparison of this plat with the description in the mortgage shows, however, that this cannot have been the survey referred to in the mortgage. The plat is of the entire rancho, containing four thousand three hundred and forty-one acres, and has upon its face several subdivisions, no one of which corresponds with

the tract of nineteen hundred and fifty-eight acres which is described in the mortgage. The plat, however, contains upwards of a hundred courses—more than double the number in the mortgage—and only eleven of these courses are the same as those in the mortgage.

2. Pioche and Robinson conveyed, December 6, 1866, to John Hewston a tract of land, "commencing at the intersection of a ditch (dividing land belonging to Haley and O'Neill) with the shore line, and running thence along said ditch . . . to E. line of 15th avenue; thence along the easterly line of said 15th avenue N. 45° 15' W. 2 chains 60 links, to S. shore of Islais creek; thence along said shore as it winds and turns to commencement." Whatever title passed by this deed was vested in the plaintiffs at the commencement of the action. By virtue ¹⁸⁷ of conveyances subsequently executed by Pioche and Robinson the defendants Luty and Thomas claimed title to the land, "commencing at a point where the northwesterly line of Fourth avenue intersects the southerly shore of Islais creek, and running thence in a northwesterly direction along the north-easterly line of said Fourth avenue, extended to the center of Islais creek, and thence ascending said Islais creek along the center line thereof to the northeasterly line of Fifteenth avenue, if extended in a northwesterly direction, as said avenue is delineated on said map; and thence in a southeasterly direction, and along the northeasterly line of Fifteenth avenue, if extended as aforesaid to the southerly shore of Islais creek; and thence in a northeasterly direction along said southerly shore as it winds and turns to the point of commencement." With reference to their title to this land the court finds, "That the lands described in the conveyance to Hewston include all the property described in plaintiffs' complaint, unless such deed is to be construed as including no part of the lands covered by the waters of Islais creek, in which event the said deed includes all the lands described in plaintiffs' complaint, except that lying in Islais creek"; and, "if Pioche and Robinson retained any title to any part of the lands described in plaintiffs' complaint, after the making of the conveyances hereinbefore set out, then such title thereafter and prior to the commencement of this action became vested in the defendants Thomas and Luty as to the lands described in their answer." The conclusion of law that "the plaintiffs are the owners of all the real property described in their complaint" must be regarded as a finding that Pioche and Robinson did not retain any title to any portion of the lands de-

scribed in the complaint. The term "shore" in its ordinary use, signifies the land that is periodically covered and uncovered by the tide, but it is sometimes applied to a river or pond as synonymous with "bank." In the absence of any qualification a grant bounded by the "shore" of a river, ¹⁸⁸ when the grantor is the owner of the river, conveys the land up to the lowest point of the shore at any time, in order that the grantee may at all times have access to the stream by which the land is bounded. It is competent, however, for the grantor to so designate the line on the shore which shall constitute the boundary, that there shall be no uncertainty in its location, and in such case the line of high or low water mark would be immaterial in determining the extent of the grant. In the present case the starting point of the description in the grant to Hewston is "the intersection of the ditch with the shore line." This starting point may be susceptible of exact location, and from some of the evidence offered at the trial it would appear capable of ascertainment, although the court does not find its location. The only land to which plaintiffs have title is that embraced within a line drawn from this starting point around the various courses to the "south shore of Islais creek," and "thence along said shore as it winds and turns to commencement." The point in the "south shore," from which the last course is to be drawn, must be the same point in the shore as is the starting point; that is, at whatever point between high and low water mark was the intersection of the ditch with the shore line, there must be the point in the "shore line" to which the course along the easterly line of Fifteenth avenue is to be extended. The term "shore" must be construed with the same meaning wherever it is used in the same conveyance, and its definite location in the first course requires the same location in the last. This is a fixed boundary or monument to which the distance "two chains sixty links" must yield. Whatever land lies between this boundary and the center of the creek is vested in the defendants Thomas and Luty, and the finding of the court that the plaintiffs were the owners of this portion of the demanded premises was erroneous.

3. The defendants other than Thomas and Luty claim title under Harvey S. Brown to certain lots in gift map ¹⁸⁹ number 4, upon the theory that the Moss mortgage did not include any part of the bed of Islais creek. As Brown had conveyed to Moss all the lands described in the mortgage before he made the conveyance under which these defendants claim, it is evident that the plaintiffs' title derived from Moss is superior to theirs.

for which the building in question was constructed, but it is not at all apparent that they are necessary to the convenient use and occupation of the building for the purposes indicated. Their uses are foreign to its purposes, except as they may tend to bring custom to its doors." And here it may be said the use of this land is foreign to the owner's purposes, except that it may furnish him an income by which he may sustain himself in the dwelling. The statute simply allows him the dwelling-house and a quantity of land around it sufficient for its convenient use. As to his income or source of support, the statute does not concern itself. It is not our purpose to indicate to the trial court the quantity of land necessary for the convenient use and occupation of this dwelling-house, but it is entirely evident that forty acres is too much, and we think it equally evident that an entire twenty-acre tract is too much. We see no objections to the complaint of sufficient merit to demand a reversal of the judgment.

For the foregoing reasons the judgment and order are reversed and the cause remanded.

Van Fleet, J., and Harrison, J., concurred.

MECHANIC'S LIEN—TO WHAT LAND ATTACHES.—The lien of a mechanic includes not only the buildings on which his work was done and the land on which they stand, but also the land about the buildings used with them and necessarily or reasonably convenient to their use: *Bank v. Curtiss*, 18 Conn. 342; 46 Am. Dec. 325. In *Lyon v. Logan*, 68 Tex. 521, 2 Am. St. Rep. 511, it was held that claiming a lien on more land than it could lawfully attach to would not vitiate the lien on so much land as it can cover, unless the claim is intentionally and fraudulently made.

CARDENAS v. MILLER.

[106 CALIFORNIA, 250.]

IN INTERPRETING A STATUTE the words used should be construed with reference to the subject matter.

STATUTES, INTERPRETATION OF.—General language used in a chapter of the code relating to real property cannot control other sections of the same code relating to personal property. Therefore, a general statement to the effect that an unrecorded instrument is valid between the parties thereto and those who have notice thereof does not control nor vary the provisions of the same code upon the subject of chattel mortgages.

A CHATTEL MORTGAGE IS VOID AGAINST A CREDITOR OF THE MORTGAGOR, though he has notice thereof, under a statute declaring that a mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value, unless it is acknowledged, or proved, certified, and recorded in like manner as grants of real property. The words "in good faith and for value" refer to purchasers and encumbrancers, and not to creditors.

B. F. Thomas, for the appellant.

A. Leslie and Richards & Carrier, for the respondent.

²⁵² The COURT. Upon further consideration of this cause upon rehearing we are satisfied with the conclusion reached in Department, as expressed in the opinion of Mr. Commissioner Searls. The supposed conflict between the opinion of the Department and the case of Fette v. Lane (Cal., Sept. 21, 1894), 37 Pac. Rep. 914, urged in the petition for rehearing, does not exist. The court were there considering the rights of a subsequent mortgagee taking with notice of a prior unrecorded mortgage, and the question as to the rights of an attaching creditor against the holder of such a mortgage was not involved. It is true that the learned commissioner who wrote the opinion in that case suggests in passing: "Nor could the attachment of the property by defendant, after notice of plaintiff's mortgage, affect his lien, even if the attachment had not been dismissed." But the question of the effect of an attachment was not before the court, and what is there said with reference thereto was not necessary to a determination of the case; it is therefore to be regarded as mere dictum, and, as it announces a doctrine which we regard as inconsistent with the plain meaning and effect of our statute, it cannot be permitted to affect our consideration. Our statute makes a very plain distinction between creditors and subsequent purchasers and mortgagees. The latter are protected against the prior unrecorded mortgage only when they take their conveyances "in good faith and for value"; and, of course, they do not take them in good faith if they have actual notice of the prior mortgage. But not so as to creditors. As to them good faith is not made a condition, but such a mortgage is declared void without qualification. As to them the question of actual notice is made wholly immaterial under the statute, and, consequently, knowledge on their part of the existence of such unrecorded mortgage will not protect its holder against their claims. ²⁵³ The plain import of the statute is that nothing but a compliance with its terms will protect a mortgage of chattels against creditors. This construction is in accord with that given to the statutes of a number of other states wherein a similar distinction is made in the law between creditors and subsequent purchasers and mortgagees: See Jones on Chattel Mortgages, sec. 318, and cases cited.

Our statute is expressed in language so clear and unequivocal, indeed, as to be susceptible of no other reasonable construction, unless the explicit terms of section 2957 of the Civil Code are to

be regarded as modified by the provisions of section 1217; but, for the reason stated in the opinion of the Department, it is clear to our minds that the latter section has no application.

The judgment and order appealed from are affirmed.

The following is the opinion above referred to, rendered in Department Two on the 13th of March, 1895:

SEARLS, C. This is an action in claim and delivery, to recover a quantity of barley, or its value and damages.

The case was tried by the court without a jury and findings in writing made and filed, upon which judgment was entered in favor of defendant.

Plaintiff appeals from the judgment and from an order denying his motion for a new trial. The complaint is in the usual form in claim and delivery.

The answer denies many of the allegations of the complaint, and justifies the taking and holding the barley as the assignee in insolvency of one A. J. Drennan, who is alleged to have been the owner thereof. At the trial it was shown that, in 1892, A. J. Drennan raised a crop of barley upon certain land in Santa Barbara county, which he leased from two separate individuals, giving one-fifth of the crop to the owners of the land in lieu of rent.

On the 11th of March, 1892, Drennan executed in due form a chattel mortgage to Fernando Cardenas, the plaintiff ²⁵⁴ and appellant herein, upon his share of the growing crop of barley, to secure the payment of two hundred dollars, with interest at one per cent per month. The mortgage contained the affidavit of the parties and was duly acknowledged, but was not recorded until the twenty-eighth day of June, 1892, when it was duly recorded.

John F. Miller, the defendant and respondent herein, brought suit against Drennan to recover money due upon a promissory note dated in 1891, issued an attachment, etc., which was levied upon the interest of Drennan in the growing crop on the twenty-third day of June, 1892.

The levy was made by the sheriff by leaving personally with the defendant Drennan a copy of the writ of attachment, together with a notice, etc., as provided by subdivision 5 of section 543 of the Code of Civil Procedure, and by placing a keeper in charge of the growing crop. Defendant Miller had actual notice of the chattel mortgage at the time of suing out and service of his writ of attachment.

On the thirtieth day of June, 1892, A. J. Drennan filed his petition in insolvency in the superior court in and for the county

of Santa Barbara, and on the same day an order adjudicating him an insolvent, directing the sheriff to take possession of his estate, staying all proceedings against said insolvent, directing publication, etc., was duly entered. The sheriff took possession of the property and placed B. F. Nossor in possession in place of S. C. Tyler, who had acted as keeper for the sheriff under the attachment.

Such proceedings were thereafter had in the insolvency proceedings that on the thirteenth day of August, 1892, John F. Miller, the defendant herein, was appointed assignee of the estate of said insolvent, and on the same day received an assignment of all the property of the estate from the clerk of the superior court.

The barley was harvested, threshed, and sacked by plaintiff in the latter part of August. There is testimony ²⁵⁵ tending to show that this was done by consent of the sheriff or his keeper. Plaintiff, however, claimed the right so to do under his mortgage.

About the 1st of September, 1892, defendant, as assignee, took possession of the barley and removed it, offering to pay plaintiff his expenses for harvesting and threshing, amounting to about three hundred dollars, but refusing to pay two hundred dollars claimed by the plaintiff as due on his mortgage. The attachment having been levied June 23, 1892, and the chattel mortgage not having been recorded until five days thereafter, viz., June 28, 1892, the question arises, Has the lien of the attachment priority over that of the mortgage in favor of an attaching creditor who had actual notice of the existence of such chattel mortgage?

If this question be answered in the affirmative we are of opinion the judgment of the court below should be affirmed, and if a negative answer be returned such judgment should be reversed. There are some minor points made by counsel for appellant, but upon examination it is believed that they are either not sustained by the record or do not call for a reversal.

Under the doctrine enunciated in *Beamer v. Freeman*, 84 Cal. 554, the lien of the attachment, if prior to that of the mortgage, though such attachment was dissolved by the proceedings in insolvency taken within one month after the attachment lien attached, did not inure to the benefit of the holder of the chattel mortgage, but to the benefit of general creditors of the insolvent; and the assignee in insolvency was, as the trustee of the creditors, entitled to possession of the property in dispute.

The contention of appellant is that the defendant, having had actual notice of the existence of plaintiff's chattel mortgage, was bound by it as effectually as if it had been placed on record before he instituted his suit and caused the writ of attachment to issue and be levied upon the mortgaged property, and in support of this contention we are referred to section 1217 of the Civil ²⁵⁶ Code, which is as follows: "An unrecorded instrument is valid as between the parties thereto and those who have notice thereof."

The term "instrument," in its broad sense, includes formal or legal documents in writing, including contracts, deeds, wills, bonds, leases, mortgages, etc.

In the law of evidence it has a still wider meaning and includes not merely documents, but witnesses and things animate or inanimate which may be presented for inspection: 1 Wharton on Evidence, sec. 615; Black's Law Dictionary, tit. Instrument. It is a familiar rule, however, that in construing a statute words used therein and their meaning are to be construed with reference to the subject matter embraced in such statute. Chapter 4 of the Civil Code, in which section 1217 occurs, relates to the recording transfers of real property, what may be recorded, mode of recording, proof and acknowledgment of instruments, and effect of recording, or the want thereof. The first section of the chapter (Civ. Code, sec. 1158) provides that "any instrument or judgment affecting the title to or possession of real property may be recorded under this chapter."

The entire chapter deals with real property and the recording of instruments relating thereto. It follows that section 1217, the last section in the chapter, must be held to relate to the same subject matter.

This intention is made more manifest by section 1164 of the same chapter, which provides that "transfers of property in trust for the benefit of creditors, and transfers or liens on property by way of mortgage, are required to be recorded in the cases specified in the titles on the special relation of debtor and creditor, and the chapter on mortgages respectively."

This last section tends to show the understanding and intent of the lawmakers to relegate the manner of recording in the specified cases to the several statutes pointed out and which provide therefor.

Turning to the chapter on mortgages and we find that ²⁵⁷ as to chattel mortgages, or mortgages on personal property, the method

of their execution is provided as well as the effect of nonrecording, differing essentially from cases of mortgages on real property.

Section 2957 is as follows: "A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value, unless: 1. It is accompanied by the affidavit of all the parties thereto, that it is made in good faith and without any design to hinder, delay, or defraud creditors; 2. It is acknowledged or proved, certified, and recorded in like manner as grants of real property."

It will be perceived that under the section quoted the mortgage, unless it is recorded, "is void as against the creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value." The defendant was a creditor of the mortgagor. In order for the mortgage to be void against subsequent purchasers and encumbrancers it is requisite that they be such in good faith, that is to say, with an honest intention to abstain from taking any unconscientious advantage of another, together with an absence of all information or belief of facts which would render the transaction unconscientious. The terms "good faith" and "bona fide purchasers" are borrowed from equity jurisprudence, and it is said must be interpreted accordingly: *Wells v. Smith*, 2 Utah, 52; *Alden v. Trubee*, 44 Conn. 459; *De Mott v. Starkey*, 3 Barb. Ch. 406; *Spicer v. Waters*, 65 Barb. 231.

The foregoing remarks apply to chattel mortgages under the statutes and where no delivery of possession of the property mortgaged to the mortgagee has been made.

The contention of appellant is that the term "creditors," as used in the statute quoted supra, is modified by the terms, "in good faith" and "for value," equally with the words "subsequent purchasers and encumbrancers."

In other words, the position of appellant is that creditors ²⁵³ like mortgagees and subsequent purchasers, must be such in good faith, and that there can be no good faith in such a case where the creditor as here has actual notice. Chattel mortgages in this state, which are not recorded, are absolutely void except in the cases provided for in the statute. Recording the instrument takes the place of the delivery of possession of the mortgaged chattels: *Berson v. Nunan*, 63 Cal. 550. Their validity depends as much upon their proper acknowledgment and registration as upon their execution and delivery. Under the law of this state

as it formerly existed, such mortgages, unless recorded, were void as to all the world except the parties thereto. Now they are valid as to all the world except the two enumerated classes, viz., creditors, and subsequent purchasers and encumbrancers of the property in good faith and for value. The term "creditor" signifies "a person to whom a debt is owing by another person called the debtor": Black's Law Dictionary.

In the general and extensive sense of the term he is a creditor who has a right by law to demand and recover of another a sum of money on any account whatever: *Stanly v. Ogden*, 2 Root, 261.

The term "good faith," as applied to a purchaser, *ex vi termini*, means one who purchases without notice and for value: Black's Law Dictionary.

This term has no natural application to a creditor who is of necessity such for value; and without value, either express or implied, he is not a creditor. No sufficient reason is discerned for supposing that the lawmakers intended to modify the term "creditor" by the language naturally applying to subsequent purchasers and encumbrancers.

The term "creditors" is general, and applies to creditors existing prior to the mortgage, as well as subsequent. A prior creditor could not have had notice, at the time of advancing his money or other value to a debtor, of a mortgage which did not then exist, and as against him the equities which may be invoked against a subsequent ²⁵⁹ purchaser or encumbrancer with notice and for value have no existence.

Non constat, but that the creditor may have trusted his debtor upon the faith of the property sought to be mortgaged.

This is not urged as a reason as against the statute if it has in fact included the creditor, but rather as a solution in his favor, where the most that can be said is that a doubt is created by the language used. The adjudicated cases in the several states seem at first glance to involve a marked difference of opinion on the subject; but, upon more careful examination, it is believed the divergence is mainly attributable to the different wording of the statutes of the several states, and in those jurisdictions where their statutes are precisely or practically similar to our own we find it usually held that an unrecorded mortgage is void as against a creditor of the mortgagor, although he have actual notice. Thus, in New York, where the statute provides that upon failure to record the mortgage "is void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees

in good faith," it is held that, as against creditors of the mortgagor with notice, the mortgage is void: *Farmers' Loan etc. Co. v. Hendrickson*, 25 Barb. 484; *Stevens v. Buffalo etc. R. R. Co.*, 31 Barb. 590; *Karst v. Gane*, 136 N. Y. 316.

In South Dakota, with a statute almost identical with our own, the supreme court, in *Kimball v. Kirby*, 4 S. Dak. 152, held that the lien of an execution takes precedence of an unrecorded chattel mortgage, irrespective of whether or not the judgment creditor had actual notice of the unrecorded chattel mortgage. New Jersey, Texas, Nebraska, and Ohio, with similar statutes, have held similarly: *Williamson v. New Jersey etc. R. R. Co.*, 29 N. J. Eq. 336; *Sayre v. Hewes*, 32 N. J. Eq. 656; *Brothers v. Mundell*, 60 Tex. 246; *Earle v. Burch*, 21 Neb. 702; *Cooper v. Koppes*, 45 Ohio St. 625.

In Iowa the language of the statute is: "No . . . mortgage of personal property . . . is valid against ²⁰⁰ existing creditors or subsequent purchasers without notice, unless," etc.

And the supreme court of that state held in *Allen v. McCalla*, 25 Iowa, 464, 96 Am. Dec. 56, that a mortgage of personal property duly executed though not recorded, etc., was valid as against existing creditors with notice of the mortgage. In this last case the court, in alluding to the different construction given to the statutes of Ohio, New York, Massachusetts, and other states, said this difference "grows out of the different, not to say peculiar, language of the statutes of those states."

Jones, in his work on *Chattel Mortgages*, at section 318, uses the following language:

"Under the statutes of some states notice of a mortgage not filed does not affect creditors, but does affect subsequent purchasers and mortgagees. Good faith is not required of creditors in order to enable them to avoid such a mortgage.

"This distinction is founded upon the terms of the statutes. Thus in New York the statute declares that such a mortgage is 'void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith.'

"Subsequent purchasers and mortgagees are not protected unless they take their conveyance in good faith, and they cannot take them in good faith if they have actual knowledge of the existence of an antecedent mortgage.

"But as against creditors such a mortgage is declared void without qualification. And, therefore, mere knowledge on the part of a creditor that his debtor has executed a mortgage which has

not been duly filed does not preclude him from availing himself of the objection that it is for this reason void. . . .

"The statute of New Jersey makes a similar distinction between creditors and subsequent purchasers and mortgagees. Such is also the law of Ohio and Texas."

California and several other states may be mentioned as having statutes similar in structure with those mentioned. ²⁶¹ We are in accord with the rulings of other states having like statutes, in holding as we do that our statute has created two classes of persons, of which creditors are one and bona fide purchasers and encumbrancers the other, and that the expression "in good faith and for value" modifies the latter and not the former. It follows that the actual knowledge on the part of the defendant of the existence of the unrecorded mortgage of the plaintiff did not, as against said defendant, validate the mortgage or prevent the priority of his attachment lien.

The judgment and order appealed from should be affirmed.

Haynes, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

Henshaw, J., McFarland, J., Temple, J.

STATUTES—INTERPRETATION.—A special provision in a statute relating to a specific subject matter controls general provisions therein: *Richards v. Commissioners*, 40 Neb. 45; 42 Am. St. Rep. 650. When general words follow specific words designating certain specified things, the general words are to be limited to cases of the same general nature as those which are specified: *People v. Richards*, 108 N. Y. 137; 2 Am. St. Rep. 373.

CHATTEL MORTGAGES—RECORDING.—A mortgage of chattels, duly executed, is valid against existing creditors with notice, although the mortgage be not recorded, and the mortgagor retains possession of the property. The phrase "without notice," used in the statute, applies to creditors as well as to purchasers: *Allen v. McCalla*, 25 Iowa, 464; 96 Am. Dec. 56, and note, in which the validity of an unrecorded chattel mortgage against creditors with actual notice thereof is discussed. One having notice of the existence of a chattel mortgage cannot treat it as void because it has not been filed for record: *Union Nat. Bank v. Onion*, 3 N. Dak. 193; 44 Am. St. Rep. 533, and note. See the notes to *Brown v. James H. Campbell Co.*, 21 Am. St. Rep. 232, and *Bingham v. Jordan*, 79 Am. Dec. 750.

EX PARTE LACEY.

[108 CALIFORNIA, 326.]

MUNICIPAL CORPORATIONS, POWERS OF.—Under a constitution providing that any city may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with the general laws, a city may enact and enforce an ordinance prohibiting the conducting of any steam shoddy machine or steam carpet-beating machine within one hundred feet of any church, schoolhouse, or residence.

CONSTITUTIONAL LAW—FORBIDDING OFFENSIVE TRADES.—The operation of a steam shoddy machine or steam carpet-beating machine within a hundred feet of any church, schoolhouse, or residence may be prohibited by municipal ordinance.

NUISANCE—POWER OF LOCAL LEGISLATURE TO DETERMINE WHAT IS.—As to those classes of business in the conducting of which police and sanitary regulations are made in a greater or less degree by every city, the determination of the municipal legislature that they are hostile and should be regulated is conclusive. Hence, one prosecuted for conducting a steam carpet-beating machine within one hundred feet of a church, schoolhouse, or dwelling cannot escape conviction by proving that his business was not in fact so conducted as to constitute a nuisance.

D. P. Hatch, for the petitioner.

C. McFarland, city attorney, for the people.

327 GAROUTTE, J. The petitioner has been convicted and imprisoned for violating a city ordinance of the city of Los Angeles, which provides: "No person or persons shall establish or conduct any steam shoddy machine, or steam carpet-beating machine, within one hundred feet of any church, schoolhouse, residence, or dwelling-house." He now alleges the judgment void upon the ground that the ordinance is void, and seeks his release by writ of habeas corpus. He claims the ordinance void upon the ground that it interferes with certain of his inalienable rights vouchsafed to him by the constitution. Upon the part of the city it is claimed that the passage and enforcement of the ordinance is but the exercise of a police power granted to it in terms by the constitution of the state.

The constitution of the state of California, article 11, section 11, provides: "Any county, city, town, or township may make and enforce, within its limits, all such local, police, sanitary, and other regulations as are **328** not in conflict with general laws." It will thus be observed that Los Angeles city is vested with certain powers by direct grant from the constitution, and that grant of power is not confined within narrow limits, but is broad and far-reaching in its scope and effect. Under this grant of power the city had the right to pass this ordinance, unless it is in con-

flict with general laws; and we know of no general laws which conflict with it, unless it can be said to be violative of those general principles of constitutional liberty which form the very foundation of both state and federal constitution. We see nothing in the language of this ordinance contrary to these great principles of our government. We see nothing there depriving petitioner of any fundamental right. In the exercise of its police and sanitary power the city has attempted to regulate the business of beating carpets by steam-power. Under its constitutional grant it had the right to regulate this business. The use of steam-power of itself within municipal territory has always been recognized as a proper subject of regulation; and, in addition here, it may well be assumed that the dust and other disagreeable and unhealthy matters arising in such quantities from the beating of carpets, as would naturally be indicated by the use of steam-power, are a constant source of danger and menace to the good health and general welfare of the neighborhood where located.

Conceding the business covered by the provisions of this ordinance not to constitute a nuisance per se, and to stand upon different grounds from powder factories, street obstructions, and the like, still the case is made no better for petitioner. This is not a question of nuisance per se, and the power to regulate is in no way dependent upon such conditions. Indeed, as to nuisances per se, the general laws of the state are ample to deal with them. But the business here involved may properly be classed with livery-stables, laundries, soap and glue factories, etc., a class of business undertakings in the conduct of which police and sanitary regulations are made to a ³²⁹ greater or less degree by every city in the country. And in this class of cases it is no defense to the validity of regulation ordinances to say: "I am committing no nuisance, and I insist upon being heard before a court or jury upon that question of fact."

In this class of cases a defendant has no such right. To the extent that it was material in creating a valid ordinance, we must assume that such question was decided by the municipal authorities and decided against petitioner and all others similarly situated. This court said in *Ex parte Shrader*, 33 Cal. 284: "The legislature can add to the mala in se of the common law the mala prohibita of its own behest. . . . The power to regulate or prohibit, conferred upon the board of supervisors, not only includes nuisances, but extends to everything expedient for the preservation of the public health and the prevention of contagi-

ous diseases. Now, there are many things not coming up to the full measure of a common-law or statute nuisance that might, both in the light of scientific tests and of general experience, pave the way for the introduction of contagion and its uncontrollable spread thereafter. Slaughterhouses, as ordinarily, and perhaps invariably, conducted in this country, might, within the limits of reasonable probability, be attended with these consequences. A competent legislative body has passed upon the question of fact involved, and we cannot go behind the finding. So far as we can know by this record, the power conferred has been exercised intelligently and in good faith." It must be borne in mind that the court was not discussing this question from the standpoint that the conduct of a slaughterhouse within municipal territory constituted a nuisance per se. And in the case of *Johnson v. Simonton*, 43 Cal. 249, which involved the constitutionality of an ordinance of the board of supervisors of San Francisco, prohibiting the feeding of still slops to milch cows, the court says: "If, indeed, it be a fact that the milk of cows fed in whole or in part upon still slop is unwholesome as human food, there can be ³³⁰ no doubt of either the authority or the duty of the board to enact the ordinance in question, and the scientific correctness of the determination by the board of the matter of fact involved is not open to inquiry here."

In the case of *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636, the court declares the following rule for testing the validity of ordinances enacted under the police power of a municipality: "When a health law is challenged in the courts as unconstitutional on the ground that it arbitrarily interferes with personal liberty and private property, without due process of law, the courts must be able to see that it has, at least, in fact, some relation to the public health; that the public health is the end naturally aimed at, and that it is appropriate and adapted to that end." Tried by this rule the ordinance in question fairly and fully fills the requirements of the law. Neither can it be urged that petitioner is deprived of his property without due process of law, for, as is said by Judge Dillon in his work upon *Municipal Corporations*, section 141, in speaking of police and sanitary regulations: "It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury it

is either *damnum absque injuria*, or in the theory of the law he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure."

This ordinance is not unreasonable nor arbitrary nor discriminating. It treats all persons alike who are engaged in the business named therein. All have the same rights, and all are subject to the same burdens. It is not unreasonable in the limits of distance fixed. As to the location of the exact spot distant from a church or a schoolhouse or a dwelling-house, where an ³³¹ ordinance would cease to be reasonable, it is not for this court now to say. The limits here prescribed are those with which we are to deal, and those limitations of distance may well be said to be reasonable. We see no substantial objection that can be made to the validity of this ordinance. Upon the contrary, the subject matter covered by it is clearly one with which the city had the constitutional right to deal, and the businesses there enumerated are unmistakably those which the municipal authorities had the right to regulate in the interest of the comfort and good health of the people of the city. The power is vested in the city by direct grant from the constitution to control and regulate business undertakings of the character here involved, and petitioner's constitutional rights have in no way been trespassed upon.

It is therefore ordered that petitioner be remanded.

McFarland, J., Harrison, J., Van Fleet, J., and Temple, J., concurred.

MUNICIPAL CORPORATIONS—NUISANCES—POWER TO DECLARE WHAT ARE.—Under a general grant of power over nuisances, town authorities have no power to adopt an ordinance declaring a thing a nuisance which in fact is clearly not one, but in doubtful cases depending upon a variety of circumstances requiring judgment and discretion their action is conclusive: *Harmison v. Lewistown*, 153 Ill. 313; 46 Am. St. Rep. 893, and note.

MUNICIPAL CORPORATIONS—POWER TO REGULATE OFFENSIVE TRADES.—The legislature may delegate to a municipal corporation the power to restrict an individual in the exercise of such dominion and control over his premises as may result in injury to others, provided the restraining act does not discriminate in favor of one person, or class of persons, over others: *State v. Tenant*, 110 N. C. 609; 28 Am. St. Rep. 715, and note. An owner of property cannot be prohibited by a legislative body from conducting thereon a lawful business unless such business is of such a noxious or offensive character that the health, safety, or comfort of the surrounding community requires its exclusion from that particular locality: *Ex parte Whitwell*, 98 Cal. 73; 35 Am. St. Rep. 152, and note. An ordinance prohibiting the location of a livery-stable in any city block in which a school building is situated, or in any block opposite to a block in which a school building is situated, without regard to the manner in which such stable is con-

structed, kept, or used, and without specifying the distance from a school building within which a livery-stable may be conducted, is unreasonable and void: *Phillips v. Denver*, 19 Col. 179; 41 Am. St. Rep. 230, and note. A statute authorizing a city to provide for the erection, management, and regulation of slaughterhouses empowers it to forbid the operation of such houses within designated limits except under certain specified conditions: *St. Louis v. Howard*, 119 Mo. 41; 41 Am. St. Rep. 630, and note.

IN RE WALKERLY.

[109 CALIFORNIA, 627.]

ALIENATION, UNLAWFUL RESTRAINT—DEVISE, CONSTRUCTION OF.—A devise of certain property to trustees for a specified purpose, accompanied by a provision that no final sale or distribution of the trust estate shall take place during the life of the testator's wife, but only after the expiration of twenty-five years after his death, and after her death shows a purpose to preserve the property inalienable for at least twenty-five years, and for a longer period should she live longer. It is therefore an attempt to restrain the alienation of property for a period which may be greater than the duration of lives in being.

A TRUST TO MANAGE PROPERTY and apply the proceeds to the use of persons designated, and to sell the property and distribute the proceeds among the nephews and nieces of the testator and the descendants of those who may have died, is a valid trust under the statutes of California, provided it does not restrain the power of alienation for a period which may be beyond the duration of lives in being.

A PERPETUITY is any limitation or condition which may take away or suspend the absolute power of alienation for a period beyond the continuance of lives in being. The absolute power to alienate is equivalent to a power to convey the absolute fee.

ALIENATION.—THE LAW AGAINST SUSPENDING THE POWER OF ALIENATION APPLIES TO EVERY gift, conveyance, or devise, and to all trusts, whether created by will or deed, whether providing for remainders or executory devises, or merely restraining the power to alienate for a fixed period of years, and then providing for a sale with a gift over.

PERPETUITIES—TRUSTS.—A perpetuity will no more be tolerated when covered by a trust than when it displays itself undisguised in the settlement of a legal estate.

ALIENATION, SUSPENSION OF POWER OF, WHAT IS.—The fact that all the beneficiaries under a trust have estates which are alienable does not prevent the suspension of the power of alienation if the trustees cannot join therein without acting in contravention of the trust, if the statute has declared that all their acts in contravention of the trust are void.

A TRUST CANNOT BE DESTROYED by the joint act or conveyance of the trustees and of the beneficiaries if the instrument creating the trust has provided a fixed period for its existence, which has not terminated.

ALIENATION.—THERE IS UNLAWFUL RESTRAINT OF ALIENATION WHEN there are no persons in being who, by joining in a conveyance of their distinct interests, can pass an absolute interest in possession.

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TRUST ESTATES, RESTRAINT UPON ALIENATION—CONDITIONS WHICH MAY NOT BE REJECTED AS REPUGNANT. If property is devised in trust for specific purposes, provided that no final sale or distribution thereof shall be made until after the expiration of twenty-five years, this provision cannot be treated as a condition which may be rejected as void because repugnant to the estate devised. It therefore constitutes an unlawful restraint upon the power to alienate.

PERPETUITY, EQUITABLE CONVERSION.—When lands are devised to trustees to be held for a period of years and then to be sold, they cannot be regarded as converted into personalty prior to the time when their sale is authorized by the terms of the trust. Hence, the direction to sell cannot rescue the trust from the operation of the law against perpetuities.

PERPETUITIES.—THE EFFECT OF A DEVISE OFFENDING THE LAW AGAINST PERPETUITIES is that the property descends to the testator's heirs, though his will clearly shows that such was not his intention.

PROBATE HOMESTEAD, TESTATOR HAS NO TESTAMENTARY POWER OVER.—If the statute provides for the selection by the court sitting in probate of property to be used as a homestead be the family of the decedent, and that if such selection be from the separate estate of the decedent, the court can set it aside for a limited period only, to be designated in such order, and the title vests in the heirs subject to such order, the order excludes the property so selected from the testamentary power of the husband, and it descends to his heirs, regardless of any devise he may have made.

ALIENATION, RESTRAINT UPON—DIRECTION TO SELL.—If property is devised to trustees to be held by them for specified purposes, and also to be sold, this direction to sell cannot exclude the trust from the operation of the law against perpetuities, if the trustees are by its terms to retain the proceeds of the sale, and not to distribute them until after a fixed period not measured by lives in being.

RESTRAINTS UPON ALIENATION APPLY TO PERSONAL PROPERTY as well as to real by the code of California, and any trust or other disposition of personalty which suspends the power of transferring it for any period which may be beyond lives in being is void.

ESTOPPEL AGAINST ASSERTING LAW AGAINST PERPETUITIES.—The fact that the widow and other heirs have accepted legacies bequeathed to them in a will cannot estop them from urging that the disposition of property made by it is offensive to the law against perpetuities, and should therefore be disregarded.

WILL—INTENTION, LANGUAGE OF WILL CONTROLS.—A finding by the trial court from extrinsic evidence showing the testator's intention, though such evidence is received without objection, cannot have effect as against the language of his will, nor prevent the court from disregarding such provisions of the will as violate the law against perpetuities, though to do so violates his intention as thus found by the court.

PERPETUITIES.—THE COURT CANNOT ALTER A WILL SO AS TO FREE IT FROM OBJECTION arising from its offending the law against perpetuities, though such alteration puts it in that form in which it would doubtless have been put had the testator been advised that otherwise it would be disregarded as creating a perpetuity.

Rodgers & Paterson, for the appellant.

H. C. Firebaugh, F. E. Whitney, B. B. Newman, and Fox,
Kellogg & Gray, for the respondents.

⁶⁸⁷ **HENSHAW, J.** William Walkerly died testate upon September 16, 1887, leaving as heirs at law his widow, ⁶⁸⁸ Blanche M. Walkerly, and a posthumous child born February 14, 1888.

This appeal is by the widow and the minor child from the decree of distribution rendered in the matter of his estate.

Upon June 2, 1887, Walkerly executed his will containing the following provisions:

"First. I declare that my entire estate is my separate property, having been acquired by me prior to my marriage.

"Second. I direct my executors hereinafter named to pay all my just debts and funeral expenses without unnecessary delay.

"Third. I give, bequeath, and devise to my dear wife, Blanche M. Walkerly, all my household furniture, books, pictures, jewelry, and plate, to her sole use and benefit forever. I also give and bequeath to her during her widowhood the free use and enjoyment of my residence, consisting of block number 121, with dwelling, stable, etc., thereon, situated in the city of Oakland. Upon the death or second marriage of my said wife, my trustees herein named are hereby directed to take possession and control of said dwelling and premises, and to manage and administer the same in the same manner and for the same purposes as they are directed in this will to manage and administer other property herein bequeathed and devised to them.

"Fourth. I hereby give and bequeath unto my dear wife, Blanche M. Walkerly, an annuity of two thousand four hundred (\$2,400) dollars during her life, payable quarter yearly, in gold coin of the United States, and I do hereby make the said annuity a charge and burden upon that certain piece of real estate situate on the northwest corner of Post and Stockton streets in the city and county of San Francisco, known as the Walkerly block or building; and I do request my trustees hereinafter named to see that this annuity or allowance for the support and maintenance of my wife is promptly paid as herein directed.

⁶⁸⁹ "Fifth. I give and bequeath unto my grandnephew, Andrew Rungay, the sum of two thousand dollars.

"Sixth. I do hereby give, bequeath, and devise unto Martin Bacon, Frank Barker, and Columbus Bartlett all the rest and residue of my estate of every description and wheresoever situated, in trust, for the following uses and purposes, to wit:

"1st. To take the possession, charge, and management of the property, and collect the rents, issues, and profits thereof.

"2d. Out of the income, or rents and profits, to pay quarter

yearly the annuity or allowance hereinbefore made to my wife, Blanche M. Walkerly, for her support and maintenance.

"3d. To pay to my sister, Mary Windley, the sum of five hundred dollars per annum, during her life, payable semi-annually. Should my sister die before her husband, then, and in such case, the annuity left shall not cease and determine, but shall go on, and shall be paid to Stephen Windley during his lifetime.

"4th. To annually distribute the residue of the rents and profits of the trust estate, after deducting the sum of \$2,400 to be paid to my wife, and the \$500 to be paid to my sister Mary or her husband, and the taxes, insurance, and expenses, and charges of administration equally among my nephews and nieces. Upon the death of any nephew or niece his or her share shall go and be divided equally between his or her children, share and share alike.

"5th. To sell and convey all the trust property and estate at the expiration of twenty-five years from the date of my death, and to distribute the proceedings equally among my nephews and nieces, or their heirs, the descendants or heirs of any deceased nephew or niece taking collectively the share which their father or mother would take were he or she living.

"Provided, that no final sale or distribution of the trust estate be made during the lifetime of my wife, Blanche M. Walkerly, but only after the expiration of ~~640~~ twenty-five years from date of my death, and after her death. Upon the distribution of the proceeds of the sale of the trust estate among the parties entitled, then this trust shall cease and determine. Should any one or more of my said trustees die or resign, the remaining trustees or trustee must immediately appoint some suitable person to fill the vacancy, so as to keep the number of trustees at three.

"Seventh. I hereby nominate and appoint my nephews Martin Baker and Frank Barker, and my friend Columbus Bartlett, the executors of this my last will and testament, without bonds, with full power and authority to sell any part of my estate, real or personal, whenever, in their judgment or that of a majority of them, it is necessary or advisable to do so, excepting my residence in the city of Oakland, and the Walkerly building in San Francisco. In the event that the proceeds of the sales of my other property shall not prove sufficient to pay my debts, expenses of administration, etc., then, in such case, but not otherwise, I hereby authorize my executors to negotiate, execute, and place a mortgage on the Walkerly building, for the purpose of raising sufficient funds to pay the residue of my debts, etc.

"It is my will that the Walkerly block be transferred and delivered over to my trustees hereinbefore named so soon as can be conveniently done after my death, to be managed by them in pursuance of the trust hereinbefore created, and that my residence be not sold while occupied by my widow. Should she marry again, then my trustees are directed to take possession of the same, and manage it for the benefit and as part of the trust estate, with power to sell the same whenever in their judgment it is best to do so."

Upon September 7, 1887, he republished said will with the following codicil thereto;

"I, William Walkerly, of the city of Oakland, Alameda county, California, do make, publish, and declare this as and for a codicil to my last will and testament. ⁶⁴¹ That is to say, being informed by my wife, Blanche Walkerly, that she is pregnant with a child by me, I desire to make provision for such child, should it be born alive, and to make a more liberal and different provision for my said wife than I have made in my will to which this is a codicil.

"First. I hereby revoke the gifts, bequests, and devises made in my said will to and for the benefit of my wife, Blanche Walkerly, and, in lieu thereof, I do hereby give and bequeath to her the sum of one hundred thousand dollars (\$100,000), to be paid to her when the Walkerly block shall be sold, as described and provided for in my will, and in the mean time to be a lien, mortgage, and burthen upon said Walkerly block, bearing interest at the rate of five per cent per annum. Said interest to be paid to her semi-annually by my trustees, Martin Bacon and Columbus Bartlett.

"Second. I give, bequeath, and devise unto my child, which shall be born unto me, lawfully begotten upon the body of my wife, Blanche Walkerly, the sum of one hundred thousand dollars (\$100,000), to be paid when the Walkerly block shall be sold as described and provided for in my will, and in the mean time to be a lien, mortgage, and burthen on said Walkerly block, bearing interest at the rate of five per cent per annum. And my trustees, Martin Bacon and Columbus Bartlett, are hereby directed to pay the interest on this bequest semi-annually to the guardian of such child.

"Third. I hereby nominate and appoint my nephew Martin Bacon the guardian of the estate of any child which shall lawfully be born to me, without bonds."

Upon the hearing of the petition for distribution the court,

first making certain findings of fact hereinafter considered, rendered its decree, which itself contained a recital of the findings of fact above adverted to, and which, after further specifically setting forth the proceedings in probate showing that the estate was ready for distribution and that the widow had remarried and ⁶⁴² was the wife of William F. Burbank, made distribution as follows:

"It is hereby ordered, adjudged, and decreed that the residue of said estate of William Walkerly, deceased, hereinafter particularly described, and now remaining in the hands of said executors, and any other property now known or which may hereafter be discovered which may belong to said estate, or in which the said deceased may have any interest, be and the same is hereby distributed unto Martin Bacon, Frank Barker, and Henry Davis Hawks, in trust, for the following purposes and uses, to wit:

"First. To take the possession, charge, and management thereof, and to collect the rents, issues, and profits thereof.

"Second. Out of the income or rents or profits of said trust estate, to pay semi-annually \$2,500 to Blanche Walkerly-Burbank, formerly Blanche M. Walkerly, and \$2,500 to William Martin Walkerly, a minor, and to distribute annually the residue of the rents and profits of said trust estate, after the aforesaid payments and expenses of the trust property have been paid equally among the nephews and nieces of said William Walkerly, deceased, and upon the death of any nephew or niece his or her share to be divided equally between his or her child or children, share and share alike.

"Third. To sell and convey all the trust property and estate as soon as practicable, and convert the same into money, and distribute the same as follows:

"1. Out of the proceeds obtained from the sale of the Walkerly block in San Francisco, hereinafter mentioned, \$100,000 to Blanche Walkerly-Burbank, with interest thereon from the 27th day of November, 1893, at the rate of five per cent per annum, payable semi-annually.

"2. Out of the proceeds obtained from the sale of the Walkerly block in San Francisco, \$100,000 to said William Martin Walkerly, a minor, with interest thereon from the 27th day of November, 1893, and after deducting therefrom said sum \$2,000 paid as attorney's fees to ⁶⁴³ Arthur Rodgers, the attorney of said minor, appointed heretofore by this court, and interest as stated in the decree.

"3. The remainder of the proceeds of the sale of said Walkerly block in San Francisco, and all other property of said estate, to be equally divided among the following-named persons." The nephews and nieces and the children of deceased nephews and nieces are then named, and their respective shares allotted to them.

The residue so distributed to the trustees comprised the Walkerly block, block 121 in Oakland, which had been set apart to Blanche Walkerly and the child as a homestead during her widowhood, and personal property consisting of moneys to the amount of four thousand six hundred and fifteen dollars, and certain stock certificates, judgments, and claims of considerable amount, but small actual value.

The first proposition urged by appellants against the decree may be thus stated: The decree declares trusts other and different from those set up by testator in his will. The trusts sought to be established by testator in his will are void.

The trust declared by the decree, read by itself and apart from the will whose provisions it is supposed to formulate, is legal and requires no independent consideration. But does it fairly interpret and represent the trusts sought to be created by the will? This vital point must first receive attention.

Omitting from present consideration the language of the codicil, Walkerly bequeathed and devised the residue of his estate to the trustees named upon certain defined trusts: 1. To pay an annuity of two thousand four hundred dollars to his widow during her life, making the annuity a charge upon the Walkerly block; 2. To pay an annuity of five hundred dollars a year to his sister during her life, and upon her death to her husband during his life; 3. Annually to distribute the remainder of the net income and profits of the estate to testator's nephews and nieces, and, upon the death of ⁶⁴⁴ any nephew or niece, to distribute his or her share among the children of such decedent. The trusts so declared belong to those classes of express trusts which as to real property are alone permitted to be created by our statutes: Civ. Code, sec. 857, subds. 2, 3. So far, then, as concerns their objects and purposes up to this point they contravene no law and are undoubtedly legal.

But there is still to be considered the life of the trust—the event upon the happening of which, or the time upon the arrival of which, the testator has declared it shall cease and determine. These provisions are found in sections 5 and 7 of the will above quoted. At the expiration of twenty-five years from the date

of testator's death the trustees are required to sell all the trust property, and to divide the proceeds among the then living nephews and nieces, or their heirs, the "descendants or heirs" of a deceased nephew or niece taking collectively the share of the ancestor. That there may be no room for construction of his meaning as to when the sale shall be made, the testator further declares in the same connection that "no final sale or distribution of the trust estate shall be made during the lifetime of my wife, Blanche M. Walkerly, but only after the expiration of twenty-five years from date of my death, and after her death."

This language is certain, precise, and free from doubt. The testator had left, as a legacy to his wife, an annuity of two thousand four hundred dollars, the payment of which was made a charge upon the most valuable portion of his estate, the Walkerly block. His special purpose was to preserve this property unaliened and inalienable for at least twenty-five years; for a longer period if his wife should live longer, but, if she should die sooner, still for twenty-five years. This purpose is made manifest, not only from the clauses of the trust already discussed, but in addition by the exemption of this property from the operation of the power of sale conferred in the seventh paragraph of the will. To the ⁶⁴⁵ grant of power to sell, therein made, is expressly attached a reservation excepting this property.

Turning now to the codicil, which is to construed with the main instrument, it will be seen that the testator's declared purpose therein is to make a more liberal provision for his widow and for the child with which he has been informed she is pregnant. This he does by revoking the annuity and giving her a present legacy of one hundred thousand dollars, with payment only deferred. It is to be paid "when the Walkerly block shall be sold as described and provided for in my will," and in the mean time to be a charge upon that property. There is here not only no modification of the original time of the sale of this land and the extinguishment of the trust, but the provisions of the will in this regard are referred to with particularity as fixing the time of payment. The circumstance that the time of payment thus fixed must be after the death of the widow, and that therefore the legacy could not be paid to her, cannot affect or modify the terms of trust. The legacy is put wholly without and made entirely independent of the trust except as to the date of payment. It is a present gift, vesting immediately, and, if the condition deferring the time of its payment is repugnant to it as being impossible upon its face, the condition would be void:

Hone v. Van Schaick, 20 Wend. 568; *Oxley v. Lane*, 35 N. Y. 350. In passing may be pointed out the radical and important distinction between the present gift to the wife and child each of one hundred thousand dollars, to be paid when the Walkerly block is sold, and the future interests of the nephews and nieces to whom nothing was directly given. All of the residue was devised to the trustees, who were to sell as provided, and, upon sale, to distribute the proceeds to the nephews and nieces who should be then alive, and the "descendants or heirs" of those who might be dead.

The legacy to the child presents no features meriting special attention.

648 No other conclusion, therefore, can be reached than that the general purpose of the testator as to all his property, clearly expressed by his will, was that it should be held by the trustees for twenty-five years before distribution, and that his special purpose as to that particular property called the Walkerly block was that in no event should it be sold or aliened before the expiration of twenty-five years from his death.

But the trust estate consisted: 1. Of the Walkerly block; 2. Of the homestead block 121 in Oakland; and 3. Of personal property—and, as the terms and conditions of the trusts are not uniform as to these, a separate and more particular consideration of them and of the law bearing upon them becomes necessary.

We proceed to consider:

1. The trust declared upon the Walkerly block.

This property comprises by far the greater portion in value of the testator's estate. It was devised to the trustees upon the trusts indicated, namely, to manage the property and apply the proceeds for the use of the persons designated, and, at the expiration of twenty-five years, or if the widow should at that time be alive, then upon her death, to sell the property and distribute the proceeds among the then living nephews and nieces and the "descendants or heirs" of those who might be dead. The purposes indicated come within the purview of subdivisions 1 and 3 of section 857 of the Civil Code. The fatal defect in the trust is that it provides for an absolute period of years for its determination, during which period the power of alienation is suspended.

"The absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition": Civ. Code, sec. 715.

"Every future interest is void in its creation which, by any possibility, may suspend the absolute power of alienation for a longer period than is prescribed in this ⁶⁴⁷ chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed": Civ. Code, sec. 716.

"The suspension of all power to alienate the subject of a trust, other than a power to exchange it for other property to be held upon the same trust, or to sell it and reinvest the proceeds to be held upon the same trust, is a suspension of the power of alienation, within the meaning of section 715": Civ. Code, sec. 771.

"The delivery of the grant, where a limitation, condition, or future interest is created by grant, and the death of the testator, where it is created by will, is to be deemed the time of the creation of the limitation, condition, or interest, within the meaning of this part of the code": Civ. Code, sec. 749.

It would seem as though all need of discussion were foreclosed as to the trust under consideration by the plain terms of the code above set forth, yet, because of the great value of the property involved, and the serious consequences which must follow to the interests of respondents, it would perhaps be unjust to leave this consideration without further amplification. We will, therefore, discuss, so far as we have been able to follow them, the propositions made by respondents in support of this trust.

A perpetuity is any limitation or condition which may (not which will or must) take away or suspend the absolute power of alienation for a period beyond the continuance of lives in being. The absolute power of alienation is equivalent to the power of conveying an absolute fee: Chaplin on Suspension of Alienation, sec. 64. The law against the suspension of the power of alienation applies to every kind of conveyance and devise. It applies to all trusts, whether created by will or deed, whether providing for remainders or executory devises, or, as here, merely restraining the power of alienation for a fixed period of years, and then providing for sale with gift over. In short, it "covers the entire ⁶⁴⁸ field of estates, interests, rights, and possibilities": Chaplin on Suspension of Alienation, sec. 2. Says Perry: "A perpetuity will no more be tolerated when it is covered by a trust than when it displays itself undisguised in the settlement of a legal estate" (Perry on Trusts, sec. 382), and section 771 of the Civil Code is but an enactment of this rule.

Every express trust, valid in its creation, vests the whole estate in the trustees. The beneficiaries take no estate or interest in

the property, but may enforce the performance of the trust: Civ. Code, sec. 863. If this trust be not valid in its creation, the trustees would take no estate, but neither would the beneficiaries whose rights are dependent upon the validity of the trust. If it be valid, then the "whole estate" vests in the trustees. The "whole estate," as has been pointed out (*Embury v. Sheldon*, 68 N. Y. 227), means the whole of such an estate as is necessary to the performance of the trust. In the one under consideration it embraces the whole legal and equitable estate which the testator enjoyed, since no less would be sufficient to enable the trustees to carry out the purposes: 1. To apply the income for twenty-five years (Civ. Code, sec. 857, subd. 3); and 2. At the expiration of that time to sell the property and dispose of the proceeds: Civ. Code, sec. 857, subd. 1. The beneficiaries herein then take no estate as such, their interest being the right to the enforcement of the trust.

But, if we understand the position of respondents, it is contended that the nephews and nieces take a future estate, which future estate is vested and is alienable, and that therefore it is a valid estate, since only those future interests are void which by possibility may unduly suspend the power of alienation. Following this argument, and for this purpose treating the interest of the beneficiaries as a future interest or estate within the contemplation of the code (Civ. Code, sec. 716), it may be first suggested that all expectant estates, whether vested in interest, or contingent with a vested right, or entirely ^{contingent} contingent, pass by succession, will, and transfer, like present estates and interests: Civ. Code, sec. 699. But the fact that such interests may pass does not relieve from the operation of the rule, unless there are persons in being who, by combining and conveying all their distinct interests created by the original grant or devise, can pass an absolute interest in possession. Conceding that the future interest of the beneficiaries is vested in the sense in which remainders are spoken of as vesting, and that the interest would thus be alienable, it still is not such an interest as would by transfer carry an absolute interest in possession. As is pointed out by the court in *Vanderpoel v. Loew*, 112 N. Y. 167, the vesting of an estate involves absolute alienability only so far as that particular estate is concerned. The fact that a given remainder is vested renders it absolutely alienable, so far as it is itself concerned, but the absolute fee may at the same time be inalienable. Therefore, to convey this absolute interest in possession the beneficiaries would be compelled to unite with their conveyance that

of the trustees in whom the fee is vested. But the trustees cannot convey until the expiration of twenty-five years. An attempt by them to convey before that time would contravene the trust, and be a void act (Civ. Code, sec. 870), and so even by this method of progression our path leads to that barrier of perpetuity which cannot be surmounted.

So, even though the beneficiary should be a remainderman under such a trust as this, he still could not alienate the land within the trust period so as to avoid the statute. Such a trust cannot be terminated or destroyed during the period fixed for the existence, even by the consent and joint act of all the trustees and beneficiaries: *Douglas v. Cruger*, 80 N. Y. 15; *Penfield v. Tower*, 1 N. D. 216.

Hence the question whether the interest of the beneficiaries is contingent or vested is here of no possible moment. The absolute alienability required by section 715 of the Civil Code does not imply vesting, and it ⁶⁵⁰ affords no escape from the operation of the rule, because the interest which the beneficiaries take may be relieved from uncertainty as to persons or event. When so relieved the interest may be said to be vested. But it is not such a vesting nor yet such an interest as removes the bar of the statute, since all of the interests and estates, contingent and vested, cannot convey the fee so long as the terms of the trust from which alone their interests are derived stand in the way. The perpetuity here does not result from too remote limitations or the failure of future estates to vest, but it arises by the direct act of the testator in forbidding his trustees to alienate for a period not tolerated by the law.

Nor is the twenty-five years a "condition" which may be rejected as void because repugnant to the interest conveyed. It is a limitation, a restraint upon alienation, forming an integral part of the trust. To the constitution of every valid express trust it is essential that there should be a trustee, an estate conveyed to him, a beneficiary, a legal purpose, and a legal term. While equity will, in certain instances, make good the absence of the first requisite, if the second or third be lacking, or the fourth or fifth be illegal, the trust itself must fail. Of the express trusts permitted by the statute there are two great classes, one of which does, and the other does not, involve a suspension of the power of alienation. Under the first class are included all those whose very purpose and essence it is that the land shall not be alienated by the trustee during the trust term, and where, consequently, a sale by him would be in direct con-

travention of the trust. In the case of such express trusts as occasion the suspension of the absolute power of alienation, the term of duration is the vital subject of inquiry: Chaplin on Suspension of Alienation, 146, 148.

Trusts such as these under consideration in their very nature operate to suspend the power of alienation. That power must be suspended in the one case, while the trustee is distributing the rents and profits, and in the ⁶⁵¹ other case it is suspended by the express duty imposed upon the trustee to sell only at the expiration of a fixed period.

The law has seen fit to insist that the measure of the period of suspension shall be lives in being, and it will not countenance the suspension for any fixed period or term of years not depending upon the duration of life, for the sufficient reason that during the time of such a limitation, however short, the person or persons capable of conveying the absolute interest might die—a possibility not to be endured. So it happens that whenever a testator, through temerity or ignorance, violates the plain mandate of the statute, as in this case, and creates a trust by which the absolute power of alienation is sought to be suspended for a term of years, he must pay the penalty of his rashness or folly in the destruction of his cherished design.

Such, though grievous to the beneficiaries, have always been the necessary and logical decisions of the courts, and the books abound in cases which, while monuments to the learning of the judges, are equally monuments to the persistency of testators or to the recklessness of their advisers. Thus it is, as is said by the vice-chancellor in *Field v. Field*, 4 Sand. Ch. 528, that “the statute restricts the suspension of alienation and ownership to lives and lives only. It does not admit of a suspense for a term of years, however short, nor one dependent in part upon life and in part upon a fixed period of time.” The rule has been applied in New York alone to terms of varying length of from twenty-one years to three, from the leading case of *Hone v. Van Schaick*, 20 Wend. 568, through a long and unvarying series of judicial determinations (*Bolles’ Suspension of Alienation*, note to section 78 where cases are collated), while in other states the authorities are as uniform, if not so numerous: *Mandelbaum v. McDonnell*, 29 Mich. 78; 18 Am. Rep. 61; *Farrand v. Petit*, 84 Mich. 671; *De Wolf v. Lawson*, 61 Wis 473; 50 Am. Rep. 148; *Penfield v. Tower*, 1 N. Dak. 216.

⁶⁵² Nor can the doctrine of equitable conversion be invoked to aid this trust. If we understand the argument of counsel

upon this point, they urge that under that doctrine the land should be treated as now sold and converted into personal property, and that such a trust in personal property would be valid, and that, therefore, this trust must be upheld. This would not only be a surprising application of the doctrine, but would be a novel and startling method of evading the law against perpetuities by invoking an equitable fiction. The rule of equitable conversion merely amounts to this, that where there is a mandate to sell at a future time, equity, upon the principle of regarding that done which ought to be done, will, for certain purposes and in aid of justice, consider the conversion as effected at the time when the sale ought to take place, whether the land be then really sold or not. But whenever the direction is for a future sale, up to the time fixed the land is governed by the law of real estate: *Savage v. Burnham*, 17 N. Y. 561; *Vincent v. Newhouse*, 83 N. Y. 505; *Underwood v. Curtis*, 127 N. Y. 533; *De Wolf v. Lawson*, 61 Wis. 473; 50 Am. Rep. 148. Whether a trust of personality for a fixed term would be valid is a matter of consideration hereinafter.

The intestacy of the testator as to the Walkerly block is the harsh result which must follow this void trust, and the property will descend to his heirs. It is true that such was not the testator's intent, but a testator must do more than merely evince an intention to disinherit before the heirs' right of succession can be cut off. He must make a valid disposition of his property: *Harbergham v. Vincent*, 2 Ves. Jr. 204; *Hawley v. James*, 16 Wend. 150; *Haynes v. Sherman*, 117 N. Y. 433.

2. The trust as to block 121.

The first objection presented by the appellants to the disposition of this land made in the decree is that it has been removed from administration, and no longer forms a part of the residue of the estate or of the trust property.

⁶⁵³ The argument in support of the contention is based upon the following facts: Upon application the court set apart block 121 as a homestead to the widow and minor child "during her widowhood." This life estate was terminated by her marriage to William F. Burbank, whose wife she now is. Section 1468 of the Code of Civil Procedure declares that if the property assigned as a homestead be selected from the separate property of the deceased, the court can only set it apart for a limited period, to be designated in the order, and the title vests in the heirs of the deceased, subject to such order.

The claim of the widow, therefore, is that the title to block

121, notwithstanding the testamentary disposition made of the property to the trustees, vested in herself and child, by virtue of this section, eo instanti when the court made the homestead order, and that consequently her subsequent marriage, while it terminated the homestead right, had no effect upon the title to the property which had vested in her as an heir of her husband. Against this respondents urge that the word "heirs" was not used in the section to exclude devisees, and that it should be construed as broad enough to include them.

The right of testamentary disposition is itself only a right given by statute, and may be restrained, modified, or abrogated entirely. But still it is unquestionably the general policy of our law to allow full power of testamentary disposition — saving as that power may be abridged by specific enactments. The code provisions making disposition of the homestead and of estates in value less than fifteen hundred dollars are instances of the limitations put by the legislature upon the free power of testamentary disposition, and from the lack of uniformity and harmony in their terms these homestead provisions have presented questions of much doubt and vexation to the courts.

The present question is one of that kind. Did the legislature mean by section 1468 to do more than declare the ordinary rule of succession and descent in ⁶⁵⁴ cases of intestacy, but subject always to the right of testamentary disposition; or did it mean that, as to separate property upon which the homestead character had been impressed by order of court, any devise would be void and the property must descend to the heirs?

The latter view places a limitation upon a testator's power, and removes from the disposition of a will any property which may chance to be selected and set apart to the widow and children, and may thus defeat by a curious uncertainty the object of a testator's worthy bounty. It may do more than that, as in this case. The widow, to whom a homestead of the estimated value of thirty thousand dollars had been set aside "during her widowhood"—the time in contemplation of a beneficent law during which she may be dependent and is entitled to maintenance from the estate of her deceased husband—by marrying again, while thus cutting off any further right of homestead or maintenance, is enabled to obtain a perfect and untrammelled fee in the property which her husband had devised to others, and which, in the general contemplation of the law, was to be set aside to her use only during the limited period of her widowhood and dependency. But nevertheless such an interpretation is borne out by

the language of the statute. Upon the other hand, the former view is certainly more in accord with the apparent policy of the law, but the language of the section before and after amendment to its present form stands in the way of its adoption.

Where a homestead has been selected from the separate property of a husband during his life and without his consent, it goes upon his death to his "heirs and devisees," subject to the power of the court to assign the same for a limited period, under section 1265 of the Civil Code, while by section 1474 of the Code of Civil Procedure the same property vests in "the heirs," subject to the same power of limited assignment in the court. It is not easy to see, as this court has before said, why the rule of devise or descent as to a homestead ⁶⁵⁵ upon separate property declared during life should differ from that which obtains in case it be set apart after death, and it is still less easy to perceive why the two sections last above cited should be left inharmonious, but nevertheless if the legislature has seen fit to prescribe different rules it is the bounden duty of the court to give them effect.

This the court was reluctantly driven to do in *Mawson v. Mawson*, 50 Cal. 539. Section 1465 of the Code of Civil Procedure at that time provided that the homestead on being set apart should be the property of the surviving widow or husband, if there were no minor children. *Mawson* died intestate. There were no minor children. A homestead was set apart to the widow out of the separate property. The deceased left two children of a former marriage—heirs at law—and they appealed. This court adjudged that the title vested in the widow to the exclusion of the heirs at law. By the amendment to section 1465 adopted in 1881, the title under such circumstances is now declared to vest in the heirs; and we cannot, without doing violence to the meaning of the word, hold that it includes devisees; nor can we, without doing equal violence to all rules of statutory construction, read into the section the words "or devisees": Code Civ. Proc., sec. 1858. The section is plain and unambiguous. Its meaning is in no way uncertain, and when that meaning is found nothing is left but to declare it. The wisdom of the law is for the legislature alone.

It is concluded, therefore, that the section is a limitation upon the power of testamentary disposition, and operates to vest the title to the homestead in the heirs at law, and so to withdraw it from the disposition made by the testator under his will.

Such being the case, the trust in block 121 fails for lack of subject matter. But were the other view to obtain, and the prop-

erty to be considered a part of the trust, the position of respondents would not be bettered.

For the trust as to this land differs from that of the ⁶⁵⁶ Walkerly block only in permitting a sale of the property before the expiration of the twenty-five years. In all other essential respects the trusts are the same. In the event of a sale still the proceeds are to be held and invested until distribution, which, as in the case of the Walkerly block, is deferred to a fixed time.

The mere power of sale does not, under such circumstances, save the provisions of the trust, since the proceeds of the sale are still to be held in violation of the law: Civ. Code, secs. 715, 771; Estate of Hinckley, 58 Cal. 457, 481; Hawley v. James, 16 Wend. 150; Haynes v. Sherman, 117 N. Y. 433. Nor is it the law of this state that the provisions against restraints upon alienation do not apply to trusts of personal property, as we will proceed to consider.

3. The trust in personal property.

The essential difference in this state between trusts in real property, known as express trusts, and those in personal property are: 1. The former can only be of the kinds permitted by the statute, and no others (Civ. Code, sec. 857), while the latter may be created generally for any purpose for which a contract may be made (Civ. Code, sec. 2220); 2. The former must be created and declared by writing (Civ. Code, sec. 852), while the latter may rest upon parol: Civ. Code, sec. 2222. But to all trusts, whether of real or personal property, the limitation upon the suspension of the power of alienation expressed in section 715 of the Civil Code directly applies. The section is found in division 2, part 1, title 2, of the code, where the lawmakers are dealing, as expressly declared, with the modifications of ownership and restraints upon alienation of "property in general." Again, section 771 of the Civil Code shows plainly the applicability of the law to personal property. For if it be only the suspension of the power to alienate real property which is under the ban, power to sell the realty would relieve the difficulty, and yet it is by that section expressly declared that personal property held after sale under the terms of the original trust ⁶⁵⁷ operates to suspend the power of alienation, under section 715 of the Civil Code. And finally, the applicability of section 715 to trusts in personal property has often been recognized, and never questioned: Estate of Hinckley, 58 Cal. 457; Goldtree v. Thompson, 79 Cal. 613; Williams v. Williams, 73 Cal. 99; Whitney v. Dodge, 105 Cal. 192.

We are not unmindful of the fact that the statutes of the state

of New York in express terms put a limitation upon the power to suspend the ownership of personal property: 1 N. Y. Rev. Stats., sec. 773, subd. 1. And we have not overlooked the circumstance that the supreme courts of Michigan and Wisconsin have uniformly held that their statutes similar in terms to our code provisions do not apply to trusts in personal property. But it is to be observed that the legislature of this state, in adopting section 715 of the Civil Code, placed it where it must apply, and therefore made it apply to "property in general," while the corresponding section in the Michigan statutes (Howell's Annotated Statutes of Michigan, sec. 5531, subd. 15), and that of the Wisconsin statutes (Wis. Rev. Stats., sec. 2039), are found in the chapters of the law relating to estates in real property, and so have been construed by the courts to be applicable only to trusts in such property: *Toms v. Williams*, 41 Mich. 552; *Dodge v. Williams*, 46 Wis. 70; *Palms v. Palms*, 68 Mich. 355; *De Wolf v. Lawson*, 61 Wis. 473; 50 Am. Rep. 148.

In those states it is held that, as to trusts in personal property, the common-law rule still obtains. And it is for the application of this rule that respondents here contend. But even this would not avail to save the trust. The common-law rule against perpetuities does not, as counsel argue, apply only to landed estates. Executory devises, springing and shifting uses, and trusts, whether of realty or personalty, were all within its terms: 1 Jarman on Wills, c. 9; Lewis on Perpetuities, 159; Perry on Trusts, secs. 377, 384; Lewin on Trusts, c. 7; Gray on Perpetuities, sec. 202; 4 Kent's Commentaries, 271; *Cadell v. Palmer*, 1 Clark & F. 372. As ⁶⁵⁸ Jarman states: "To the test of the rule settled by *Cadell v. Palmer*, 1 Clark & F. 372, every gift of real or personal estate, by will or otherwise, must be brought": 1 Jarman on Wills, 217.

By the Thelluson act (39 & 40 Geo. III, c. 98) the maximum period during which the power of alienation could be restrained was lives in being and twenty-one years and nine months. Tested by that act still would this trust be invalid.

We hold, however, that section 715 of the Civil Code not only applies to trusts in personal property, but also that it shortens the period permitted by the common law to lives in being. Private trusts in personal property which suspend the power of alienation must be limited like private trusts in realty to lives in being, and the trusts here are consequently destroyed by the same vice which invalidated those first considered.

We have thus far construed the trusts without noticing some-

objections urged by respondents against the right of appellants to be heard. Of those the first is that appellants are estopped from attacking the validity of the trusts. No estoppel is found against the appellants, but the facts which were claimed to establish one are set forth in the findings. Briefly, those facts are that the widow and child had been receiving a family allowance. By stipulation it was agreed that the order of family allowance should be vacated, and that the executors would thereafter pay the widow and child each four hundred and sixteen dollars and sixty-six and two-thirds cents per month; being at the rate of five per cent per annum upon the legacies provided to be paid in the codicil to the will, and the amounts so paid should upon distribution be treated as payments of interest upon account of said legacies. The court made its order in accordance with the stipulation. No mention is here made of the trusts, and no waiver, express or implied, of the right to demand a legal interpretation of them could thus arise. The legacies, as has been pointed out, were not within the trusts, but were independent and ^{also} valid bequests. The fact that under these circumstances the widow had elected to take under the will would have estopped her from denying the validity of the instrument as a will, but did not and could not operate to estop her from insisting upon a due interpretation of the instrument. Appellants still stand affirming the validity of the will as a will, but insist that the trial court has not correctly interpreted some of its provisions.

It became the duty of the court for the first time upon distribution to give effect to the legal devises and bequests of the testator, and it could not even with the consent of the parties declare valid trusts such as these which are opposed to the express mandate and policy of the law: Const., art. 20, sec. 9; Estate of Hinckley, 58 Cal. 457; Civ. Code, 3513; Gray on Restraints on Alienation, sec. 21; 2 Blackstone's Commentaries, 174; Greenhood on Public Policy, 115.

It is next urged that, as the court made findings concerning the testator's intent and decreed distribution in accordance with these findings, and as the findings are not attacked and will sustain the decree, and as "a volume of extrinsic circumstances bearing on the question was introduced without objection," these appellants are not in a position to combat the decree. But as to this it need only be said that it is the duty of the court in all cases to ascertain the intent of the testator from the language of the will, and the occasions which render parol evidence of circumstances admissible do not here arise: Civ. Code, secs. 1318, 1340.

The terms of the will are plain and unambiguous. It may be said of all wills that the testator's intent is to make a valid disposition of his property, and as to most provisions which are decreed invalid there is no difficulty in arriving at his actual meaning and intent. But a court is not therefore authorized to modify or vary the plain language of the testator, and thus create a new and valid will for him, even if it were certain that the testator would have adopted the interpretation of the court had he known his own attempt was invalid.

So of the trusts decreed by the court it may be said as was said in *Coster v. Lorillard*, 14 Wend. 349: "This would approximate nearer to the will of the testator than any other proposed alteration. But, after a diligent inquiry, I have not been able to satisfy myself that there is any principle or decision that would authorize such an interference. It would be arbitrary and establish a precedent for courts not to construe wills according to the intent of the testator as derived from a consideration of the language used to express it, but to make a will for him, such a one as we undertake to presume he would have made, if advised that his own was void as against law. This I cannot consent to do. Better that the intent of a testator should fail in a particular case than that the court should assume such arbitrary and undefined discretion over his estate. If we cannot execute the whole will, or some distinct and independent portion of it, the whole had better be declared void. The law makes a better one than will usually be made by the court."

So, too, where the language of the provisions of a will is plain and unambiguous the courts are not permitted to wrest it from its natural import in order to save it from condemnation: *Cottman v. Grace*, 112 N. Y. 299.

The determination that the trusts are void renders unnecessary any consideration of the other points presented.

The trusts being void it follows, as to the property attempted to be devised in trust, that the testator died intestate. It therefore descends to the heirs living at the time of his death.

For the foregoing reasons the decree is reversed.

McFarland, J., Garoutte, J., Harrison, J., Temple, J., Van Fleet, J., and Beatty, C. J., concurred.

Rehearing denied.

HOMESTEADS—CONVEYANCE BY WILL.—A father cannot, by will, deprive his minor children of their homestead rights in property occupied by them as a homestead at the time of his death: *Kleimann v. Gieselmann*, 114 Mo. 437; 35 Am. St. Rep. 761, and note. But in *Hazelett v. Farthing*, 94 Ky. 421, 42 Am. St. Rep. 365, it was held that

a husband may dispose of his homestead by will in any manner he may choose, subject only to the right of his widow to renounce the will and claim under the statute.

The Rule against Perpetuities.

Development of the Rule.—The policy of the early English law against the alienation of estates in real property has gradually given way to a policy which not only permits of such alienation, but also provides against unreasonable restraints thereon, and this policy by judicial, rather than by legislative, action, has resulted in what is known as the rule against perpetuities: Gray on Perpetuities, sec. 98. The decisions upon the subject at first, while they recognized that what they styled as remoteness might offend against the law, did not undertake to formulate the rule itself or to describe the limitations which must be disregarded because of their disrespect to it: *Child v. Baylie*, W. Jones, 15. The judicial action or decision was of a negative form. It commenced by assuming that remoteness was against the policy of the law and forbidden, and contented itself with establishing the exceptions to the rule, or, rather, with pointing out what remoteness was not so against public policy that it might not be sanctioned. Upon this subject it was ultimately settled that no limitation should be treated as void for remoteness if the conditions must take effect and the estate finally vest, and become alienable within lives in being: *Duke of Norfolk's case*, 3 Cas. Ch. 1. And, as we shall hereafter show, a life was regarded as in being for the purpose of this rule from the moment of its conception in the womb of the mother. It having been established that a limitation by which property could vest and become alienable within lives in being was not void for remoteness, it necessarily followed, because of the common-law disability of infancy, unless infants should be excluded from the operation of the rule, that an estate vested within lives in being would be rendered practically inalienable if vested in an infant during the further period intervening before termination of his infancy, and it was resolved not to withdraw infancy from the operation of this exception to the rule, and therefore that a limitation was not too remote if the estate could vest and become alienable at the termination of the minority of a person begotten during a life in being at the time the limitation became operative: *Sheffield v. Orrery*, 3 Atk. 282; *Bullock v. Stones*, 2 Ves. Sr. 521. The period having first been extended with the view of covering minorities, where, through the disability of an infant, the power to alienate might possibly be restrained for twenty-one years, the next question was, whether a like restraint might be imposed, though there was no minority, and it was ultimately determined that such should be the case: *Lloyd v. Carew*, Prec. Ch. 106. This case, however, only determined that there might be an extension for a reasonable time after lives in being. It was afterward finally settled that there might, after lives in being, be a further period of twenty-one years, irrespective of any minority: *Goodman v. Goodright*, 2 Burr. 870; 1 W. Black. 188; *Buckworth v. Thirkell*, 4 Doug. 328; 3 Bos. & P. 652, note; *Jee v. Audeley*, 1 Cox C. C. 324; *Long v. Blackall*, 7 Term Rep. 100; *Thellusson v. Woodford*, 4 Ves. 227. In these cases, however, the attention of the court was not called to the distinction, if any, between a term in gross and a term intended to allow for the expiration of minorities, and it was only within the present century that it was finally and definitely settled that, whether any infant or minor was interested in an estate or not, no limitation thereof could offend the law against remoteness if it vested within twenty-one years and nine months after the death, devise, or bequest upon which it depended for its creation took effect: *Beard v. Westcott*, 5 Taunt. 393, 413; 5 Barn. & Ald. 801, 805; *Benzough v. Eudridge*, 1 Sim. 173; *Cadell v. Palmer*, 1 Clark & F. 372, 441; 7 Bligh., N. S., 202; 10 Bing. 140; *Phipps v. Ackers*, 9 Clark & F. 583. The law upon the subject as thus finally settled in England was recognized in the United States almost as soon as in the mother country: *Barnitz v. Casey*, 7 Cranch, 456; and is regarded as a

part of the common law of the English colonies: *Yeap Cheah Neo v. Ong Cheng Neo*, L. R. 6 P. C. 381.

Definition.—The rule here under consideration has thus been stated in *Gray on Perpetuities*, section 201: "No interest subject to a condition precedent is good unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest."

"1. Perpetuities are grants of property wherein the vesting of an estate or interest is unlawfully postponed: *Saunders on Uses and Trusts*, 196; and they are usually called perpetuities, not because the grant as written would actually make them perpetual, but because they transgress the limits which the law has set in restraint of grants that tend to a perpetual suspense of the title, or of its vesting, or, as is sometimes, with less accuracy, expressed, to a perpetual prevention of alienation. The authorities for this will be found in what follows. According to this definition, a present gift to a charity is never a perpetuity, though intended to be inalienable: *Perin v. Oarey*, 24 How. 465; and no vested grant is a perpetuity. 2. The law allows the vesting of an estate or interest, or the power of alienation, to be postponed, and the accumulation of its increase to be made previous to vesting, for the period of lives in being, and twenty-one years and nine months thereafter, and all restraints upon the vesting that may suspend it beyond that period are treated as perpetual restraints, and, therefore, as void, and consequently the estates or interests dependent on them are void; and nothing is denounced by the law as a perpetuity that does not transgress this rule. And equity follows this rule, by way of analogy, in dealing with executory trusts, and those trusts which transgress the rule it calls transgressive trusts, being in equity the substantial equivalent of what in law are called perpetuities": *Philadelphia v. Girard*, 45 Pa. St. 9; 84 Am. Dec. 470, 474.

Statutory Modification.—The one point upon which there is no doubt, unless some statute is interposed to modify the rule, is that the time within which the estate must vest cannot be extended beyond twenty-one years and nine months after some life in being. The rule, however, has been substantially modified in many parts of the United States. We shall not undertake to state these modifications in detail, and will refer to them only so far as they may be necessary to give some indication of their general character. In some of the states, as in *Arkansas*, *North Carolina*, *Tennessee*, *Texas*, and *Vermont*, the subject has been regarded as worthy of constitutional limitations, declaring either that perpetuities shall not be, or ought not to be, allowed, or that the legislature shall take such action as to prevent them. In *Georgia*, *Iowa*, *Kentucky*, and *Pennsylvania* the English rule has been substantially adopted: *Philadelphia v. Girard*, 45 Pa. St. 9; 84 Am. Dec. 470. In *Minnesota* the period of suspension of the power of alienation is limited, in the case of real estate, to two lives in being at the creation of the estate, and, as to personal property, to one life in being and twenty-one years: *In re Tower's Estate*, 49 Minn. 371. In *California* the time is limited to lives in being, while in *Michigan*, *New York*, and *Wisconsin* the limitation is to two lives only. In *Connecticut* and *Ohio* an estate can only be granted to persons in being and to their immediate issue or descendants: *Beers v. Narramore*, 61 Conn. 13; *Alfred v. Marks*, 49 Conn. 473; *Turley v. Turley*, 11 Ohio St. 173; *Brasher v. Marsh*, 15 Ohio St. 103; *McArthur v. Scott*, 113 U. S. 340, 382; *Morris v. Bolles*, 65 Conn. 45. In *Alabama*, lands may be conveyed to the wife and child, or children only, severally, successively, and jointly, and to the heirs of the body of the survivor if they come of age, and in default over, but conveyances to other than wife and child, or children only, cannot extend beyond three lives in being at the date of the conveyance and ten years thereafter: *Ala. Civ. Code*, sec. 1834. In *Mississippi* the statute formerly declared that any person might make a conveyance or devise of lands to a succession of donees then living, and to the heir or heirs of the body of the remainderman, and, in default thereof, to the right heirs of the

donor in fee simple, but by later legislation the number of donees has been restricted to two: *Jordan v. Roach*, 32 Miss. 481, 613; *Cannon v. Barry*, 59 Miss. 289. Neither in England nor in the United States has there been any considerable difficulty in determining the period of time within which an estate must vest, but there has been much difficulty in determining what is a vesting of an estate, and what is a suspension of the power of alienation, within the meaning of the rule against perpetuities. As to the question of time, we may therefore leave the reader to consult the statutes of the state in which the question is to be determined, but in respect to the other questions we must refer him to the numerous decisions of the courts both in England and America, and even then we shall probably not have furnished him with a guide whose directions he will always be able to understand and follow. Either the rule against perpetuities is exceedingly difficult to master, or else it is one the attempting to avoid which can rarely be resisted. Judge Henshaw truly remarked in the principal case: "The books abound in cases which, while monuments to the learning of the judges, are equally monuments to the persistency of testators or to the recklessness of their advisers."

With Respect to the Computation of Time it is to commence when the conveyance or devise takes effect. In the case of a devise, it is not necessary that the estate should vest in persons in being when the will was executed, but it is sufficient that it vest in persons in being at the death of the testator, or, in other words, at the time when the will begins to be operative: *Vanderplank v. King*, 3 Hare, 1; *Peard v. Kekewich*, 15 Beav. 166; *Hosea v. Jacobs*, 98 Mass. 65, 67; *McArthur v. Scott*, 113 U. S. 340; *Lang v. Ropke*, 5 Sand. 363; and if the estate vests within the time required by the rule against perpetuities, it is not material that it may continue beyond that time: *Williams v. Teale*, 6 Hare, 239; *Hampton v. Holman*, L. R. 5 Ch. Div. 183, 188; *Otis v. McLellan*, 13 Allen, 339; *Minot v. Taylor*, 129 Mass. 162; *Donohue v. McNichol*, 61 Pa. St. 73; *Goldsborough v. Martin*, 41 Md. 488; *Heald v. Heald*, 56 Md. 300.

Estate must Vest at all Events within the Time Allowed.—It is not sufficient that the limitation may take effect within the time required by the rule against perpetuities. The rule upon this subject is exceedingly rigid and seems to admit of no exception. Therefore, no limitation can be permitted to have effect, unless any suspension of the power of alienation created by it must necessarily terminate under any and all circumstances within the time allowed by law: *Ford v. Ford*, 70 Wis. 19; 5 Am. St. Rep. 117; *Thorndike v. Loring*, 15 Gray, 391; *Smith v. Cunningham*, 13 L. R. Ir. 480; *Coggin's Appeal*, 124 Pa. St. 10; 10 Am. St. Rep. 565. It is not material that the circumstances have been such that the contingency upon which the estate was to vest has taken place within the period permitted by the rule against perpetuities, if it might have taken place at a later period: *Proctor v. Bishop of Bath*, 2 H. Black. 358; *Ibbetson v. Ibbetson*, 10 Sim. 495; 5 Mylne & C. 26; *Smith v. Dunganon, Flan. & K.* 638; 5 Ir. Eq. 84; *Thatcher's Trusts*, 26 Beav. 365; *Dana v. Murray*, 122 N. Y. 604; *Hodson v. Ball*, 14 Sim. 558, 574; *D'Abbadie v. Bizoin*, L. R. 5 Ir. Eq. 205; *Sears v. Russell*, 8 Gray, 86; *Stephens v. Evans*, 30 Ind. 39; *Lawrence's Estate*, 136 Pa. St. 354; 20 Am. St. Rep. 925; *Kent v. Dunham*, 142 Mass. 216; 56 Am. Rep. 667; *Davis v. Williams*, 85 Tenn. 646; *Cruikshank v. Home of the Friendless*, 113 N. Y. 337; *Coggin's Appeal*, 124 Pa. St. 10; 10 Am. St. Rep. 565; *Barnum v. Barnum*, 26 Md. 119; 90 Am. Dec. 88. Therefore, if property is devised to be held until such time as an act of the legislature can be procured authorizing the formation of a corporation to which such property shall be transferred, such devise is void in a state restricting the suspension of alienation to lives in being, because it is not certain that such incorporation can be procured within the duration of those lives: *Booth v. Baptist Church*, 126 N. Y. 215; *People v. Simonson*, 126 N. Y. 299; *Cruikshank v. Home of the Friendless*, 113 N. Y. 337. So, if property is devised to trustees with directions that

if any of the testator's children or grandchildren shall come to suffering in any other way than by idleness, then that the trustees shall provide for such children or grandchildren, the interest thus created is too remote, because it may happen that none of the beneficiaries come to want either within lives in being or within twenty-one years thereafter: *Moore v. Moore*, 6 Jones Eq. 132. So it has been held that an agreement between two persons that one shall hold the title to land under a trust for both, and that no part shall be sold without the consent of both, the party not owning the fee to have the right to purchase a portion at a specified price under the agreement, is void as creating a perpetuity: *Winsor v. Mills*, 157 Mass. 362. On the other hand, a provision in a will by which it was directed that an executor should not be compelled to make partition until the lapse of five years from the date of the probate of the will, for the reason that he might not be able to sell speedily without entailing sacrifice and loss, does not constitute a perpetuity. Such a provision manifestly does not absolutely prohibit action upon the part of the executor, nor necessarily suspend his power to alienate, for any time whatever: *Henderson v. Henderson*, 113 N. Y. 1.

Another consequence of the fact that the time of the vesting of an estate or of suspending the power of alienation must not be more remote than that permitted by the statute is, that if the statute measures such time by lives in being, another and different measure cannot be adopted, and a suspension for a definite period of time, however short, is not permitted: *Farrand v. Petit*, 84 Mich. 671; *Cruikshank v. Home for the Friendless*, 113 N. Y. 337; *Booth v. Baptist Church*, 126 N. Y. 215; *De Wolf v. Lawson*, 61 Wis. 469; 50 Am. Rep. 148; *Rice v. Barrett*, 102 N. Y. 161.

In the principal case the test applied to the devise in question, and under which it was pronounced invalid, was to inquire whether, at the death of the testator, there were persons in being through whose united action an estate in fee could have been conveyed. This test was undoubtedly proper and decisive under the statute of the state in which the opinion of the court was pronounced, because that statute expressly forbade any suspension of the power of alienation beyond lives in being, and declared that "the power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed": Civ. Code, sec. 716; and this test is usually accepted as applicable, even in the absence of a like stringent statutory prohibition. It may be that the fact that it is impossible, though all the world join, to make a conveyance which must necessarily pass the fee, is conclusive of the existence of an attempted perpetuity, but the recent English decisions appear to show, at least, that the converse of this is not true, and that the ability of persons in being to convey in fee is not necessarily conclusive that a perpetuity has not been attempted. In other words, "a present right to an interest in property which may arise at a period beyond the legal limit is void, notwithstanding the person entitled to it may release it": *London etc. Ry. Co. v. Gomm*, L. R. 20 Ch. Div. 562. It was therefore held in this case that a covenant on the part of a grantee that if the lands granted to him should at any time thereafter be required for the railway or works of the grantor, the grantee would, whenever required and upon receiving a sum stipulated, reconvey to the grantor, created an interest not permissible under the rule. This is a very clear illustration of the fact that an interest in land may be covenanted for which may not vest a fee within the time allowed by the rule against perpetuities, and which could have been released by persons in being. There are several other English cases which, by their results, tend to the same conclusion, namely: that a limitation may be too remote, though there are persons in being competent to convey a perfect title: *Dunn v. Flood*, L. R. 25 Ch. Div. 629; *Courtier v. Oram*, 21 Beav. 91; *Edmondson's Estate*, L. R. 5 Eq. 389. On the other hand, there are earlier English cases supporting the generally received theory that, if

there are persons in being through whose joint action the fee can be conveyed, the rule against perpetuities has not been violated: *Avern v. Lloyd*, L. R. 5 Eq. 383; *Gilbertson v. Richards*, 4 Hurl. & N. 277; 5 Hurl. & N. 453; *Birmingham etc. Co. v. Cartwright*, L. R. 11 Oh. Div. 421.

Mr. Gray, speaking upon this subject, says: "The true object of the rule against perpetuities is to prevent the creation of interests on remote contingencies. Its effect on removing restrictions on the immediate conveyance of property is only an incident. It is from regarding this incident as the main object of the rule that the erroneous, though common, notion mentioned at the beginning of the last section has had its origin. It is not the inalienability of an interest dependent on a remote contingency, but its utterly uncertain value which furnishes the sufficient justification, if it was not the original ground of the rule against perpetuities. If there is a gift over of an estate on a remote contingency, the market value of the interest of the present owner will be greatly reduced, while the executory gift will sell for very little, or, in other words, the value of the present interest plus the value of the executory gift will fall far short of what would be the value of the property if there were no executory interest. And further, if the owner of the present interest wishes to convey an absolute fee, the holder of the executory gift can extort from him a price which greatly exceeds what it ought to be, if based on the chance of his succeeding to the property": *Gray on Perpetuities*, sec. 269. We are not sure that these views fail to meet with approval of any of the American courts, or that these courts deny that there may be instances in which a limitation is too remote though there are persons in being capable of conveying the fee, but, on the other hand, it is certain that the courts, both here and in England, have treated the capacity of alienation as a test, and have, in many instances, on finding it to exist, affirmed that the rule against perpetuities had not been disregarded: *Cooper's Estate*, 150 Pa. St. 576; 30 Am. St. Rep. 829; *Miffin's Appeal*, 121 Pa. St. 205; 6 Am. St. Rep. 781; *Case v. Green*, 78 Mich. 540.

There are instances, however, in which Mr. Gray admits that the power of alienating the fee or of destroying the possibility of a remote future contingency is conclusive against the existence of a perpetuity. Thus he says, "A future estate which, at all times until it vests, is in the control of the owner of the preceding estate, is, for every purpose of conveying, a present estate, and is, therefore, not obnoxious to the rule against perpetuities. Consequently, an estate after an estate tail which must vest, if at all, at or before the termination of the estate tail is not too remote; for there is always some one, viz., the tenant in tail, who can at any time destroy it by barring the entail": *Gray on Perpetuities*, secs. 143, 144.

Vested Interests are not Subject to the Rule against perpetuities, though there may be instances, as shown in the principal case, in which they may be subject to the statutory prohibition against the suspension of the power of alienation. A vested interest is not subject to the rule against perpetuities if, "ex vi termini, it is not subject to a condition precedent. Reversions and vested remainders, and those equitable estates and interests in personalty which, if they were legal interests in realty, would be reversions and vested remainders are, for the purposes of the rule against perpetuities, to be considered vested interests. The other future interests are not vested": *Gray on Perpetuities*, sec. 205; *Craig v. Stacey*, Ridg., L. & S. 249. Therefore, "if an estate must, if it is to take effect at all, become a vested interest within twenty-one years after lives in being, it is good": *Gray on Perpetuities*, sec. 206; *Hodson v. Ball*, 14 Sim. 558; *Lett v. Randall*, 3 Smale & G. 83; *D'Abadie v. Bizoin*, L. R. 5 Ir. Eq. 205; *Van Brunt v. Van Brunt*, 111 N. Y. 178. A vested interest does not necessarily include a right to the possession. Therefore, if property is devised to be used for the support of the testator's daughter during her life, and for the support of her child or children, should she have any, and the bal-

ance for the benefit of a designated corporation, the interest of the latter, though not in possession, is vested, and, therefore, not within the rule against perpetuities: *Vanderpoel v. Loew*, 112 N. Y. 167; *Seaver v. Fitzgerald*, 141 Mass. 401; *Cole v. Sewell*, 4 Dru. & Walsh, 28; *Bel-field v. Booth*, 63 Conn. 299. A remainder after an estate tail, though it is not an estate in possession, is not too remote if it must take effect, if at all, upon the termination of the estate tail: *Cole v. Sewall*, 4 Dru. & Walsh, 1; *Heasman v. Pearse*, L. R. 7 Ch. App. 275; *Gray on Perpetuities*, sec. 447.

A limitation which involves a possibility upon a possibility, or a contingency upon a contingency, is not, in the opinion of Mr. Gray, invalid, and he devotes much space to proving that the authorities to the contrary are either mere dicta, or have been misunderstood: *Gray on Perpetuities*, secs. 123-134. The most recent decisions in England affirm that there is "a rule in existence which does prevent the limitation from being good, namely: that you cannot have a possibility upon a possibility; or, to state the rule in a more convenient form, that you cannot have a limitation for the life of an unborn person with a limitation after his death to unborn children to take as purchasers. This same thing has been called a possibility upon a possibility": *In re Frost*, L. R. 43 Ch. Div. 246; *Whitby v. Mitchell*, 42 Ch. Div. 494; 44 Ch. Div. 85.

To the Number of Lives in Being During which the vesting of an estate might be postponed and the power of alienation suspended there was no limit at the common law. Therefore, a numerous class might be selected, and if the estate must vest during the lives of some of them and within twenty-one years and nine months thereafter, it was not too remote: *Stanley v. Leigh*, 2 P. Wms. 686; *Taylor v. Biddal*, 2 Mod. 289; *Hopkins v. Hopkins*, 1 Atk. 580, 596; *Thellusson v. Woodford*, 4 Ves. 227; 11 Ves. 112; *Hale v. Hale*, 125 Ill. 399; *Brown v. Brown*, 86 Tenn. 277; *Lowry v. Muldrow*, 8 Rich. Eq. 241; *Hills v. Simonds*, 125 Mass. 536; *Trickey v. Trickey*, 3 Mylne & K. 560; *Picken v. Matthews*, L. R. 10 Ch. Div. 264. The only limitation which has ever been suggested is that the lives in being must not be so numerous or so designated that there could not be some reasonable way of proving the decease of the survivor of them: *Love v. Wyndham*, 1 Mod. 50, 54; *Thellusson v. Woodford*, 11 Ves. 146; nor some means of ascertaining all the members of the class to which they belong before the expiration of the time allowed by the rule against perpetuities: *London etc. Ry. Co. v. Gomm*, L. R. 20 Ch. Div. 562, 573. A bequest of an annuity for the benefit of a volunteer corps on the appointment of the next lieutenant colonel was held to be void as offending the rule against perpetuities. This decision was not rested on the ground of the great number of persons who might at that time be members of the corps, but upon the very remote possibility that, though the present lieutenant colonel should die, there might not be an appointment of his successor by competent authority within the time allowed by the rule against perpetuities: *In re Stratheden* (1894), 3 Ch. 265.

A Life is in Being, within the meaning of the rule, from the moment of its conception, when it is for its benefit to be so considered: *Doe v. Clarke*, 2 H. Black. 399; but third persons are not entitled to the advantage of this rule: *Blasson v. Blasson*, 2 De Gex, J. & S. 665. There may be instances in which it is proper to allow for two, or even three, periods of gestation to prevent a limitation from falling within the rule: *Long v. Blackhall*, 7 Term Rep. 100; *Gray on Perpetuities*, sec. 222.

It is, as we have already shown, the English rule and that of the states of this Union which have not adopted some modification of it, that every estate must vest within lives in being and twenty-one years and nine months. Therefore, every estate dependent upon a contingency which may not happen within that time must fail. This failure may arise either because some specific time is named after which the estate is to vest, and that time surely will not fall within the period

of time, as where such period is more than twenty-one years and nine months: *Davis v. Williams*, 85 Tenn. 646; or more than that time after the termination of some life designated: *Coggin's Appeal*, 124 Pa. St. 10; 10 Am. St. Rep. 565; or where, while the time mentioned is not measured by years, it is designated in some other mode, and the interest affected is intended to be vested in some person not living at the death of the testator, or the time when the deed takes effect, and who may not be conceived within twenty-one years thereafter. Therefore, every disposition of property which professes to be in favor of persons not born when it takes effect must fail, if they would be included within the descriptive words, "though not conceived within twenty-one years thereafter": In re *Mervin* (1891), 3 Ch. 107; *Armstrong v. Douglass*, 89 Tenn. 219; In re *Hargreaves* (C. A.), L. R. 43 Ch. Div. 401; *Butterfield v. Reed*, 160 Mass. 361; *Dorr v. Lovering*, 147 Mass. 530. Nor need the deed or will describe the beneficiary as unborn, nor show an intention of the testator to vest an estate in an unborn person, if, as a matter of fact, it may happen that an unborn person will fall within the descriptive words: In re *Frost*, L. R. 43 Ch. Div. 246. If, on the other hand, the estate must vest within the time permitted by the rule, it cannot fail though many lives in being must first terminate: *Low v. Burron*, 3 P. Wms. 262; *Boutelle v. City Sav. Bank*, 17 R. I. 781; and although a period must afterward intervene, provided it is less than twenty-one years: *Potter v. Couch*, 141 U. S. 296.

Restraints on Alienation as Part of the Rule.—Where the common-law limitation of the rule against perpetuities has been modified by statute, care must be taken in preparing conveyances, devises, and other transfers or gifts that their terms do not conflict with such modification. Whether the object of the rule at the common law was to prevent restraints upon alienation or not, it is certain that such object is manifest in all, or nearly all, of the American statutes upon the subject, and the fact that a limitation can possibly result in a suspension of the power of alienation beyond the period designated in the statutory rule against perpetuities, will be accepted as conclusive of the invalidity of such limitation: Cal. Civ. Code, secs. 715, 716.

In New York and some of the other states, as has already been shown, this suspension cannot be extended so as to include all lives in being, but is restricted to two such lives. Any attempt, therefore, to suspend the power of alienation for any definite period must, under these statutes, fail, because it is not certain that any two lives in being will continue during such period. Therefore, a devise in trust to the testator's widow of property to be held until their youngest child reaches twenty-one years of age, or would have reached that age had he survived, is unlawful, because, though such child should die, the trust must continue: *Haynes v. Sherman*, 117 N. Y. 433. If, on the other hand, the terms of the trust had been such that it might have been executed in the lifetime of the person named as beneficiary, then it could not have been defeated by a direction that the moneys should have been paid to him only upon his reaching a certain age, though that was the age of his majority, or even at a later period of his life. A devise to a person when he shall attain a designated age merely postpones the time when he may take possession. He has a vested estate, defeasible under conditions subsequent, and, though it may suspend the power of alienation, such suspension is expressly permitted by the statutes of New York: *Radley v. Kuhn*, 97 N. Y. 26. If however, the terms of the devise or bequest are such as to show that no estate is to vest in the beneficiaries until or unless they attain the age of twenty-one, and they are not in being at the testator's decease, the attempted limitation in their favor is void, because it may not take place within lives in being at such decease: *Greenland v. Waddell*, 116 N. Y. 234; 15 Am. St. Rep. 400. A gift of the use or income of the testator's estate to his wife for life, and then to his two sons and the heirs of each, or, in the event of one having no heirs, then to the heirs of the other, and, if neither should have heirs, then as the law would direct, is void, because it sus-

pend the power of alienation for at least three lives in being at the testator's death: *Ward v. Ward*, 105 N. Y. 68. The same must be the result of every attempted devise of property under the statutes of New York and states having similar statutes, the effect of which is to suspend the absolute power of alienation for more than two lives in being when such dispositions take effect: *Cross v. United States etc. Co.*, 131 N. Y. 330; 27 Am. St. Rep. 597. On the other hand, whatever the disposition may be, it will be sustained as against the rule against perpetuities there in force, if its effect cannot be to suspend such power beyond such lives: *Hillen v. Iselin*, 144 N. Y. 365. A devise of property to the testator's widow for life, and, after her death, to his six children for the terms of their natural lives, respectively, and from and after the decease of each, to his or her heirs in fee, does not violate the rule against perpetuities, because the interests of the children vested upon the death of the widow, and may be conveyed, and there is, therefore, no suspension of the power of alienation beyond two lives in being: *Bailey v. Bailey*, 97 N. Y. 460; *Surdam v. Cornell*, 116 N. Y. 305. A bequest of bonds to be held in trust to pay the income to the testator's daughter for life, and, after her death, to her children until the youngest reaches his majority, and then to be divided among them, is void by the laws of California, under which there can be no suspension of the power of alienation beyond lives in being, where it appears that the children of the daughter were not born at the death of the testator: *Whitney v. Dodge*, 105 Cal. 192. The result would have been different had all the persons beneficially interested been living at the decease of the testator: *Goldtree v. Thompson*, 79 Cal. 613. Many other illustrations might be furnished from the reported cases showing applications of the rule, both as it existed at the common law, and as it has been modified by local statutes, but our space will not permit of them, and we think it will be better occupied in formulating general rules than by detailing decisions in peculiar cases.

Conflict of Laws.—It may happen that a grantor has made a deed or other instrument of transfer, or that the will of the testator has been executed in one state or country, and the property affected by it is situated in another, and that the rule against perpetuities in the two is not the same. Upon this subject the general rule, that personal property is governed by the law of the owner's domicile, and real property by the law of the state or country in which it is situated, prevails. Therefore, if a disposition of personal property, by will or otherwise, does not conflict with the rule against perpetuities in the state or country of the owner's domicile, it is valid, though such personality is situated in another state, and the disposition could not be sustained if the rule against perpetuities there existing were applicable to it: *Whitney v. Dodge*, 105 Cal. 196; *Cross v. United States etc. Co.*, 131 N. Y. 330; 27 Am. St. Rep. 597; *Knox v. Jones*, 47 N. Y. 389. On the other hand, though a will or other attempted transfer of real property does not violate the rule against perpetuities in force in the state or country where it was made, or where the maker has his domicile, it must be denied effect if it offends the rule as existing or understood in the place where such realty is situated. In other words, the validity of a disposition of real estate must always be determined by the law of the state or country of which it is a part: *White v. Howard*, 46 N. Y. 144; *Knox v. Jones*, 47 N. Y. 389; *Hobson v. Hile*, 95 N. Y. 588; *Ford v. Ford*, 70 Wis. 19; 5 Am. St. Rep. 117. The direction accompanying the disposition of property may show that it or its proceeds are to be taken to another part of the country and there used in a manner and for a purpose designated, and the carrying out of such direction may require the doing of something not permissible by the rule against perpetuities in the state where the disposition was made, but permissible by the rule as understood in the state or country into which the fund is to be taken. It has sometimes been held that when moneys are directed to be invested in another state upon trusts permissible by its laws, but not by the law of the testator's domicile, that such direction

must be disregarded as offending the rule against perpetuities in force at such domicile: *Wood v. Wood*, 5 Paige, 596; 28 Am. Dec. 451. We apprehend, however, that there is nothing unlawful or against public policy in a testator or grantor providing for the investment in another state of funds left at his death, or for the sale of his real property at the place of his domicile or elsewhere, and the investment of the proceeds thereof in another state, and that when such personalty or proceeds of real property are to be taken out of the state, the courts of the state whence they are taken will not inquire whether the terms upon which the property to be acquired in another state are to be held will violate the rule against perpetuities existing in the first-named state. As the property to be acquired is to be held in another state, it is not a matter of any concern to the courts or authorities of the state whence the means of purchasing it came, whether it is held in violation of the rule against perpetuities or not: *Fordyce v. Bridges*, 2 Phill. 497; *Chamberlain v. Chamberlain*, 43 N. Y. 424, 434; *Vansant v. Roberts*, 3 Md. 119. The law of the state in which the property is to be held cannot, on the other hand, be violated at the instance of a grantor or testator domiciled elsewhere, and he cannot authorize the investment of funds, and the holding of property in another state, in such manner as to offend its rule against perpetuities, though such investment and holding are permissible by the law of his domicile: *Hawley v. James*, 7 Paige, 213; 32 Am. Dec. 623; *Bible Society v. Pendleton* 7 W. Va. 79. A testator domiciled in Ireland, having real property in England, by his will directed the sale of such property and the investment of the proceeds upon certain trusts allowable by the law of Ireland, but not by the English rule against perpetuities. The courts of the latter country held, not only that this real property was a part of its soil and subject only to its law, but that the proceeds must necessarily follow the law applicable to the land itself, and could not be brought under any other law by the directions of the will: *Freke v. Carbery*, L. R. 16 Eq. 461. In our judgment, the direction of the testator to sell his land, and to invest the proceeds in the funds designated in the will, operated as an equitable conversion of them into personalty, and if those funds were not to be held in England, the manner of holding them could by no means violate either the letter or the spirit of the English rule against perpetuities. Such, at least, we take to be the rule of the American courts. A testator directed his real property situated in Michigan to be sold, and that with the proceeds real property in Missouri should be purchased and held upon certain trusts, which it was claimed were not permissible by the rule against perpetuities existing in Michigan, and it was further insisted that the will should be disregarded. In sustaining the will the court said:

"The fact, however, that these trusts would be void under our statute does not prevent the equitable conversion of the lands in this state into Missouri lands, though such lands in Missouri may be tied up beyond the time limited by the Michigan statutes. The direction is for a conversion of these Michigan lands—an absolute sale and disposition of them. The object of our statute was to prevent the lands within this state from being taken out of the channels of trade and the accumulation of large landed estates to be held in perpetuity, or for a long series of years. The only act which the executor is required to perform in Michigan is to make this sale, the proceeds to be taken to Missouri and there invested. Our statute is in no sense violated by the direction in the will that the estate, after conversion here, is to be invested in Missouri lands, and there held for any number of lives. The testator, in ordering his estate to be invested in Missouri lands, must be presumed to have intended to submit to the jurisdiction and laws of that state. Whether the trusts created by the will are in violation of the Missouri statute is a question for that jurisdiction, and not for us, to determine": *Ford v. Ford*, 80 Mich. 55. See, also, *Ford v. Ford*, 72 Wis. 621; 70 Wis. 19; 5 Am. St. Rep. 117.

Construction.—Another general rule always proper to keep in mind is that, as the law favors the giving of some effect to every deed or devise and the vesting of estates, every instrument attempting to make a disposition of property will, unless its language forbids, be so construed as not to conflict with the rule against perpetuities, and, therefore, if an instrument is susceptible of two constructions, one of which is obnoxious to the rule, and the other not, the former will not be given. Hence a devise in trust for the testator's three sons and their widows and children will not be construed, as to an unmarried son, to include a wife he may marry after the testator's death, where a different construction would possibly result in a perpetuity: *Dean v. Mumford*, 102 Mich. 510. So if property is devised to be held in trust for several persons, it will be construed to vest an estate or interest in each, where to construe it, as held in *solido*, would conflict with the rule and destroy the trust: *Locke v. Farmers' etc. Co.*, 140 N. Y. 135. It is only when the grantor or testator expresses his purpose in such language that it is clear that the carrying of it out must result in an improper suspension of the power of alienation, or in a too remote vesting of an estate, that a perpetuity will be created. The law presumes conclusively, unless his language is to the contrary, that he intended the limitation to take effect within a lawful period: *Armstrong v. Douglass*, 89 Tenn. 219; *Beers v. Narramore*, 61 Conn. 13. Nor are instances wanting in which the courts, for the purpose of sustaining a gift, have disregarded directions of the testator repugnant to the rule. Thus, where a devise was made to trustees for the support of the testator's children during their lives, with the remainder to his grandchildren, born and unborn, when the youngest reaches forty years, it was held that as there was a clear intent expressed that the grandchildren should have the property, and as the law of the state did not permit the vesting of the remainder in them at a later period than the age of majority of the youngest, the direction regarding the period of forty years would be disregarded to the extent of treating the estate as vested when the youngest became twenty-one years of age: *Edgerly v. Barker*, 66 N. H. 434.

Invalid Restraints on Right of Alienation.—Another illustration of the policy of the law to sustain the limitation, if possible, is, that all such attempted restraints upon the power of alienation as are invalid in law will be disregarded, and the limitation be given the same effect as if the testator had not, by any means, manifested his unlawful purpose. Hence, if a deed or devise is attended with an express condition that the beneficiaries shall not sell or convey the property, no perpetuity is created, because the condition itself is void, and the fee and absolute power of disposition vest in him: *Ernst v. Shinkle*, 95 Ky. 608. So if an absolute estate is given, and the grantor or testator directs, in the event of the grantee or devisee dying without issue or without having disposed of the property, then that some other disposition shall be made of it, it will not violate the rule, because this further direction or reservation is repugnant to the estate granted, and may, therefore, be disregarded: *Saxton v. Webber*, 83 Wis. 617; *Combs v. Combs*, 67 Md. 11; 1 Am. St. Rep. 359; *Sanford v. Lackland*, 2 Dill. 6; *Daniels v. Eldredge*, 125 Mass. 356; *Josselyn v. Josselyn*, 9 Sim. 63. A like result follows a devise of property to several persons providing that if any of them shall seek partition within a time designated, he shall forfeit his share. The condition against partition is invalid, and cannot defeat the right of any of the co-owners to compel partition whenever he desires, nor prevent the vesting of the estate, because the limitation conflicts with the rule against perpetuities or against the suspension of the power of alienation: *Greene v. Greene*, 125 N. Y. 506; 21 Am. St. Rep. 743. So it has been held that a devise of real property to J. and the heirs of his body, "so long as they hold and till the same," was upon a condition subsequent "wholly inoperative and void," and therefore to be absolutely rejected: *Stansbury v. Hubner*, 73 Md. 226; 25 Am. St. Rep. 584.

The Property Subject to the Rule against Perpetuities Includes Personal as well as real, and legal as well as equitable, interests, except in those states whose statutes have, expressly or by implication, excluded personal property from the operation of the rule: *Lawrence's Estate*, 136 Pa. St. 354; 20 Am. St. Rep. 925; *In re Walkery*, 108 Cal. 627, 656, ante, p. 97; *Cadell v. Palmer*, 1 Clark & F. 372; *Greenland v. Waddell*, 116 N. Y. 234; 15 Am. St. Rep. 400; *Booth v. Baptist Church*, 126 N. Y. 215. In fact, upon principle, it is difficult to conceive of any class of property which is not within the rule, nor of any interest in property which must not become vested within the time allowed by its provisions. There are, indeed, certain rights connected with property both real and personal, such as the right to enter for a breach of condition subsequent, or the right to restrict it to certain specific uses, about which there is much difference of opinion as to whether or not they are estates or interests in such property so as to fall within the rule, but these we shall treat hereafter.

Accumulations.—The rule which forbids perpetuities in real and personal property necessarily excludes the right to create a perpetuity in the proceeds or accumulation thereof. It has been said that the accumulation of the income of an invested fund is not forbidden, because it may tend to a perpetuity: *Goldtree v. Thompson*, 79 Cal. 624. On the contrary, we understand that every scheme by which property is to be held and the proceeds retained and accumulated for a period beyond that allowed by the rule, is unlawful, and must be disregarded, unless some special statutory modification of the rule against perpetuities has been made within which the direction in question falls: *Fosdick v. Fosdick*, 6 Allen, 41; *Cochrane v. Schell*, 140 N. Y. 527; *Manice v. Manice*, 43 N. Y. 376; *Thorndike v. Loring*, 15 Gray, 391. There are, indeed, purposes for which an accumulation may be directed, though it is not certain that for the accomplishment of the purpose the accumulation may not be required to go on for a time beyond that allowed by the rule, as where such accumulation is directed to raise funds with which to pay the testator's debts, for the creditors have an immediate and present charge on the property, and can stop the accumulation at once: *South Hampton v. Hertford*, 2 Ves. & B. 54, 65; *Bateman v. Hotchkin*, 10 Beav. 428. So a direction to accumulate income for the purpose of paying annuities will be sustained, though the income which will probably be realized will be more than sufficient to satisfy the annuities, unless it is apparent that the testator acted in bad faith, and that his purpose was rather to provide for an accumulation than to provide for the annuities mentioned: *Cochrane v. Schell*, 140 N. Y. 527.

Charitable Uses.—One exception, at least, has been established to the general rule that property and every estate and interest therein must vest within the time specified in the rule against perpetuity, and this, although the power of alienation may be suspended for all time. The object of the rule was to prevent the tying up of estates and the accumulation of property in a single family, or some portion thereof, either perpetually or for a long period of time, and when the limitation, though it might prevent the estate or interest from vesting until a remote period, did not tend to accomplish this forbidden object, and therefore could not promote the mischief which the rule was designed to prevent, such limitation has sometimes been permitted to have effect. The best established instance of this involves what is commonly called charitable bequests or uses, or public charities. To the disposition of property for these purposes it is no objection that it is required to be kept by trustees perpetually, or for a period beyond lives in being and twenty-one years: *Ould v. Washington Hospital*, 1 McAr. 541; 29 Am. Rep. 605; *Griffin v. Graham*, 1 Hawks, 96; 9 Am. Dec. 619; *Penny v. Croul*, 76 Mich. 471; *Crerar v. Williams*, 145 Ill. 625; *Woodruff v. Marsh*, 63 Conn. 125; 38 Am. St. Rep. 346. In some parts of the United States the common law respecting the charitable uses has never been adopted, and, where such is the case, a perpetuity will not be permitted, even though its object is a public charity: *Cottman v. Grace*, 112 N. Y. 299:

Adams v. Perry, 43 N. Y. 487; *Read v. Williams*, 125 N. Y. 560; 21 Am. St. Rep. 748; *O'Hara v. Dudley*, 95 N. Y. 403; 47 Am. Rep. 53. There may, in some instances, be difficulty in determining whether a use or purpose is charitable so as to exclude the limitation from the operation of the rule against perpetuities. The keeping in repair of a cemetery or of burial lots and monuments of any particular person or family therein is not, according to the weight of authority, a charitable purpose, and the giving of a fund for this purpose cannot be sustained, if to do so would create a perpetuity: *Bates v. Bates*, 134 Mass. 110; 45 Am. Rep. 305; *Coit v. Comstock*, 51 Conn. 352; 50 Am. Rep. 29; *Johnson v. Hollifield*, 79 Ala. 423; 58 Am. Rep. 596.

It is not necessary, to create a charitable use, that the fund be devoted to almsgiving. It may be for any purpose in which the public has an interest such as the promotion of education or knowledge or religion, or the spread of the truth, or the suppression of vice, as well as to make provision for the indigent, and when, for these purposes or any other which they deem charitable, a disposition of property is made, the courts will favor the disposition and extend to it their aid: *Johnson v. Johnson*, 92 Tenn. 59; 36 Am. St. Rep. 104; *Sears v. Chapman*, 158 Mass. 400; 35 Am. St. Rep. 502; *George v. Braidock*, 45 N. J. Eq. 757; 14 Am. St. Rep. 754; *Eutaw etc. Church v. Shively*, 67 Md. 493; 1 Am. St. Rep. 412; *Howe v. Wilson*, 91 Mo. 45; 60 Am. Rep. 226; *Webster v. Morris*, 66 Wis. 366; 57 Am. Rep. 278; *Maught v. Getzendanner*, 65 Md. 527; 57 Am. Rep. 352; *Beardsley v. Selectmen*, 53 Conn. 489; 55 Am. Rep. 152; *Mills v. Newberry*, 112 Ill. 123; 54 Am. Rep. 213; *Coit v. Comstock*, 51 Conn. 352; 50 Am. Rep. 29; *Haines v. Allen*, 78 Ind. 100; 41 Am. Rep. 555; *Suter v. Hilliard*, 132 Mass. 412; 42 Am. Rep. 444; *Clement v. Hyde*, 50 Vt. 710; 28 Am. Rep. 522; *Simpson v. Welcome*, 72 Me. 496; 39 Am. Rep. 349; *Adye v. Smith*, 44 Conn. 60; 26 Am. Rep. 424. A gift, however, cannot be restricted to the donor's family or descendants. Otherwise he might, by designating them as objects of charity, provide for them perpetually, and thus evade the rule against perpetuities. "A public or charitable trust may be indefinite in duration, and its general object or purpose, as indicated, being charitable, the application and selection of the particular objects or individuals who are to receive its benefits may be confided to those who are its trustees. That a gift should have this character, there must be some benefit to be conferred upon, or duty to be performed toward, either the public at large, or some part thereof, or an indefinite class of persons. If a trust were created for the poor of a particular town or parish, or of persons of a specified class or occupation, as seamen, laborers, or mechanics, it would not be doubted that it would be good as a charity. So if a sum were bequeathed, the income of which, from time to time, or in the discretion of the trustees, was to be applied to the relief of the destitute, by distribution of fuel or provisions, or in any other similarly defined mode, or as the trustees might deem most expedient, the gift could be enforced as a public charity. . . . To establish as a permanent charity a provision for a single family, and thus, it may be, to permit an indefinite accumulation of property, which might eventually be solely for the benefit of the testator's heirs, and those who may claim under them, would be foreign to the general principles of our law on this subject, and cannot be justified by so slight a prospective public benefit": *Kent v. Dunham*, 142 Mass. 216; 56 Am. Rep. 667; *Fontaine v. Thompson*, 80 Va. 229; 56 Am. Rep. 588. In New Hampshire, however, a devise to trustees of certain property, "to be distributed by them after my decease among my relatives, and for benevolent objects, in such sums as in their judgment shall be for the best," was sustained, though the attention of the court does not seem to have been given to the question whether, by sustaining it, they might, in effect, have permitted the testator to provide for members of his family only at a period more remote than permitted by the rule against perpetuities: *Goodale v. Mooney*, 60 N. H. 528; 49 Am. Rep. 334. The benefit of a charitable

bequest may be limited to persons of a particular race, as where the executors are directed to give the residue of the testator's estate to "some poor deserving Jewish family residing in the city of New Haven": *Bronson v. Strause*, 57 Conn. 147. In this case a direction that the principal and income of a certain fund be applied by the executors to the maintenance and support of such of the testator's heirs at law "as shall or may be in need of pecuniary assistance," the times and mode of such distribution to be left to the option of the executors, was sustained, but, in order to sustain it, the will was construed to require the executors to make this distribution among those of the testator's needy heirs who were living at the time of his death. Such construction being adopted, it was clear that the directions of the testator could not offend the rule against perpetuities, because the interests created, or benefits intended to be conferred by the will, must all vest within the lives in being at the time of her decease.

Equitable Interests are, beyond all question, within the operation of the rule. A future equitable interest must vest within the time allowed by its provisions: *Gray on Perpetuities*, sec. 323. Every grant, transfer, devise, or bequest conferring an equitable estate or interest, will, as in legal estates and interests, be so construed, if possible, as to avoid the objection of remoteness. In other words, unless the language used by the grantor or donor must be disregarded by so doing, every equitable interest will be treated as vesting in the beneficiaries within the time allowed by the rule: *Newcastle v. Lincoln*, 3 Ves. Jr. 387; *Banles v. Le Despencer*, 10 Sim. 576; *Lyddon v. Ellison*, 19 Beav. 565; *Shelley v. Shelley*, L. R. 6 Eq. 540; *Dean v. Mumford*, 102 Mich. 510; *Locke v. Farmers' etc. Co.*, 140 N. Y. 135. In considering whether a trust is invalid because conflicting with the rule, two questions arise: 1. Will the equitable estate or interest of the beneficiaries vest in them within the time permitted? and 2. Though such estate does so vest, are the terms of the trust such that, in the performance of the duties confided to them, the trustees may be required to hold the title, without the power of alienation on their part, for a period beyond that permitted by the statute of the state forbidding any disposition of property which may restrain the power of alienation beyond the time designated therein?

If an Equitable Estate or Interest will not Vest within lives in being, and twenty-one years and nine months after the instrument creating it becomes operative, or, in other words, if it is possible, notwithstanding the lapse of such time, that the person entitled to such interest may not be ascertainable, then the trust conflicts with the rule and must be disregarded: *Mainwaring v. Baxter*, 5 Ves. 458; *Doe v. Milsanc*, Hass. & W. 358; *Pet. P. E. I.* 236; *In re Dameron* (1893), 3 Ch. 421; *In re Wood* (C. A. 1894), 3 Ch. 381; and, when statutes have modified the common law by designating a shorter time, the equitable interest must vest within such time, or it cannot vest at all: *Greenland v. Waddell*, 116 N. Y. 234; 15 Am. St. Rep. 400; *Landers v. Dell*, 61 Conn. 189; *Ketchum v. Corse*, 65 Conn. 85. On the other hand, it is sufficient that the equitable estate or interest must vest within the time allowed by the rule: *Armstrong v. Douglass*, 89 Tenn. 219; *Saxton v. Webber*, 83 Wis. 617; *Meek v. Briggs*, 87 Iowa, 610; 43 Am. St. Rep. 410; *Montignani v. Blade*, 145 N. Y. 111, *In re Lowman* (C. A. 1895), 2 Ch. 348; *Goldtree v. Thompson*, 79 Cal. 613; *Crooke v. County of Kings*, 97 N. Y. 421; *Bailey v. Bailey*, 97 N. Y. 460; *Otterback v. Bohrer*, 87 Va. 548.

Trusts which cannot be Executed within the Time Allowed.—It often happens, as in the principal case, that while the equitable estate is vested, yet, that the trustees, for the purpose of the full execution of the trust, must retain the title for some period beyond that allowed, in which event it is clear that there is an attempted suspension of the power of alienation, because any conveyance made by them or their successors in office must be in contravention of the trust, and therefore void. Does this suspension of the power of alienation bring the trust

within the rule and require it to be declared void? If, notwithstanding the suspension, the interest of the beneficiaries is vested or must vest within the time permitted by the rule, it cannot possibly be violated: Gray on Perpetuities, secs. 202, 322, 412. But in many of the states the statutory enactments of the rule against perpetuities indicated the legislative understanding that the object of that rule was to prevent the suspension of the power of alienation, and such suspension beyond the time named in the rule is forbidden. Hence the decisions apparently declaring that trusts, which by their terms are not to be executed within the time, are necessarily within the rule. There are undoubtedly decisions in which the courts, without relying on any statutory prohibitions of the suspension of the power of alienation, have declared, in general terms, that trusts which might not be executed within the time named in the rule were in violation of it and could not be sustained: *Slade v. Patten*, 68 Me. 380; *De Ford v. De Ford*, 36 Md. 168; *Barnum v. Barnum*, 26 Md. 119; 90 Am. Dec. 88. In these cases, however, it will also be found that if the trusts in question had been declared valid, they must have operated in favor of persons not in being within twenty-one years and nine months after the vesting of the estate in the trustee, and therefore that the decisions might, and ought to have been, put upon the ground that as to those persons no equitable interest could vest in them, because it might not vest within the time permitted by the rule. So, in other decisions, though they were partially based on statutory prohibitions of the power of alienation, the trust was not only intended to be kept open for a period beyond lives in being, but the final distribution of the property was directed to be made at that remote time to persons who should then be entitled thereto, though their interests could not have vested within the time permitted by the rule: *Penfield v. Tower*, 1 N. Dak. 216; *Smith v. Edwards*, 88 N. Y. 92, 102. The doctrine proclaimed in the principal case is, that though the interest of the beneficiaries may be said to be vested, and relieved "from uncertainty as to persons and event," yet, if for the purpose of the trust, the estate must remain in the trustees, so that they are forbidden to convey, "there is not such vesting nor yet such an interest as removes the bar of the statute, since all of the interests and estates, contingent and vested, cannot convey the fee, so long as the terms of the trust from which alone their interests are derived stand in the way. The perpetuity here does not result from too remote limitations or the failure of future estates to vest, but it arises by the direct act of the testator in forbidding his trustees to alien for a period not tolerated by the law": *In re Walkery*, 108 Cal. 650; ante, p. 97. If this is true and applicable to every class of trusts, it must follow that many trusts, commonly supposed to be valid, will be declared unlawful in those states in which the suspension of the power of alienation beyond lives in being is prohibited. For it cannot be said that any persons in being will surely survive for any definite period, and, therefore, every trust which for its execution necessarily requires any definite period forbids alienation during that time, and hence forbids it for a time which may be beyond lives in being. Though the instrument creating the trust may direct the trustees to retain the property for a specified period, yet other directions may show that the purpose is to have it retained for the benefit of persons named and then in being, and here the trust may be saved by construing it as terminating with such lives: *Montignani v. Blade*, 145 N. Y. 111. In Pennsylvania a devise was made to trustees to hold and manage the property for the benefit of certain of the testator's heirs, and, when two-thirds of the persons interested in the estate should so demand, to sell it and divide the proceeds among them. It is clear that two-thirds of the persons so interested might not have united in demanding a division within lives in being, and, therefore, that the power of alienation was, so far as the trustees were concerned, so suspended; but the court said: "We do not regard this trust as in any way an illegal restraint upon alienation, for the reason that there is a

vested interest in the devisee which he can sell or dispose of at pleasure, and it is only the time of enjoyment of the profits of the same which is provided for. We are unable to see anything in this trust which is in conflict with the law in regard to perpetuities. The mere fact that no time is fixed within which the power of sale must be exercised does not, of itself, create a perpetuity. It is sufficient to say that a power to sell and distribute the proceeds, created by a will, must be exercised within a reasonable time. It is always within the power of the orphan's court to control the exercise of a discretion, in such cases, upon the application of the parties in interest. A power of sale is good, although no time is limited for its exercise. Aside from this, it was competent for all the parties in interest at any time to defeat the power, and to take the property discharged thereof. Under these circumstances, we cannot say that the trust created a perpetuity": *Cooper's Estate*, 150 Pa. St. 576; 30 Am. St. Rep. 829.

Trusts to Secure the Payment of Loans, etc.—It is the frequent practice in America to convey property to accomplish some purpose which the trustees, by the terms of the trust, have not the power to accomplish at once, and which they may therefore not accomplish within lives in being, as where property is conveyed as security for specific debts not due until a future date, and with a power to sell for the payment of these debts, if there is default in paying them at maturity. It is certain that these and other cases in which, in effect, a charge is interposed upon property, and trustees or other persons are invested with power to sell to satisfy such charge, and in which the interest of the debtors may remain subject to the charge for a period beyond lives in being, constitute an exception to the rule that an estate must necessarily vest or be free from contingency within the period designated in the rule. In all such cases, if the trustees or other persons authorized to exercise the power of sale are not forbidden to exercise it at once, or at such period as they may deem reasonable, there is no suspension of the power of alienation, and the authorities also agree that there is no violation of the rule against perpetuities: *Brandenburg v. Thorndike*, 139 Mass. 102; *Atwater v. Russell*, 49 Minn. 57; *In re Sudeley* (1894), 1 Ch. 334. If an estate is given to trustees to pay debts, and, subject to such payment, is devised or conveyed to others, it is possible that it may be necessary for the trustees to retain the estate beyond lives in being and twenty-one years. Nevertheless, the beneficiaries are regarded as having vested estates which they may at any time convey, or, in other words, as holding an estate subject to the charge, and the fact that it is so subject is not deemed to be violative of the rule against perpetuities: *Bacon v. Proctor, Turn. & R.* 31; *Bagshaw v. Spencer*, 1 Ves. Sr. 142. In every instance coming within our observation in which property has been vested in trustees with the power to sell to raise moneys for any specific purpose, such power has not been regarded as involving either a perpetuity or a restraint upon the power of alienation, where the time within which it was to be exercised was not necessarily to be postponed to a future definite period, though it was clear that the creator of the trust understood that the sale would not take place at once, and though the directions concerning the sale showed a desire on his part that it should be postponed to a propitious time. In such cases it is said that the power must be exercised within a reasonable time, and, therefore, that it is not within the rule against perpetuities: *Hope v. Brewer*, 136 N. Y. 126; *Deegan v. Wade*, 144 N. Y. 573; *In re Cooper's Estate*, 150 Pa. St. 576; 30 Am. St. Rep. 829; *In re Tower's Estate*, 49 Minn. 371. See, also, *South Hampton v. Hertford*, 2 Ves. & B. 54, 65; *Bateman v. Hotchkin*, 10 Beav. 426. In each of the cases to which we have referred it was within the discretion of the trustees to sell and convey the property at any time, and, therefore, as to them, there was no restraint upon the power of alienation, but it must be conceded that, through their failure to exercise the power, it was uncertain when the interests dependent upon its exercise would come into being or would cease to exist. But there are many trusts in which it is clear that if they are respected,

the trustees must hold the property for some period which may, or perhaps must, be beyond that specified in the rule against perpetuities. Notwithstanding what is said in the principal case, we think that the weight of authority sustains the rule that if the beneficiaries have a vested interest—one they may release or assign—the trust is valid. Thus, where property was held subject to an annual charge, and, upon the nonpayment of such charge, the right was reserved to enter and distrain as for nonpayment of rent, an objection was interposed that such charge was void for remoteness, it was held that such could not be the case, for the reason that the person entitled to the charge might at any time release it: *Gilbertson v. Richards*, 4 Hurl. & N. 276; 5 Hurl. & N. 453. A similar decision resulted from a conveyance of real property, in which the grantee agreed that, in the event of his opening any mines for the purpose of obtaining coal, he would yearly render a true account of all coal mined by him, and pay two shillings for every ten tons raised or obtained by him: *Morgan v. Davey*, 1 Cababe & E. 114. On the same reasoning, a power to raise money to pay debts and legacies was held not to be obnoxious to the rule against perpetuities, because the beneficiaries might compel the exercise of the power within a reasonable time, and because it gave them a present assignable interest in the property: *Silk v. Prime*, 1 Brown Ch. 138, note; *Briggs v. Oxford*, 1 De Gex, M. & G. 363. Speaking, in the case last cited, of the power given to trustees so long as there should be any encumbrances existing upon property to cut and sell timber trees thereon, and to apply the money resulting toward the discharge of such encumbrances, the court said: "The power is one to be exercised solely by virtue of a contract between the parties to the settlement, a contract to this effect, that that which was a debt upon the estate should be liquidated in a particular mode. It appears to me that to whatever extent of time the operation of that contract extends, it is not a contract within the doctrine of perpetuity. The person who enjoys the estate has only to pay off the encumbrance, and there is an end of it." So, in New York, where real property was vested in trustees to be held until from the rents and profits a specified sum should be realized, and the objection was made that this interposed a restraint upon the power of alienation and offended the rule against perpetuities, the objection was overruled, because "where the sale by the trustee is to pay a sum in gross by collecting and accumulating rents, etc., to a specific amount, the cestui que trust may release or assign. If the sum required to make the payment is provided in any other way, the trustee is not guilty of any violation of his trust by uniting with the cestui que trust in a conveyance or release of the land. The purpose of the trust would have been accomplished. There is no provision of the statute which prohibits such an alienation": *Radley v. Kuhn*, 97 N. Y. 26; *Bailey v. Bailey*, 97 N. Y. 470. See, also, *Cochrane v. Schell*, 140 N. Y. 527, sustaining a trust to pay annuities. On the other hand are American cases tending to show that the imposition of a charge upon real property, for the nonpayment of which it may be sold, or may without sale vest in another, is within the rule against perpetuities, if the charge may continue longer than lives in being and such other time as is permissible by the local rule against perpetuities: *Dean v. Mumford*, 102 Mich. 510; *Merritt v. Bucknam*, 77 Me. 253.

In many parts of the United States it is the custom of persons loaning money to take as security conveyances to trustees who are authorized, upon default in the payment of the indebtedness, according to the terms of some bond or promissory note, to sell so much of such property as may be necessary to discharge the obligation and the costs of the sale, and thereupon to convey to the purchaser the property so sold. In every case in which the note or other obligation is not payable at once the trustees are without power to convey, and must, unless the parties interested in the trust in some way release them from their obligations as trustees, retain the title for an indefinite period, which may be beyond lives in being, and, if it be true that the purposes of the trust must be such that they must be accomplished within lives in being,

then all these securities are worthless. Very singularly this question does not seem to have been presented for decision in any court of last resort. In our judgment, these securities neither offend the law against perpetuities nor involve an unlimited suspension of the power of alienation. In the first place they are not within the reason of the rule. They cannot result in the tying up of property or the keeping of it in one family for an unlimited period of time. In the second place, he to whom the debts are payable, though they are not due, may consent to their immediate payment, or he may, even without such payment, direct the trustees to convey the legal title to the creators of the trust or their successors in interest, or the creditors may unite with the trustees and the debtors in a conveyance of the whole title, and such transfer, having been assented to by all the parties in interest, is not forbidden as in contravention of the trust. A trust deed of this class differs essentially from the trust involved in the principal case. There conceding that the interests of the beneficiaries were vested and assignable, still the trustees were required to retain the property for the period of twenty-five years, and it was not within the power of the beneficiaries to absolve them from this duty, and therefore the united action of all the parties in interest could not transmit a perfect title.

A Power to Sell and Convey may exist though there is no trust estate, and the existence of the power may, in some instances, save a disposition of property from the operation of the rule, and in others bring the disposition within it. Thus, if an estate is destructible by a single person, there can be no perpetuity, though he is not bound to exercise, and, in fact, does not exercise, his power to destroy. Hence, if an estate is limited to the grantee for life with a general power of appointment by him, with full power also to convey in fee or by mortgage, this power, though not used, renders the life estate destructible by the grantee, and prevents any future limitation from offending the rule against perpetuities. "The element of indestructibility of the estate of the person who, for the time being, is entitled to the property subject to a future limitation is essential to a perpetuity": *Miffin's Appeal*, 121 Pa. St. 205; 6 Am. St. Rep. 781. If, however, upon the exercise of the power of sale, the proceeds are to be held in violation of the rule, the existence of the power cannot render the trust valid: *Estate of Hinckley*, 53 Cal. 457, 481; *In re Walkerly*, 103 Cal. 656, ante, p. 97. Generally a power cannot be sustained unless it must be exercised within the limits of the rule against perpetuities: *Lawrence's Estate*, 136 Pa. St. 354; 20 Am. St. Rep. 925; *Gray on Perpetuities*, sec. 473.

Mortgages.—If it be true, as stated above, that a power which can be exercised beyond the limits of the rule against perpetuities cannot be sustained, then it must follow that a mortgage with a power of sale cannot authorize the exercise of such power, except within the same limits, and, therefore, in those states where the rule is restricted to lives in being, a mortgage to secure a debt due at some time in the future, not measured by lives in being, cannot confer the power to sell upon default in the payment of the debt. It is unquestionably true that the mortgagor and the mortgagee may, by joint action, convey a perfect title. It has been assumed, rather than decided, that a power of sale in a mortgage is valid though the mortgage authorizes such power to be exercised at a period beyond lives in being and twenty-one years: *Gilbertson v. Richards*, 5 Hurl. & N. 653; but this case was so much criticised in a subsequent decision that its weight as authority is but slight: *London etc. Ry. Co. v. Gomm*, L. R. 20 Ch. Div. 562. Nevertheless, we think that upon this subject it is likely to be ultimately sustained; for the practice of incorporating powers of sale in mortgages has been so general and so long continued (*Jones on Mortgages*, secs. 1764-1768), that we shall be surprised to hereafter learn that they are forbidden by the rule against perpetuities where, by the terms of the mortgage, they may be exercised beyond lives in being, when, as is the case in many parts of the United States, the rule is restricted to that short

period, and a mortgage debt due one day after date may be beyond that time.

Renewal Rights.—In England it seems to be possible to create a right in lessees and their successors in interest to perpetual renewals of their leases: *Hare v. Burgess*, 4 Kay & J. 45; *Bridges v. Hitchcock*, 1 Brown Parl. C. 522. In California, a lease for years, with a covenant for perpetual renewal was held to be void as an attempt to create a perpetuity: *Morrison v. Rossignol*, 5 Cal. 65. Even in England the covenant for renewal in a lease will not be permitted to create a perpetuity. Thus it was claimed that, by virtue of an indenture dated in the year 1529 conveying lands to a municipal corporation, it covenanted that when a term of ninety-nine years in a part of the lands should expire, if any heirs of the body of a person named in the grant, being of consanguinity or kindred of the grantor, should come, claim, and make lawful request to the mayor and burgesses to have a new grant and lease to him or her, then, and as often as any such chance should fall, the mayor and burgesses, upon the request to them so made, should make a new lease and grant of the premises to such owner so making the request for thirty-one years. It was held that this provision directly tended to create a perpetuity, and was therefore not enforceable, and it seems that the only instance in which a covenant for renewal can be sustained is where it, in effect, creates an estate tail or other vested interest in the person in whose favor the right of renewal is reserved: *Hope v. Gloucester*, 7 De Gex, M. & G. 647.

Conditions Subsequent.—*Options to Purchase and Rights of Re-entry or Reverter* dependent upon contingencies which may not occur within the time allowed by the rule against perpetuities, must fail, if it be true that it is the nonvesting of the estate within that time, and not the suspension of the power of alienation, which brings a limitation within the rule. Of course, every person entitled to exercise an option of purchase or to re-enter and resume an estate on breach of some condition subsequent, or upon the happening of some other cause of forfeiture of which he has the right to take advantage, may release that right and unite in a conveyance of the property, and hence it is clear that the existence of his right does not lead to a suspension of the power of alienation, however remote may be the contingency upon which he is authorized to act, and by acting, to acquire or resume an estate. If he who grants an estate reserves to himself and his heirs the right to re-enter and determine the estate granted upon the happening of a future contingency, there are many cases regarding his reservation to himself as an estate or interest in the lands granted, and which, therefore, hold that he retains a present interest, consisting of his right of reverter, which at some future time may be converted into an estate in fee. "This possibility of reverter, as it is termed, remains in the grantor or deviser immediately on the creation of the conditional estate," and is therefore held not to violate the rule against perpetuities. Hence, conditions subsequent, the effect of which is to reserve to the grantor or deviser and his heirs the right to resume an estate granted or devised, are sustained and enforced, however distant in point of time may be the contingency upon the happening of which the estate granted is to revert: *Brattle Square Church v. Grant*, 3 Gray, 142, 148; 63 Am. Dec. 725; *Giles v. Boston Soc.*, 10 Allen. 355; *Piper v. Moulton*, 72 Me. 155; *Coit v. Comstock*, 51 Conn. 352; 50 Am. Rep. 29; *Hunt v. Wright*, 47 N. H. 396; 93 Am. Dec. 451; *Jones v. Postell*, Harp. 92; *In re Macleay*, L. R. 20 Eq. 186. If, however, instead of reserving a right of reverter to himself and his heirs, the grantor or deviser should merely limit the estate to be held by the grantee or devisee for a specific purpose and until the happening of a future contingency, after which it is to vest in some other person, the limitation is within the rule, for such person does not have any interest in the property except that dependent upon a condition which may not occur within the time allowed by the rule: *First Universalist Soc. v. Boland*, 155 Mass. 171;

Brattle Square Church v. Grant, 3 Gray, 142, 148; 63 Am. Dec. 725. Hence, a condition that the grantee of a pew should forfeit it to the grantor society if he should leave the meetinghouse without first offering it at a certain price, was sustained: *French v. Old South Soc.*, 106 Mass. 479. The court said: "It is objected that the rule against perpetuities makes the conditions of the plaintiff's deed void. If a perpetuity may be defined as 'an estate unalienable though all mankind join in the conveyance' (see *Scattergood v. Edge*, 1 Selk. 299), 'or where, if all that have interest join, yet they cannot bar or pass the estate' (see *Washburn v. Downs*, 1 Cas. Ch. 213), here is no violation of the rule, for the plaintiff and defendants could at any time join in a conveyance of the property. The grantee took an estate on condition subsequent, and the possibility of reverter remaining in the grantor on breach of the condition is not subject to the rule against perpetuities, even if the pew is held as real estate." The more recent decisions in England, however, seem to overthrow what had formerly been supposed to be the law upon this subject, and to refuse to recognize the distinction that had been made between those cases in which the right of re-entry or reverter had been reserved to the grantor and his heirs, and those in which, on the happening of a remote contingency, he had provided for the vesting of the property in some third person. They hold that if a grantor conveys property, reserving to himself the right to repurchase at a future time at a specified price, or provides that it shall be used for certain purposes only, and if not so used, shall revert to him, that his only interest in the property is dependent upon an uncertain contingency, and, if it may not happen within the time allowable by the rule against perpetuities, no estate can revert to him: *Gray on Restraint of Alienation*, secs. 299-302; *Dunn v. Flood*, 25 Ch. Div. 629; *London etc. Ry. Co. v. Gomm*, 20 Ch. Div. 581.

Lands are often granted with restrictive covenants in the conveyance that they shall be used for a specified purpose only, or, on the other hand, that they shall not be used for some designated purpose, and sometimes the language of the deed is such that the breach of the covenant or condition is made a cause of forfeiture, conferring upon the grantor and his heirs the right to re-enter as for breach of a condition subsequent and to resume the estate granted. That a restrictive covenant or condition of this kind, so far at least as it may be regarded as a contract, may, in a proper case, be enforced in equity, and that its enforcement cannot be prevented by urging the rule against perpetuities, are conceded both in this country and in England: *Parker v. Nightingale*, 6 Allen. 341; 83 Am. Dec. 632; *Whitney v. Union R. R. Co.*, 11 Gray, 359; 71 Am. Dec. 715; *Barrow v. Richard*, 8 Paige, 351; 35 Am. Dec. 713; *Tobey v. Moore*, 130 Mass. 448; *Bullard v. Shirley*, 153 Mass. 559; *Mackenzie v. Childers*, L. R. 23 Ch. Div. 265; *Coles v. Sims*, 5 De Gex, M. & G. 1. In the latter country, however, we should judge from the cases already cited that the use of the property for a particular purpose could not be made a condition subsequent, so that a breach of the condition might result in the reversion of the estate at a period beyond that permitted by the rule against perpetuities. Such, however, is not the law in the United States. A conveyance was made containing an agreement between the parties that intoxicating liquors should neither be manufactured, sold, or disposed of as a beverage in any place of public resort on the premises, and it was declared in the conveyance that upon a breach of this condition by the grantee, his assigns, or legal representatives, the deed should become null and void, and therefore the premises conveyed should revert to the grantor. Claiming that the grantee had been guilty of a breach of this condition, the grantor brought an action of ejectment to recover possession of the premises, on the ground that the title thereto had reverted to him for a breach of a condition contained in the deed, and recovered judgment. This judgment was, upon appeal, affirmed by the supreme court of the United States. The attention of the court, however, does not seem to have been particularly addressed to the question whether or not the

conveyance contained a limitation not permitted by the rule against perpetuities, but rather to the question whether or not the condition was repugnant to the estate granted or was against public policy. The court, however, said: "The reports are full of cases where conditions imposing restrictions upon the uses to which property conveyed in fee may be subjected have been upheld. In this way slaughterhouses, soap factories, distilleries, livery-stables, tanneries, have, in a multitude of instances, been excluded from particular localities, which, thus freed from unpleasant sights, noxious vapors, or disturbing noises, have become desirable as places for residences of families. To hold that conditions for their exclusion from premises conveyed are inoperative would defeat numerous arrangements in our large cities for the health and comfort of whole neighborhoods": *Cowell v. Springs Co.*, 100 U. S. 55, 57; see note to *Ladd v. City of Boston*, 21 Am. St. Rep. 484, 508.

Effect of Violating the Rule.—The result of the limitation of property by deed, devise, or otherwise, unlawful because in conflict with the rule against perpetuities, is that the limitation is disregarded and the estate vests or remains as if the limitation had not been attempted. Hence, if a devise or bequest of property is made in such a way that to carry it out may create a perpetuity, such property goes to the heir or the residuary legatee or devisee: *Wilson v. Odell*, 58 Mich. 533; *Shanley v. Baker*, 4 Ves. 732; *Cox v. Harris*, 17 Md. 23; *Van Kleeck v. Reformed Dutch Church*, 20 Wend. 457; 6 Paige, 600; *Greene v. Dennis*, 6 Conn. 293; 16 Am. Dec. 58. "The remaining inquiry is as to the effect of the invalidity of the devise over, on account of its remoteness, upon the preceding gift in fee to the deacons and their successors forever. Upon this point, we understand the rule to be that if a limitation over is void by reason of its remoteness, it places all prior gifts in the same situation as if the devise over had been wholly omitted. Therefore, a gift of the fee, or the entire interest, subject to an executory limitation which is too remote, takes effect as if it had been originally limited free from any divesting gift. The general principle applicable to such cases is, that when a subsequent condition or limitation is void by reason of its being impossible, repugnant, or contrary to law, the estate becomes vested in the first taker discharged of the condition or limitation over according to the terms in which it was granted or devised; if for life, then it takes effect as a life estate; if in fee, then as a fee simple absolute: 1 Jarman on Wills, 200, 783; *Lewis on Perpetuities*, 657; 2 *Blackstone's Commentaries*, 156; *Kent's Commentaries*, 130; *Coke on Littleton*, 206 a, 206 b, 223 a. The reason on which this rule is said to rest is, that when a party has granted or devised an estate, he shall not be allowed to fetter or defeat it by annexing thereto impossible, illegal, or repugnant conditions or limitations. Thus it has often been held that when land is devised to A in fee, and upon the failure of issue of A, then to B in fee, and the first estate is so limited that it cannot take effect as an estate tail in A, the limitation over to B is void, as being too remote, because given upon an indefinite failure of issue, and the estate vests absolutely in fee in A, discharged of the limitation over. So it was early held that where a testator devised all his real and personal estate to his wife for life, and after her death to his son and his heirs forever, and in case of the death of the son without any heir then over to the plaintiff in fee, the devise over to the plaintiff was void, and the son took an absolute estate in fee: *Tilbury v. Barbut*, 3 Atk. 617; *Tyte v. Willis*, Cas. t. Talb. 1; 1 *Fearne on Contingent Remainders*, 445. So, too, if a devise be made to A and his heirs forever, and for want of such heirs then to a stranger in fee, the devise over to the stranger would be void for remoteness, and A would take a fee simple absolute": *Brattle Square Church v. Grant*, 3 Gray, 142, 156; 63 Am. Dec. 725, 735. In general, though there are some persons whose interests are not too remote, yet the whole gift must fall, unless the grantor or testator has made it severable, or otherwise shown a clear intention that some part of it may stand though another fall. Hence if there be a gift to a class

of persons, and the share or part of some of them cannot be determined within the period allowed by the rule, and that of others can, none of them can take any portion of the gift: *Seaman v. Wood*, 22 Beav. 591; *Webster v. Boddington*, 28 Beav. 128; *Stuart v. Cockerell*, L. R. 7 Eq. 363; *Webster v. Parr*, 26 Beav. 236; *Jee v. Audley*, 1 Cox, 324; *Leake v. Robinson*, 2 Mer. 363, 388; *Sears v. Putnam*, 102 Mass. 5; *Hall v. Hall*, 123 Mass. 120; *Goldsborough v. Martin*, 41 Md. 488; *Barnum v. Barnum*, 26 Md. 119; 90 Am. Dec. 88; *Porter v. Fox*, 6 Sim. 485; *Ker v. Hamilton*, 6 Vict. L. R. 172; *Coggin's Appeal*, 124 Pa. St. 10; 10 Am. St. Rep. 565. But the courts favor the vesting of estates, and therefore a gift to a member of a particular class in such a way that the gift to one is not affected by that to another, or that each takes some specific sum or property, then each may take his share as though he had been named without the others, and hence is not prejudiced by the fact that the limitation is, as to some other member of the same class, too remote: *Boughton v. Boughton*, 1 H. L. Cas. 414; *Storrs v. Benbow*, 8 De Gex, M. & G. 390; *Wilkinson v. Duncan*, 23 Beav. 469; *Benedict v. Webb*, 98 N. Y. 460; *Herbert v. Webster*, 15 Ch. Div. 610; *Wilson v. Wilson*, 26 L. J. Ch. 95; 4 Jur., N. S., 1076.

It is very natural, when a disposition of property has been made which conflicts with the rule against perpetuities, that, as the person in whose favor the disposition was attempted was doubtless intended to receive something, the courts should seek to give him such estate as might lawfully have been vested in him, and decisions may be found carrying out what the court doubtless supposed would have been done by the grantor or deviser had he been advised that the limitation which he made was unlawful and unavailing. Hence, it was held that a bequest for life of personal property with too remote a limitation over might be treated as vesting the donee with the absolute fee: *Caldwell v. Willis*, 57 Miss. 555. But the general rule is, that a limitation void as creating a perpetuity is void in toto: *Post v. Rohrbach*, 142 Ill. 600. Where a will provided that, after the death of the testator's surviving daughter, the whole property should be divided into as many shares as there were grandchildren of the testator, the children of his deceased grandchildren to take their parents' share, and, under the local rule against perpetuities, the limitation in favor of the children of the deceased grandchildren was not permissible, it was held that none of the grandchildren took anything: *Andrews v. Rice*, 53 Conn. 566. Where a testator gave, first, an estate for life to his wife, second, an estate for lives to his children, third, another estate for life to his grandchildren, and lastly, a further estate for life to his great grandchildren, and the limitation over to grandchildren and great grandchildren, was held void, the whole disposition was adjudged to be invalid, and the property, therefore, was permitted to descend to the heir at law. "Where a limitation which would fall within the allowed limits is so bound up with one which falls without the same as to constitute in fact but one disposition of the property, there the common law will not interfere to save the prior limitation": *Lockridge v. Mace*, 109 Mo. 162. If property is devised to a trustee with power to sell, provided that such sale shall not take place until all of the testator's children shall reach twenty-one years of age, he having at his decease eight children, and the statute of the state prohibits any restraint upon alienation beyond lives in being, this attempted limitation upon the power of sale cannot be disregarded for the purpose of giving some effect to the will. "It is quite true that cases occur in which that sort of judicial remedy is applied in order to save trusts from the peril of some unlawful incident or limitation, but the doctrine is only applicable where the vicious provision is clearly separable from a valid devise or trust, and may be disregarded without maiming the general frame of the will or the testator's substantial and dominant purpose": *In re Butterfield's Will*, 133 N. Y. 473.

There is no doubt, however, that a disposition of property infected by a limitation so remote as to be forbidden by the rule against perpetu-

ties may be so made that the lawful may be separated from the unlawful purpose, and the former allowed to take effect, while the latter is disregarded, and that while the courts may not differ as to the general rule governing cases of this class, they will often disagree as to its application to cases, the facts of which are substantially identical. Thus, where a will was made giving property to the testator's grandchildren, so that they took absolute interests, and a codicil was afterwards executed expressing a desire that they should take life estates only, and that their children might take as successors after their deaths, and where it was held that the purpose of letting in the children of the grandchildren was not permissible, and therefore failed, the court said: "That as the great grandchildren could not take, the intention of the testator will be best effected by holding that the absolute interests given to the grandchildren were not destroyed by the codicil": *Arnold v. Congreve*, 1 Russ. & M. 215; *Kampf v. Jones*, 2 Keen, 756; *Packer v. Scott*, 33 Beav. 511. These cases were, perhaps, no more than applications of the general rule, that when an absolute interest is given by a deed or will, and subsequent restrictions are attempted to be interposed therein, which cannot become effectual, the whole interest must remain according to the original gift: *Ring v. Hardwick*, 2 Beav. 352; *Sears v. Putnam*, 102 Mass. 5; *Slade v. Patten*, 68 Me. 380; *Howe v. Hodge*, 152 Ill. 252. A will gave property to four persons, naming them, for life, and provided that after their deaths it should go to the heirs of B. and N. The law of the state did not permit limitations, except to persons in being and their descendants, and as the heirs of B. and N. might not be their descendants at all, this limitation was adjudged too remote, but it was further decided that, as none of the previous provisions of the will or trust were invalid, they would be given effect, and the property remaining at the termination of the four life estates would be treated as intestate estate: *Beers v. Narramore*, 61 Conn. 13. If the dispositions of a will, in other respects lawful, contain an unlawful direction for an accumulation, this may be disregarded and the surplus income allowed to pass to the heirs at law: *Cochrane v. Schell*, 140 N. Y. 517. Respecting trusts containing provisions partly lawful and partly unlawful, the court said: "It is difficult to discover any principle which forbids the sustaining the general intent of the testator by cutting off a void trust which is separable from other valid trusts, in a case where the trust which is defeated is independent of other provisions of the will and subordinate to them, and is not an essential part of the general scheme": *Manice v. Manice*, 43 N. Y. 384. This general rule seems equally applicable to the provisions of a deed or will, though they do not create an express trust, if they do contain directions or limitations, some of which are valid and others void, if the latter can be disregarded and the former given effect without violating what appears from the instrument to have been the intention of the grantor or testator.

IN RE WONG HANE.

[108 CALIFORNIA, 683.]

MUNICIPAL ORDINANCE THROWING UPON DEFENDANT THE BURDEN OF PROVING HIS INNOCENCE of a crime is void.

MUNICIPAL ORDINANCE making it unlawful for a person to have a lottery ticket in his possession, unless that possession is shown to be innocent or for a legal purpose, is void, because it attempts to impose upon the person accused of the crime the burden of establishing his innocence.

MUNICIPAL ORDINANCE CONTAINING A VOID PROVISION MUST BE ADJUDGED WHOLLY VOID when to give it effect independent of such provision is to make the municipal legislature

enact confessedly what it never meant. Therefore, an ordinance making it unlawful for a person to have in his possession a lottery ticket, unless it be shown that his possession is innocent or for a lawful purpose, cannot be sustained by disregarding this limitation and enforcing such ordinance only in cases in which the prosecution shall first show that the possession was neither innocent nor lawful.

M. G. Norton, for the petitioner.

W. E. Dunn, for the respondent.

⁶⁸⁰ HARRISON, J. The petitioner is held in confinement by the chief of police of the city of Los Angeles under a warrant of arrest issued by the police judge of that city upon a complaint charging him with the violation of a city ordinance, in that he did "willfully and unlawfully have in his possession, such possession being neither innocent nor for a lawful purpose, a certain tool, device, and paper used and intended to be used in ⁶⁸¹ and for the contriving, setting up, preparing, and drawing a certain lottery." The ordinance under which the complaint is made is as follows:

"The mayor and council of the city of Los Angeles do ordain as follows:

"Section 1. It shall be unlawful for any person to have in his possession, unless it be shown that such possession is innocent or for a lawful purpose, any lottery ticket, or any ticket, certificate, paper, or instrument, purporting or representing, or understood to be or to represent, any ticket, chance, share, or interest in or dependent upon the event of any lottery; or any tool, instrument, stamp, or devise used or intended to be used in or for contriving, preparing, making, writing, printing, stamping, or getting ready for sale or distribution any lottery ticket or tickets.

"Sec. 2. Any person who shall violate any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars, or be imprisoned in the city jail for a term not exceeding six months, or by both such fine and imprisonment."

The effect of this ordinance is to make proof of the mere possession of a lottery ticket a misdemeanor, and to place upon the defendant the burden of showing that his possession was lawful or innocent. The mere possession of a lottery ticket does not, however, of necessity involve the possessor in a crime. The ticket may be in possession of the court, or of one of its officers, to be used as evidence upon the trial of one charged with selling it. It may be in the possession of one who purchased it in a

country which recognizes the right to traffic in lottery tickets, and who is merely passing through the city. The Penal Code of this state does not make the purchase of a lottery ticket an offense—the provisions of that code being directed against the selling of such tickets. By the very terms of the ordinance under consideration, it is assumed that the possession of the ticket may be lawful or innocent, and that in such case the ⁶⁸² possessor is not guilty of a violation of the ordinance. The ordinance, however, throws upon the defendant the burden of proving his innocence, and by its terms, unless he shows that his possession is lawful or innocent, his mere possession of the ticket renders him liable to punishment. If there are any circumstances under which the possession of a lottery ticket may be lawful or innocent, a defendant who is charged with the offense of having such ticket in his possession is entitled to the presumption of innocence, and cannot be compelled to establish his innocence by affirmative proof. To the extent that the defendant is required to establish his innocence, the provisions of the ordinance violate his constitutional rights.

It is not sufficient to say that the prosecution may disregard this clause of the ordinance and itself make proof of the criminal intent of the defendant, or show that his possession was not innocent or for a lawful purpose. The ordinance is to be tested by its own terms. It has declared that the offense does not exist “unless it be shown that such possession is innocent or for a lawful purpose.” Instead of enacting that the possession with a criminal purpose shall constitute the offense, the city council has industriously provided that the offense is established, unless the possession is shown to be with an innocent purpose. This is a qualification attached to the definition of the offense, and is of necessity to be established by the defendant, since, if it were shown by the prosecution, it would establish the innocence of the defendant, and therefore that no offense had been committed.

Nor can this clause in the ordinance be disregarded as being unconstitutional, and effect be given to the first part alone. The provisions of the ordinance are to be considered as a whole, and it is not to be assumed that the city council would have adopted the first clause without enacting the condition thereto. The connection of the two clauses by the conjunction “unless” shows that they are to be taken together, and that the ⁶⁸³ first clause does not by itself express the legislative will of the council. It is well established that a statute may be in part constitutional, and in part unconstitutional, and, if the parts are wholly independent

of each other, that which is constitutional may stand, while that which is unconstitutional will be rejected; but, as was said in *Poindexter v. Greenhow*, 114 U. S. 305: "These are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the legislature one they may never have been willing by itself to enact." The same court also said in *Sprague v. Thompson*, 118 U. S. 94, where it was sought to apply the rule to certain illegal exceptions in a statute of the state of Georgia: "The insuperable difficulty with the application of that principle of construction to the present instance is that, by rejecting the exceptions intended by the legislature of Georgia, the statute is made to enact what confessedly the legislature never meant. It forces upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions": See, also, *Cooley's Constitutional Limitations*, 209-212; *Warren v. Charlestown*, 2 Gray, 84.

As we can consider the ordinance only in the form in which it has been enacted, we must hold that it did not authorize the arrest of the petitioner. The petitioner is, therefore, discharged.

Garoutte, J., McFarland, J., Henshaw, J., Van Fleet, J., and Temple, J., concurred.

MUNICIPAL CORPORATION—ORDINANCES VOID IN PART. An ordinance void in part is void altogether where all of its parts are connected with and essential to each other: *State v. Webber*, 107 N. C. 962; 22 Am. St. Rep. 920, and note. Where parts of an ordinance are so connected or dependent upon each other that it cannot be presumed that the makers would have enacted one without the other, and one or more of the parts are void, the whole is void and must fall: *Jacksonville v. Ledwith*, 26 Fla. 163; 23 Am. St. Rep. 558, and note. See, also, the note to *City of Tarkio v. Cook*, 41 Am. St. Rep. 683.

CASES

IN THE

SUPREME COURT

OF

ILLINOIS.

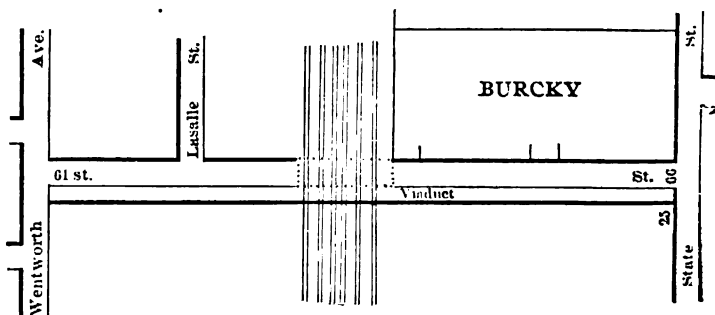
CHICAGO v. BURCKY.

[158 ILLINOIS, 103.]

STREETS, SPECIAL DAMAGES FOR VACATING.—If a viaduct is constructed along the line of the street opposite the plaintiff's land, and part of the same street is vacated at a point just west of this land, whereby all access to the south and west is shut off, he suffers such special damages, of a character differing from that sustained by the general public, as entitle him to maintain an action against the city to recover compensation.

STREETS.—THE RIGHT TO RECOVER SPECIAL DAMAGES FOR VACATING A STREET OPPOSITE PLAINTIFF'S PREMISES is not lost by his subsequently opening streets upon his lands by means of which access to and from them may be had. The right to damages becomes perfect when the street is vacated, and cannot be diminished by any act which the plaintiff may, in the future, take for the purpose of mitigating the injuries done to him.

Action by Elise Burcky to recover damages suffered by her as the owner of a tract of land on the north side of Sixty-first street, in the city of Chicago, having a frontage of five hundred and fifty-eight feet on that street. The land was bounded on the east by State street and on the west by the tracks of two railway corporations. The situation of the streets is apparent from the following diagram:



The municipal authorities passed an ordinance authorizing the railway corporations to construct a viaduct just south of the south line of Sixty-first street, commencing two hundred and ten feet west of State street and extending to one hundred and seventy feet east of Wentworth avenue, and agreed, upon the completion of the viaduct, to build approaches thereto from State street to Wentworth avenue, such approaches and viaduct to be used as a public highway, and thereupon that part of Sixty-first street commencing on the west line of plaintiff's land and extending west to within one hundred and thirty-nine feet of La Salle street was vacated. After the viaduct had been constructed and the street vacated, and during the pendency of the present action, the plaintiff had opened two streets through her land, one of which ran on the westerly side thereof and was called Butterfield street, and the other was about equidistant between the east and west sides of her land. The defendant asked that the jury be instructed that because the property claimed to be damaged did not abut on any part of Sixty-first street which had been vacated, plaintiff did not sustain any actionable injury. The court refused this instruction, a verdict was given and judgment rendered in favor of the plaintiff, and the defendant appealed.

W. S. Johnson, Byron Boyden, and James Mayo Palmer, for the appellant.

Alex Clark, for the appellee.

¹⁰⁷ CRAIG, C. J. The viaduct and its approaches, constructed along the south line of Sixty-first street, were about one-quarter of a mile long, and extended from Wentworth avenue to State street. The construction of the viaduct opposite the plaintiff's land prevented the laying out of any streets south, and stopped all travel in that direction, while the vacation of that portion of Sixty-first street crossed by the railroad tracks stopped all travel west, so that the property of plaintiff abutting on Sixty-first street between the railroad tracks and State street was shut in, and all access shut off from the south and from the west. By the construction of the viaduct south of plaintiff's property, and by closing the street west of the property, and thus stopping all communication south and west, it is plain that plaintiff's property was seriously damaged. But it is contended that the damages she has sustained are not ¹⁰⁸ special in their character, but are of the same kind as those sustained by the general public, and upon this ground no recovery can be had. If the damages sustained

by the plaintiff are of the same kind as those sustained by the public at large, differing only in degree and not in kind, or if the damages sustained by the plaintiff are of the same kind sustained by the general public, the only difference being in the excess of damages sustained by plaintiff, then, under the well-settled rules of law which control cases of this character, she could not recover: *Chicago v. Union etc. Assn.*, 102 Ill. 379; 40 Am. Rep. 598; *East St. Louis v. O'Flynn*, 119 Ill. 200; 59 Am. Rep. 795; *Parker v. Catholic Bishop*, 146 Ill. 158.

Where damages are sustained by the public at large, but in different degrees, the law does not confer a remedy. Thus, in *Davis v. County Commrs.*, 153 Mass. 218, it is said: "The general doctrine is familiar, that ordinarily one cannot maintain a private action for loss or damage which he suffers in common with the rest of the community—even though his loss may be greater in degree." The reason for the rule is that a contrary doctrine would encourage many trivial suits.

In *Shaw v. Boston etc. R. R. Co.*, 159 Mass. 597, the court say: "The only right of the plaintiff to use the highway is that of the public generally. Where one suffers in common with all the public, although, from his proximity to the obstructed way or otherwise, from his more frequent occasion to use it, he may suffer in a greater degree than others, still he cannot have an action, because it would cause such a multiplicity of suits as to be of itself an intolerable evil."

In *Smith v. Boston*, 7 Cush. 254, in passing on the question, the court held that a landowner could not recover unless he suffered a special damage not common to the public.

In *Heller v. Atchison etc. R. R. Co.*, 28 Kan. 625, in the discussion of the question, the court ¹⁰⁹ said: "Where a party owns a lot which abuts upon that portion of the street vacated, so that access to the lot is shut off, it is clear that the lotowner is directly injured and may challenge the action. The closing up of access to the lot is the direct result of the vacating of the street, and he, by the loss of access to his lot, suffers an injury which is not common to the public. But in the case at bar access to plaintiff's lots is in no manner interfered with. The full width of the street in front and on the side is free and undisturbed, and the only real complaint is, that by vacating the street away from her lots the course of travel is changed. But this is only an indirect result."

In the discussion of the question in *Chicago v. Union etc. Assn.*, 102 Ill. 379, 40 Am. Rep. 598, it is said: "In the American

Law Register for October, 1880, one of the learned editors of that periodical, Mr. Edmund H. Bennett, in a note to *Fritz v. Hobson*, after a very elaborate review of the principal cases bearing upon the question now before us, comes, as we think very correctly, to the conclusion: '1. For any act obstructing a public and common right, no private action will lie for damages of the same kind as those sustained by the general public, although in a much greater degree than any other person; 2. An action will lie for peculiar damages of a different kind, though even in the smallest degree; 3. The damages, if really peculiar, need not always be direct and immediate, like the loss of a horse, but may be as remote and consequential as in other cases of tort; 4. The fact that many others sustain an injury of exactly like kind is not a bar to individual actions of many cases of a public nuisance.'

Other cases holding a like doctrine might be cited, but we have referred to enough to show the current of authority bearing on the question. There is less difficulty in determining what the law is, than in making a proper application of the law to the different cases that may ¹¹⁰ arise. In this case we think it plain that plaintiff was entitled to recover. Her property fronted on Sixty-first street. It extended west to and cornered with that part of the street which was vacated. By the vacation of the street and the erection of the viaduct, her property, extending from the railroad tracks east to State street, was shut in, and all access from the south and the west was shut off. What was originally a thoroughfare along the entire line of plaintiff's property fronting on Sixty-first street was, by the action of the town, turned into a blind court. No other property was damaged or affected in the same way, except the small tract lying between Wentworth avenue and the railroad tracks. The property of the general public was not affected like plaintiff's, nor was the damage sustained by the public of the same kind. Before the action taken by the town, plaintiff's property fronting on Sixty-first street was so situated that it was available as lots for business purposes, but after the action of the town it was rendered useless for that purpose.

It is also claimed that by making the subdivision and opening Butterfield street, which separates plaintiff's property from the vacated portion of Sixty-first street, plaintiff has barred herself of the right to recover. When the street was closed up and the viaduct constructed, the town became liable to pay such damages as the plaintiff had sustained. The rights of the parties, so far as the question of damages was concerned, were fixed, and any

future subdivision which the plaintiff might make of her property could not deprive her of a right to recover such damages as she had sustained.

From what has been said, if we are correct, the instruction did not announce a correct rule for the determination of the case, and it was properly refused.

The judgment of the appellate court will be affirmed.

STREETS—VACATING—DAMAGES.—While a city has power to vacate streets, it is liable in damages to abutting property owners arising from the exercise of that power, including loss from depreciation in value, and it is no defense to an action for such damages that the owner still has access to his property by another street: *Heinrich v. St. Louis*, 125 Mo. 424; 46 Am. St. Rep. 490, and extended note.

STREETS—VACATING—SPECIAL DAMAGES.—Where a city possessing the power vacates one of its streets, the abutting owners have been held entitled to damages for the injuries sustained thereby; and, if one of them sustains special injury in excess of that suffered by the community at large, he is entitled to damages therefor: Extended note to *Heinrich v. St. Louis*, 46 Am. St. Rep. 496.

ORR v. HANOVER FIRE INSURANCE COMPANY.

[186 ILLINOIS, 140.]

INSURANCE.—A VOLUNTARY ASSIGNMENT FOR THE BENEFIT OF CREDITORS executed in the mode prescribed by statute is a breach of a condition in a policy of insurance providing that if the property or any interest therein be sold or transferred, or any change takes place, other than by the death of the assured, in the interest, title, or possession, whether by legal process or judicial decree, or voluntary transfer by the assured, then in such case the policy shall be void.

W. J. Calhoun and H. M. Steely, for the appellant.

Thomas Bates and Lawrence & Lawrence, for the appellee.

¹⁵¹ **CRAIG, C. J.** This was an action brought by Abner R. Orr, assignee of W. B. Cauble, against the Hanover Fire Insurance Company, to recover the loss sustained by the burning of a certain two-story brick business building in the town of Sidell, in Vermilion county, which was insured against loss by fire in said company. The policy was issued February 14, 1893, to W. B. Cauble, to run one year, amount of insurance two thousand dollars. In the circuit court the parties waived a jury, and on a trial before the court a judgment was entered in favor of the plaintiff, which, on appeal to the appellate court, was reversed and a remanding order denied.

The policy upon which the action was brought contained the following provision: "If the interest of the insured be other than the entire, unconditional, and sole ownership of the property for the sole use and benefit of the insured, or if the property be encumbered by any lien, deed of trust, judgment, mortgage, or otherwise, . . . or if the property, or any interest therein, be sold or transferred, or any change takes place (other than by the death of the insured) in the interest, title, or possession, whether by legal process or judicial decree or voluntary transfer by the assured, . . . then in every such case this policy shall be void." The policy ¹⁸⁹³ further provides as follows: "If the property becomes subject to any lien or encumbrance by virtue of any mortgage, deed of trust, judgment, or decree, then in every such case this policy shall be void, unless otherwise provided by agreement indorsed hereon."

On the fourth day of August, 1893—five days before the fire—W. B. Cauble made a voluntary assignment of all his property for the benefit of creditors, to Abner R. Orr, the person who instituted this suit. The assignee, Orr, on the day the assignment was executed, took possession thereof until the same was destroyed by fire. Prior to the fire it appears that five judgments, aggregating fourteen hundred and ninety-seven dollars and eighteen cents, had been entered against the insured, Cauble, in the county and circuit courts of Vermilion county, by confession.

The policy, which is the contract between the parties, contains no ambiguity, and its language is plain and easily understood. If the insured had sold and conveyed the property by absolute deed, before the fire, without the knowledge or consent of the insurance company, it is plain that, under the terms and conditions of the policy, no recovery could be had, for the reason the policy expressly provides that if the property insured be sold or transferred, or any change takes place in the interest, title, or possession, the policy shall be void. Here the insured did not make a sale of the property, as that term is ordinarily understood, but he made an assignment, under the statute, for the benefit of creditors, and by deed of assignment, duly executed, he transferred the property embraced in the policy to an assignee, and the question presented is, whether that was such a transfer or change in the title as would render the policy void.

When an assignment is properly executed, acknowledged, and recorded, it is well settled that the title of the assignor to the property, both real and personal, passes to the assignee. In other

words, as was said in *Freydendall* ¹⁵³ v. *Baldwin*, 103 Ill. 325: "It is a proposition that needs nothing in its support, if the voluntary assignment made by the failing debtors was valid, all the property, real and personal, which they owned at the time, passed to their assignee under the provisions of the statute." If therefore, the title to the property, under and by virtue of the deed of assignment, passed from the insured to the assignee, it is plain there was a change in the title of the property caused by the voluntary act of the insured, and by the plain terms of the policy it became void.

May on Insurance, section 264, says it is a general principle that the insured cannot recover unless he has an interest in the property at the time of the loss, and that an absolute alienation works a forfeiture, whether so stipulated in the policy or not, if the property remains out of the insured at the time of the loss; that a transfer to the assignee, by decree of court, of a bankrupt's estate, under the bankrupt laws of the United States, upon the bankrupt's petition, is an alienation. In such case the property is vested in the assignee, and though the proceedings may be stayed and the property may revert in the bankrupt, this is a contingency too remote to be considered the foundation of an insurable interest in the bankrupt. And he adds: "And, of course, a voluntary assignment for the benefit of creditors is equally a transfer, unless possession be retained by the assignor."

In the case of *Dadmum Mfg. Co. v. Worcester Fire Ins. Co.*, 11 Met. 429, the assured made a general assignment, under the statute, for the benefit of creditors. Suit was brought by the assignee upon a policy of insurance which had been issued to the assignor, and which provided that "the alienation, in any way, of any property insured under this policy shall, ipso facto, make the policy void, unless notice of the alienation shall be given to the company and indorsed on the policy." In the decision of the case it is said: "The facts in this case are, that the assured, being ¹⁵⁴ embarrassed, assigned their property, including the premises insured, to *Dadmum, Church & Lord*, to sell the same and pay the debts secured by the assignment, and the deed of assignment contained only a qualified release of the assignors. This deed, it is now said by the plaintiffs, was fraudulent and void against creditors, by force of the statutes of 1836 and 1828. However that may be, it does not now lie with the assignors to aver their fraud in making that deed, in order to avoid the title made by them under it, and thus be allowed to fall back upon their former title. . . . No notice of the conveyance was given

to the defendants, nor did any assignment of the policy take place. This was a violation of the tenth rule of the defendants, of which they may avail themselves. It is said that this conveyance was in trust, to pay debts which the property was more than sufficient to cover; but this fact does not alter the character of the conveyance nor make it less an alienation": See, also, *Young v. Eagle Fire Ins. Co.*, 14 Gray, 150; 74 Am. Dec. 673; *Perry v. Lorillard Fire Ins. Co.*, 61 N. Y. 214; 19 Am. Rep. 272.

But it is said in the argument that the conveyance in this case was in the nature of a mortgage or trust for the benefit of creditors, and "that there was no change, in fact, of title, but only in the evidence of it." We do not concur in that view. Upon the execution and delivery of the deed of assignment all the title and interest originally held by the assignor passed from him to the assignee. His legal interest was gone and the right of possession was gone. The assignee was clothed with the right and power to sell and convey the property and distribute the proceeds among the creditors. After the assignment the assignor has no more control over the property than he would have in case of an absolute sale.

In conclusion, we are satisfied the appellate court reached a correct conclusion, and its judgment will be affirmed.

INSURANCE—CONDITION AGAINST ALIENATION—ASSIGNMENT FOR BENEFIT OF CREDITORS.—Assignment of property under voluntary insolvency proceedings is alienation within the provisions of a policy of a mutual insurance company, that "when any property insured by this company shall be taken possession of by a mortgagee, or in any way be alienated, the policy shall be void": *Young v. Eagle etc. Ins. Co.*, 14 Gray, 150; 74 Am. Dec. 673, and note. An assignment in bankruptcy or for the benefit of creditors under proceedings to take the benefit of the bankrupt act, is an alienation within the meaning of that term in the policy, whether the proceedings be voluntary or involuntary: Extended note to *Lane v. Maine etc. Ins. Co.*, 28 Am. Dec. 158. For an extended discussion of violations on conditions in policies of insurance against alienation, see the note to *Morrison v. Tennessee etc. Ins. Co.*, 59 Am. Dec. 304-312.

WITT v. GARDINER.

[188 ILLINOIS, 176.]

WILLS, ATTESTING IN PRESENCE OF TESTATOR, WHAT IS.—A will may be regarded as attested in the presence of the testator, though the attestation did not take place in the room in which he then was, and was not actually seen by him, if it took place within the range of his vision and might have been so seen considering his position and state of health at the time.

A WILL IS NOT ATTESTED IN THE PRESENCE OF THE TESTATOR, however close he may be to the witnesses at the time, if his position is such that he cannot possibly see them sign, or where his position is such that he cannot readily change it, and the witnesses are out of his sight. The true test is not whether the testator saw the witnesses sign, but whether, considering his mental condition and his posture at the time, he might have seen them do so.

A WILL IS NOT ATTESTED IN THE PRESENCE OF THE TESTATOR, though he was physically able to have gotten out of bed, if he did not do so, and could not have done so without peril and in violation of the orders of his attending physician.

Thomas Henshaw and J. M. Riggs, for the appellant.

Henry T. Rainey, for the appellees.

178 BAILEY, J. This was a bill in chancery, brought by Freddie T. Witt, by his guardian, against Christopher J. Gardiner and others, to contest the will of Elizabeth Gardiner, deceased. The will was executed January 23, 1892, and the testatrix died March 1, 1894, leaving the complainant, her grandson and only heir at law, and being at the time of her death the owner and in possession of certain parcels of real estate, and also owning other property of the aggregate value of several thousand dollars. After the death of the testatrix the will was filed in the county court for probate, but probate thereof was there denied. On appeal by the proponents to the circuit court a hearing was had de novo, resulting in an order admitting the will to probate, and the complainant thereupon filed this bill.

No question is raised by the bill as to the testamentary capacity of the testatrix, nor is there any charge that the execution of the will was procured by undue influence, the grounds upon which its validity is called into question being: 1. That it was not signed by the attesting witnesses in the presence of the testatrix; and 2. That the testatrix did not know the contents of the will at the time she executed it.

179 The facts appearing from the record are briefly these: Elizabeth Gardiner, at the time the will was executed, was a woman about eighty years of age, was partially deaf, and was then confined to her bed by sickness and under a physician's

care, and had been so for about a month. During that time her physician had been visiting her twice a day, and her condition had required the attendance of watchers each night. On the day the paper was executed, Christopher J. Gardiner called upon her, and after having her attendants all leave the room held a consultation with her and then left the house. Later the same day he returned, bringing with him the will drawn up, and also bringing R. W. Greene and L. L. Roberts to serve as attesting witnesses. When they entered her room she was informed that the persons named were there to witness her will, and to that she assented. Christopher J. Gardiner then produced the draft of the will, with the testatrix's name already written at the bottom of it, and she, being propped up on pillows on her bed for the purpose, executed the instrument by making her mark, whereupon the two witnesses and Christopher J. Gardiner left the bedroom, which was situated in the rear of the northerly part of the house, and went into the front room, situated on the southerly side of the house, adjoining the bedroom and communicating with it by a door, which was left standing open, and went to a table standing in the front room and there signed their names to the will as attesting witnesses.

There is very considerable conflict in the evidence as to the place in the front room where the table was standing when the will was attested, the testimony of some of the witnesses tending to show that it was standing near the center of the room—a place which was within the range of the testatrix's vision as she was lying on her bed—while the testimony of other witnesses tends to show that it was standing at the east side of the room, near a window, and where, as much of the testimony tends ¹⁵⁰ to show, it could not be seen from the place where the testatrix was lying, the partition between the two rooms intervening.

The proponents of the will attempted to show that the attestation, though made in another room than the one in which the testatrix was lying at the time, was in fact made in her presence, by attempting to show: 1. That the table on which the attestation occurred stood in the center of the front room; or 2. That even if it stood on the east side of the room, she could have seen the act of attestation by changing her position and leaning over out of the bed; or 3. If she could not have seen the act by so leaning over, it was possible for her to have arisen from her bed and gone to the door leading to the front room and viewed the act from that position, and this being true, that the attestation was good without proof that she did get out of her bed and saw

it. Each of these several positions seems to have been urged to the jury by the proponents of the will, and evidence was given tending to show that the testatrix had sufficient strength to have made it physically possible for her, though very sick, to have arisen from her bed and gone to the door leading to the adjoining room. There was no evidence, however, that she in fact got out of bed or changed her position in the least during the time the will was being attested.

Such being the evidence, the court, at the instance of the proponents, gave to the jury, among other instructions, the following:

"25. The court instructs the jury, for the proponents, that although the jury may believe, from the evidence, that the attesting witnesses went to an adjoining room to a table to sign their names as attesting witnesses, and that the testatrix did not actually see them sign the same, yet if the jury believe, from all evidence and circumstances proven, that it was within the physical power of the testatrix to have seen them sign the same if she had ¹⁸¹ so desired, then, in law, the attesting would be in compliance with the law, although the testatrix may not have actually witnessed the signing of the names of the witnesses."

"10. You are further instructed that if you believe, from the evidence, that at the time the witnesses signed the will in evidence the said Elizabeth Gardiner, if she had desired to do so, was physically able, by turning her head or changing her position, to have seen them sign, then you are instructed that the attestation of the will in evidence was legally accomplished in the presence of the testatrix, as the law requires."

"8. The jury are instructed that if you find, from the evidence, that the witnesses signed the will in such a place that the testatrix could have seen them sign if she so desired, then you are instructed that the said will was, under the law, attested in the presence of the testatrix, and it makes no difference whether she actually saw them sign or not."

By the provisions of the statute all wills, to be entitled to probate, must be "attested, in the presence of the testator or testatrix, by two or more credible witnesses": Rev. Stats., c. 148, sec. 2. The issue of fact submitted to the jury in this case was whether the attestation was in the presence of the testatrix.

What constitutes the "presence" of a testator or testatrix, within the meaning of the statute, has been made the subject of much discussion by the courts, but the rule supported by the weight of authority may be stated substantially in the language

of a distinguished modern law-writer as follows: Contiguity, with an uninterrupted view between testator and subscribing witnesses, is the indispensable element to the physical signing in the testator's presence. The subscription is not invalidated by not having been performed in the same room, or even in the same house, provided it took place within the testator's range of vision, as in case where witnesses left the testator, ¹⁸² who lay in bed in one room, and subscribed their names at a table in another room opposite, and in sight, through a passage, the doors being thrown open; or where a lobby intervened, but the testator might have seen the subscription made in a gallery through the lobby and a broken glass window; or where the testatrix sat in her carriage, and the will was attested in the attorney's office, but not out of her sight. In all such cases the attestation is held good, on the theory that the testator might at least have seen the signing, considering his position and the state of his health at the time of the transaction; and it is deemed immaterial that he did not see, when he might have done so, for the act, being done in his presence, could not have been vitiated by his turning and looking away. On the other hand, no mere contiguity to the witnesses will constitute a "presence" with the act, if the testator's position be such that he cannot possibly see them sign, as where, for instance, he occupies his bedchamber and the witnesses subscribe in an outer hall, where they are necessarily hidden from sight by an intervening flight of stairs, or where his position, which he cannot readily change, is such that the witnesses are in reality out of sight. If the subscription is made in an adjoining room, with the door closed, it is not enough that the testator might have seen it had the door stood open; nor will even a subscription in the room he occupies suffice, provided that from his actual position he could not have seen it done. But unless some material obstacle obstructs the vision, we here suppose that the testator is sick and feeble, propped up in bed, and requiring some aid in order to bring him into a right position, in which case, of course, his disability is an important factor in determining whether or not he might have seen the witness subscribe. Thus, the will of one who lay in bed with the curtains drawn while the will was attested in front of him was admitted to probate, because he might easily have seen the act by pushing the curtain ¹⁸³ aside; but that of another was refused probate under like circumstances, upon the distinction that the testatrix was not only too weak to open the curtain herself, but lay helplessly with her back to the witnesses. In fine, the true test,

as asserted by the English cases, is not whether the testator saw the witnesses sign, but whether he might have seen them sign, considering his mental condition and his posture at the time of the subscription: Schouler on Wills, sec. 341. The same authority further says: "Indeed, to speak generally, if the testator be ill, unable to change his position readily for himself, or confined to his bed, his posture at the time of the attestation should be such as to enable him to perceive his witnesses subscribe; and ability to perceive is here construed with some reference to his physical condition at the time of subscription. But if, while the attesting witnesses are subscribing, the testator, conscious of the act, is in an adjoining room, where, by the mere act of volition, he can witness the attestation, this constitutes a subscription in his presence": Schouler on Wills, sec. 342.

In *Reed v. Roberts*, 26 Ga. 294, 71 Am. Dec. 210, where the testator was in extremis, and feeble from age and disease, and racked with bodily pain, it was held that to make the attestation sufficient under the statute, the testator's position should be such as to enable him, without change of situation, to see the witnesses subscribe. In the opinion the court say: "The object of the law can only be effectuated when the testator is so situated, both as to the will and the witnesses, that he may, if he chooses, see both in the act of attestation. And it is wholly immaterial whether the attestation be in the same room or in a different room. The rule is the same in both. The will and the witnesses must be in the presence of the testator. He ought to be able, without an effort or change of position, to see both": See, also, *Reynolds v. Reynolds*, 1 Spear, 253; 40 Am. Dec. 599; *Ray v. Hill*, 3 Strob. 297; 49 Am. Dec. 647; *Ambre v. Weishaar*, 74 Ill. 109.

¹⁸⁴ We think it plain that the instructions above recited, and especially the one marked 25, laid down an erroneous rule, and one which was likely to mislead the jury. This is especially so in view of the testimony of the testatrix's physician, that she was physically capable of getting out of bed and going to the door of her bedroom, although her doing so would have been perilous and against his express orders, and also in view of the contention made by the proponents of the will before the jury, that she might have leaned over the front of her bed, or even got up from her bed and gone to the door of her room, and thus seen her witnesses attest the will. That instruction holds, in terms, that if it was within her physical power to see them sign the will, the signing must be deemed to have been in her presence. The

jury were likely to understand this instruction as holding that if it was within her physical power to get out of bed and go to the door, the attestation was in compliance with the law. Such, clearly, is not the rule. It is doubtful whether it would have been the rule if the testatrix had been in good health. It can scarcely be said, we think, that because a testator in health has the physical ability to follow his witnesses wherever they may choose to go, and so be present at the attestation of his will, an attestation other than in his actual presence will answer the requirements of the statute. And certainly when a testatrix, as in this case, is sick and confined to her bed, and, though physically capable of arising from her bed and walking to the door of an adjacent room, is able to do so only with great difficulty, and perhaps with peril to her life, it will not be said that an attestation which can be seen by her only in that manner took place in her presence.

Substantially the same criticism may be made upon the instruction marked 10. That instruction held that if the testatrix was physically able, by turning her head or changing her position, to see the witnesses sign, the ¹⁸⁵ attestation was in her presence. It having been contended by counsel that she might have seen the attestation by leaning out of bed, or by getting up and going to the door of the adjoining room, and the evidence tending to show that she was physically able to make such change in her position, the instruction may have been, and probably was, understood by the jury as holding that if she was physically capable of making such change of position, and thereby seeing the attestation, the will was, in contemplation of law, attested in her presence.

The eighth instruction would, perhaps, have been unobjectionable, had it not been for the theory upon which the case was presented to the jury, but, in view of that theory, and of the other instructions given, it also was likely to mislead. It held that if the witnesses signed the will in such place that the testatrix could have seen them sign if she had so desired, the attestation was in her presence. In view of the contention that she could have seen them sign by leaning out over the front of the bed, or by getting up and going to the door, the jury were likely to understand the instruction as holding that if she could have seen the act of signing in either of those ways the attestation was in her presence. The instruction, under the circumstances, should have been modified so as to hold that if she could have

seen the witnesses sign from the place where she was then lying, the attestation was in her presence.

It is claimed that the error in those instructions was cured by other instructions given. Two instructions were given at the instance of the proponents, which held, in substance, that if the table on which the witnesses signed the will was in such position that it could have been seen by the testatrix from the position she occupied on the bed in the adjoining room, the attestation was in her presence. There is nothing in those instructions in any degree inconsistent with the ones we have criticised, and we are unable to see how the erroneous instructions could have ¹⁸⁸ been thereby cured. No instruction was given for either party which held that if it was necessary for the testatrix to lean out over the front of her bed, or to get up and go to the door in order to see the witnesses sign, the attestation was not in her presence.

For the errors pointed out in the foregoing instructions the decree of the court below finding the will in question to be the last will of the testatrix will be reversed, and the cause will be remanded to the circuit court for a new trial.

WILLS—ATTESTATION—SIGNING IN PRESENCE OF TESTATOR.—It is not essential that a testator should actually see the witnesses attest his will, but it is necessary that he should be in a situation to do so if he desire it: *Edeelen v. Hardey*, 7 Har. & J. 61; 16 Am. Dec. 292; *Dewey v. Dewey*, 1 Met. 349; 35 Am. Dec. 367, and note; *Maynard v. Vinton*, 59 Mich. 139; 60 Am. Rep. 276, and extended note; *Riggs v. Riggs*, 135 Mass. 238; 46 Am. Rep. 464; *Will of Meurer*, 44 Wis. 393; 28 Am. Rep. 591, and extended note. This subject will be found fully treated in the notes to the following cases: *Coffin v. Coffin*, 80 Am. Dec. 242; *Reynolds v. Reynolds*, 40 Am. Dec. 602, and *Guthrie v. Owen*, 36 Am. Dec. 320, and note.

WATERLOO MILLING COMPANY v. KUENSTER.

[156 ILLINOIS, 259.]

BANKS, LIABILITY FOR AGENTS SELECTED FOR COLLECTION.—If a bank takes a bill or note for collection at a distant place, a collecting bank selected by it at the latter place is not regarded as its agent, but as the agent of the owner, and the former bank is not answerable for the default or misappropriation by the latter, where due care was used in selecting the corresponding bank.

BANKS, RIGHT OF TO RECOVER MONEYS PAID ON WORTHLESS DRAFTS.—If a bank to which drafts are confided for collection transmits them to another bank at the place where they are payable, and receives from the latter drafts, the amount of which it pays over to its customer, and such drafts being immediately forwarded for collection, are dishonored, the moneys so paid may be recovered from the customer receiving them.

BANKS — NO ESTOPPEL FROM PROVING UP CLAIM. — A bank is not precluded from recovering from its customer the amount of drafts which it had paid over to him, and which are subsequently dishonored, by the fact that it proved up and claimed and received dividends in its own name on account of such drafts.

Action by the Waterloo Milling Company to recover moneys alleged to have been received from divers persons by the defendants as agents of the plaintiff. The defendants were doing business as bankers, and from plaintiff received various drafts, to be transmitted to other points for collection. These drafts were forwarded by the defendants to bankers in North Carolina, who collected them, and, before paying over the proceeds, became insolvent and suspended business. The defendants, by way of counterclaim, sought to recover certain moneys which they had paid over to plaintiff, being the amount of drafts forwarded to the defendant by one of the banks in North Carolina, such drafts having afterwards been dishonored. Judgment was rendered against plaintiff on his complaint and in favor of the defendants on their counterclaim. Plaintiff appealed.

Josh Wilson and Hartzell & Sprigg, for the appellant.

Travous & Warnock, for the appellees.

307 **BAILEY, J.** The controlling question in this case is whether the First National Bank and the Bank of New Hanover, of Wilmington, North Carolina, to which the defendants transmitted the drafts in question for collection, were, in making the collections and remitting the money, the agents of the defendants or of the plaintiff. It appears from the stipulation of the parties that the drafts were delivered by the plaintiff to the defendants with bills of lading attached, to be transmitted by the defendants to Wilmington for collection. No instructions were given by the plaintiff to the defendants as to the bank or agency in Wilmington to which the drafts should be sent, and all were sent in due time and with due diligence to these banks, all but the last two being sent to the First National Bank, and those two to the Bank of New Hanover. At the time the drafts were sent to these banks, respectively, the banks were each responsible and in good standing, their solvency then never having been called in question, and it is admitted that the defendants used due diligence in selecting these banks as the agencies for collecting the drafts and remitting the money. The drafts were all paid to the Wilmington banks in due course of business, but before the money collected was remitted to the defendants both banks

failed, and the money, with ²⁶⁸ the exception of certain sums paid over by the receiver of the First National Bank of Wilmington, was never received by either the defendants or the plaintiff.

Where a draft upon a nonresident drawee is deposited with a local bank for collection, and especially where, as in this case, it is deposited to be transmitted to the place of residence of the drawee for collection, the bank fully discharges its duty by transmitting the draft, in due season, to a suitable agent at the place of residence of the drawee, with necessary instructions, and it is not liable for loss occasioned by the negligence or default of the collecting agent thus employed. Such collecting agent becomes the agent of the holder of the draft, and not of the bank with which it is deposited for collection. While some of the courts have been disposed to hold the bank in such cases to a higher degree of responsibility, the better reasoning, as well as the weight of authority, seems to support the rule as we have stated it, and that rule has long been recognized and adopted in this state.

In *Allen v. Merchants' Bank*, 22 Wend. 215, 34 Am. Dec. 289, the stricter rule is held, but in a note to that case as it is reported in 34 Am. Dec. 315, by Mr. Freeman, it is said: "The preponderance is against the principal case, and in favor of the rule that the liability of a bank taking a note or bill for collection which is payable at a distance extends merely to the selection of a suitable and competent agent at the place of payment, and to the transmission of the paper to such agent, with proper instructions, and that the corresponding bank is the agent, not of the transmitting bank, but of the holder, so that the transmitting bank is not liable for the default of the correspondent, where due care has been used in selecting the correspondent." The foregoing statement of the rule by Mr. Freeman is quoted with approval in *First Nat. Bank v. Sprague*, 34 Neb. 318, 33 Am. St. Rep. 644, and the rule itself is adopted.

In *Guelich v. National State Bank*, 56 Iowa, 434, 41 Am. Rep. 110, the reasons of the rule are stated as follows: "The course of ²⁶⁹ business of defendant and all other banks is, in such cases, to make collections through their correspondents. They do not undertake themselves to collect the bills, but to indorse them to other banks at the place where payment is to be made. The holder of the paper, having full notice of the course of business, must be held to assent thereto. He therefore authorizes the bank with whom he deals to do the work of collection through

another bank. The bank receiving the paper becomes the agent of the depositor, with authority to employ another bank to collect it. The second bank becomes the subagent of the customer of the first, for the reason that the customer authorizes the employment of such an agent to make the collection. The paper remains the property of the customer, and is collected for him. The party employed, with his assent, to make the collection, must therefore be regarded as his agent."

In *Daly v. Butchers and Drovers' Bank*, 56 Mo. 94, 17 Am. Rep. 663, the plaintiff was a depositor in the defendant's bank, and deposited therein certain drafts in controversy in that case. The drafts were sent by the defendant to the National Bank of Vicksburg, which the defendant believed trustworthy, with directions to collect and remit. The Vicksburg bank collected the money and kept it, and became insolvent, and it was held that the defendant was not liable for the loss.

The foregoing cases are entirely in harmony with the decision of this court in *Aetna Ins. Co. v. Alton City Bank*, 25 Ill. 243, 79 Am. Dec. 328, in which it was held that where a bill or note is received by a bank for collection which renders its transmission to another place necessary, the bank discharges its duty by sending it in due season to a competent, reliable agent, with proper instructions for its collection. There the legal holder of the bill indorsed and delivered it to the defendant bank for collection in the usual and regular course of banking business, and the defendant bank, on the same day, indorsed and transmitted ²⁷⁰ it for collection to certain bankers in St. Louis, Missouri, the proceeds of the bill, when collected, to be placed to the credit of the Alton Bank. By the negligence of the correspondent bankers in failing to have the bill protested for nonacceptance and to give notice of nonacceptance, the amount of the bill was lost, and it was held that the defendant bank was not liable. In discussing the case the court said: "This presents the question whether the bank receiving such paper for collection is bound for the acts of their correspondents and are responsible for their negligence, or whether their undertaking requires anything more than that they should use reasonable care and prudence in the selection of a responsible correspondent to whom it shall be intrusted. That a bank receiving such paper for that purpose, in the usual course of business, is bound to use ordinary and reasonable care in selecting an agent competent and responsible there is no doubt, and a want of such precaution would clearly render it liable for consequent loss. It does not appear that there was

any agreement on the part of the bank to become liable, at all events, for any loss that might occur from the acts of their correspondents, and the law has imposed no such liability": See, also, *Drovers' Nat. Bank v. Anglo-American etc. Co.*, 117 Ill. 100; 57 Am. Rep. 855; *Fabens v. Mercantile Bank*, 23 Pick. 332; 34 Am. Dec. 59; *Stacy v. Dane County Bank*, 12 Wis. 629; *Citizens' Bank v. Howell*, 8 Md. 530; 63 Am. Dec. 714; *Lawrence v. Stonington Bank*, 6 Conn. 521; *Third Nat. Bank v. Vicksburg Bank*, 61 Miss. 112; 48 Am. Rep. 78; *Bank of Louisville v. First Nat. Bank of Knoxville*, 8 Baxt. 101; 35 Am. Rep. 691; *Merchants' Nat. Bank v. Goodman*, 109 Pa. St. 422; 58 Am. Rep. 728; *Hyde v. Planters' Bank*, 17 La. 560; 36 Am. Dec. 621; *German Nat. Bank v. Burns*, 12 Col. 539; 13 Am. St. Rep. 247; *Bank of Lindsborg v. Ober*, 31 Kan. 599; *Mechem on Agency*, sec. 514.

In the light of these authorities it must be held that the First National Bank and the Bank of New Hanover, of Wilmington, North Carolina, were the agents of the plaintiff, and not of the defendants, and that the losses ²⁷¹ resulting from their default must be borne by the plaintiff, and not by the defendants.

It appears, however, that on the twenty-fourth day of November, 1891, the First National Bank of Wilmington, after collecting the drafts forwarded to it, remitted to the defendants two drafts on the United States National Bank of the City of New York, aggregating nine hundred and forty dollars and twenty-five cents, and failed and became insolvent the day following; that the defendants, on receipt of the drafts, not having received intelligence of the failure of the drawer, placed the amount of the drafts to the credit of the plaintiff and paid the same over to it, and that the money so paid has been retained by it; that the drafts themselves were immediately forwarded to New York for collection, and were there dishonored and protested, and that nothing was realized from them; that the defendants subsequently proved up their claim for the amount of the two drafts before the receiver of the First National Bank of Wilmington, and afterwards obtained from the receiver, by way of dividends on their claim, the sum of six hundred and twenty-five dollars and ninety-two cents. They now claim, and have been permitted to recover by way of setoff, the difference between the amount of the dividends so received and the face of the drafts. This we think was proper. If the plaintiff had itself deposited these drafts with the defendants and received payment of their amount, the drafts being at the time worthless, by reason of the insolvency of the drawer, there can be no doubt that the de-

defendants would have had the right to charge back and recover the amount of the loss from the plaintiff. They were in fact received by the defendants from the first National Bank of Wilmington, which, for all the purposes of the transactions under consideration, is to be regarded as the plaintiff's agent. The rights of the defendants would therefore seem to be the same as though the plaintiff had itself deposited the drafts with the defendants.

272 Nor are we able to see that the case is at all affected by the circumstance that the defendants retained the drafts and proved up a claim for their amount before the receiver in their own name. They had paid the amount of the drafts to the plaintiff, and until the money so paid was refunded to them they were entitled to hold the drafts, and collect in their own name and for their own benefit whatever could be collected from the estate of the insolvent drawer, of course crediting whatever they might be able to collect upon their claim against the plaintiff.

We are of the opinion that the judgment is fully warranted by the facts appearing by the stipulation of the parties, and the judgment of the appellate court will therefore be affirmed.

BANKS—LIABILITY FOR AGENTS SELECTED FOR COLLECTION.—If paper left with a bank is such that it must be sent to a distant point for the purpose of receiving payment or of taking steps necessary to preserve the liability of the parties thereto, or to charge with liability persons who are not liable except after certain steps have been taken, the authorities agree that it is the duty of the bank to forward the paper to a suitable correspondent at the place where the necessary action must be taken, and for the negligence of the bank in not so forwarding the paper, or in selecting an agent whom it knows or should know to be unfit for the purpose, it is answerable for injuries resulting to the owner of the paper: *Extended note to Isham v. Post*, 38 Am. St. Rep. 776.

BANKS—RECOVERY OF MONEY PAID ON WORTHLESS CHECK.—A bank paying a check on a forged indorsement is entitled to recover the money so paid from the person receiving it, on making demand within a reasonable time after the discovery of the forgery: *First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 296; 43 Am. St. Rep. 247, and note. To the same effect, see *Birmingham Nat. Bank v. Bradley*, 103 Ala. 109, ante, p. 17, and note.

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WILSON v. MASON.

[156 ILLINOIS, 304.]

A BROKER IS NOT ENTITLED TO COMMISSIONS UNLESS he finds and produces to the vendor a purchaser who is ready, willing, and able to complete the purchase as proposed.

A BROKER IS NOT ENTITLED TO HIS COMMISSIONS when the purchaser found and produced by him does not enter into a valid, binding, and enforceable contract, and refuses or fails to complete the purchase.

A BROKER EARNS HIS COMMISSION WHEN he produces a purchaser between whom and the vendor a valid contract to purchase is entered into, mutually obligatory upon both, though the purchaser afterwards refuses to comply with his part of the contract.

EXECUTORS HAVE NO POWER TO PURCHASE REAL ESTATE, unless such power is expressly or impliedly conferred by the will.

AN EXECUTOR WILL NOT BE PRESUMED TO HAVE POWER to contract for the purchase of real estate, though he has assumed to enter into such a contract. The presumption of regularity accorded to official acts does not aid his proceedings.

BROKERS—STATUTE OF FRAUDS.—If a contract is of such a character that the vendee may successfully plead the statute of frauds against its performance, then it is not a valid contract entitling the broker to commissions.

Assumpsit by a real estate broker, Wilson, to recover compensation claimed to have been earned by him in the sale of property known as the "Real Estate Board Building," situate in the city of Chicago. The parties whom plaintiff claimed to have procured as purchasers were the executors of the will of Alfred Cowles. A written contract was signed "James L. Houghteling, Henry B. Mason by James L. Houghteling," also "Lewis L. Coburn, Alfred Cowles, executors under the will of Alfred Cowles, by Lewis L. Coburn." This contract recited that Mason and Houghteling sold, and that the executors of the will of Alfred Cowles bought, the premises for three hundred and seventy-five thousand dollars, of which seventy-five thousand dollars was to be paid in cash, fifty thousand dollars by a mortgage note which had been made to the decedent, Cowles, and which was held by his executors, and the balance by the assumption by the purchasers of the two mortgages aggregating two hundred and fifty thousand dollars. The title was objected to by the purchasers, on the ground that a child born after a certain suit of foreclosure was commenced was not made a party thereto, and that its interests were still therefore outstanding. Because of this objection the purchasers refused to take the property. The contract was afterwards canceled. Subsequently the supreme court in another case decided that the objection made to the title was not tenable. Judgment for the defendants, and the plaintiff appealed.

Hamline, Scott & Lord, for the appellant.

Edwin Burritt Smith and James C. Hutchins, for the appellees.

309 MAGRUDER, J. There appears to have been some conflict in the testimony as to what the agreement was between appellant and appellees about the payment of commissions. The agreement was oral, and the parties differ as to its terms. Appellant swears that he was to be paid two and a half per cent upon the contract price for procuring a purchaser, or making a sale of the property. The testimony of appellees is to the effect that the commission was only to be paid in case the purchaser took and paid for the property. We cannot enter into a discussion of the facts upon this subject. The judgment of the appellate court affirming the judgment of the trial court is conclusive here, so far as the facts put in issue by the pleadings are concerned. The question, however, as to whether the appellant procured a purchaser of the property, or made a sale thereof, is to some extent a question of law, and has been raised by the propositions submitted to the trial court. No proposition was submitted by appellees, the defendants below, to be held as law by the trial court in the decision of the case. Seven propositions were submitted by the plaintiff below, the appellant here. Of these the trial court modified the first and sixth, and marked them "held" as so modified. The second, third, fourth, and fifth were marked as "held," but the court refused to mark the seventh as "held," and marked the same "refused." The only assignments of error made by the appellant which we can consider relate to the modification of the first and sixth propositions and the refusal of the seventh.

The duty of a broker who is employed to sell real estate is to find and produce to the vendor a purchaser who is ready, willing, and able to complete the purchase proposed. This he must do before he is entitled to any commissions. If the vendor rejects the purchaser so produced, the broker is bound to show that such purchaser ³¹⁰ was willing, ready, and able to perform the contract according to the proposed terms. If the principal accepts the purchaser thus presented, either upon the terms previously proposed or upon modified terms then agreed upon, and a valid contract is entered into between them, the commission is earned. In such case the broker has earned his commission, although the sale is never actually completed, if the failure of the purchaser to complete the sale results from the inability of the vendor to

make a good title, and without fault on the part of the broker: *Coleman v. Meade*, 13 Bush, 358; *Glentworth v. Luther*, 21 Barb. 145; *Pratt v. Hotchkiss*, 10 Ill. App. 603; *Goodridge v. Holladay*, 18 Ill. App. 363; 2 Am. & Eng. Ency. of Law, 578, 581. The propositions as modified by the trial court conform substantially to these views, and, as they are sustained by the authorities, we see no error in the modifications made.

By the seventh proposition the trial court was asked to hold, as a proposition of law, that under the evidence in the case, defendants could not defeat plaintiff's claim on the ground that, under the statute of frauds, the contract entered into between them and the proposed purchasers was not enforceable. The proposed purchasers were the two executors of an estate; one of the executors signed the names of both of them to the contract; the evidence failed to show that the executor so signing had any written authority from his coexecutor to sign the latter's name to the contract, and it also failed to show that the executors had any power under the will to purchase land for the estate. The proof tends to establish affirmatively that whatever authority the executor who signed the contract had to execute it for his coexecutor was merely oral.

Some of the cases go so far as to hold that the broker is not entitled to his commissions, unless the sale is actually accomplished by the delivery of the deed of the land from the vendor to the vendee and the payment of the ³¹¹ purchase money by the latter, or unless it is proven that the sale is prevented by the fault of the vendor. Other cases seem to hold that the broker is entitled to his commissions when the minds of the vendor and purchaser meet in a verbal agreement for the sale by the one and the purchase by the other of the land. We are not inclined to follow either of these classes of cases, regarding them as extreme and exceptional. The true rule is, that the broker is entitled to his commissions if the purchaser presented by him and the vendor, his employer, enter into a valid, binding, and enforceable contract. If, after the making of such a contract, even though executory in form, the purchaser declines to complete the sale, and the seller refuses to compel performance, the broker ought not to be deprived of his commissions. He has done all that he can do when he produces a party who is able and, in binding form, offers to purchase upon the proposed terms. An agreement by a real estate broker to procure a purchaser not only implies that the purchaser shall be one able to comply, but that the seller and the purchaser must be bound to each other in a

valid contract. So where the agreement of the real estate broker is to make a sale, his commission is earned when a contract is entered into which is mutually obligatory upon the vendor and vendee, even though the vendee afterwards refuses to execute his part of the contract of the sale or purchase: *Parker v. Walker*, 86 Tenn. 566; *Coleman v. Meade*, 13 Bush, 358; *Francis v. Baker*, 45 Minn. 83; *Love v. Miller*, 53 Ind. 294; 21 Am. Rep. 192; *Veazie v. Parker*, 72 Me. 443; *Willes v. Smith*, 77 Wis. 81; *Rice v. Mayo*, 107 Mass. 550; *Christensen v. Wooley*, 41 Mo. App. 53; *Love v. Owens*, 31 Mo. App. 501; *Greene v. Hollingshead*, 40 Ill. App. 195; *Short v. Millard*, 68 Ill. 292; *Kerfoot v. Steele*, 113 Ill. 610; *Ward v. Cobb*, 148 Mass. 518; 12 Am. St. Rep. 587.

An oral agreement upon the part of the purchaser of land would not be a valid agreement; and if he refused to complete the sale of the land after such oral agreement, ³¹² without fault upon the part of the seller, the obligation of the broker would not be fulfilled, and he could not recover his commissions: *Parker v. Walker*, 86 Tenn. 566; *Middleton v. Findla*, 25 Cal. 76; *Whitney v. Cochran*, 1 Scam. 209; *Christensen v. Wooley*, 41 Mo. App. 53. Nor would a written agreement be binding upon the purchaser of land, under the statute of frauds, if such agreement were signed for him by some other person not lawfully authorized in writing to do so: *Rev. Stats.*, c. 59, sec. 2; *Cloud v. Greasley*, 125 Ill. 313; *McGinnis v. Fernandes*, 126 Ill. 228.

Executors have no power to purchase real estate, unless such power is granted by will. Power to purchase is an incident of the power to invest, but the will must be produced to show that the power to invest exists. An executor has power to complete a contract made by his decedent, but he cannot, by virtue of the general powers of his office, make any contract which will bind the estate. Executors, whether acting separately or jointly, have no authority to create an original liability on the part of the estate, or enter into an executory contract binding upon or enforceable against it: *Barry v. Lambert*, 98 N. Y. 301; 50 Am. Rep. 677; *Austin v. Munro*, 47 N. Y. 366; 7 Am. & Eng. Ency. of Law, 299, 300; *Trull v. Trull*, 13 Allen, 407; 2 *Woerner's American Law of Administration*, secs. 328, 381; *Walker v. Diehl*, 79 Ill. 473; *Ryan v. Duncan*, 88 Ill. 144. As a general rule, the power to sell land does not exist in the executor, unless he is directed to sell by the will, either expressly or by implication: 2 *Woerner's American Law of Administration*, sec. 339. And we see no reason why the same is not true as to the power to purchase, which may be involved in a power to invest. All the

executors who qualify must join in executing a testamentary power of sale or purchase: 2 Williams on Executors, Randolph & Talcott's notes, top p. 154, marg. p. 828; 2 Woerner's American Law of Administration, sec. 346; Williams v. Mattocks, 3 Vt. 189; Floyd v. Johnson, 2 Litt. 109; 13 Am. Dec. 255. It follows that the actual title of an executor must be established, ³¹³ and that the presumption of regularity accorded to official acts does not aid his proceedings: Abbott's Trial Evidence, 55; Bank of Troy v. Topping, 13 Wend. 557; Hathaway v. Clark, 5 Pick. 490. In the case at bar, the will of Albert Cowles was not produced, nor were the powers of the executors, either joint or several, shown.

An executor cannot delegate to another the execution of a power of sale committed to him by the will in trust and confidence: 2 Williams on Executors, Randolph and Talcott's notes, top p. 133, marg. p. 815; 7 Am. & Eng. Ency. of Law, 300, 301. A power of sale given by will to two executors, both of whom qualify and take upon themselves the burden of the execution of the will, cannot be delegated by one to the other; and an agreement for a sale entered into by one coexecutor for himself and the other is not valid, and cannot be specifically enforced: Berger v. Duff, 4 Johns. Ch. 368; Sebastian v. Johnson, 72 Ill. 282; 22 Am. Rep. 144; 7 Am. & Eng. Ency. of Law, 301.

Hence, we are inclined to think that, under the proofs as made in this case, the contract was not valid and enforceable against the proposed purchasers, executors of the estate of Alfred Cowles, deceased, and that there was no error in refusing the seventh proposition. It is true, as is claimed by counsel for appellant, that a verbal contract respecting land may be as obligatory upon the parties to it as a written contract, where they make no objections themselves that it is not in writing; and in equity a defendant cannot avail himself of the statute of frauds unless he pleads it: Kelly v. Kendall, 118 Ill. 650; School Trustees v. Wright, 12 Ill. 432. But the defense of the statute of frauds is personal, and cannot be made by persons who are neither parties nor privies to it. It does not lie in the mouth of a third person to object for the parties to a contract, that they are not bound by its terms because it is verbal: Chicago Dock Co. v. Kinzie, 49 Ill. 289; Kelly v. Kendall, 118 Ill. 650. The question is not whether, in this action of assumpsit brought by the appellant against appellees ³¹⁴ for commissions, proper objection was or was not made to the proof of the contract as not being in writing. The question is whether, in a proceeding to enforce the contract by either of

the parties thereto, a plea of the statute of frauds would have defeated such enforcement. If the contract is of such a character that the vendee can successfully plead the statute of frauds against its performance in a suit therefor by the vendor, then it is not a valid contract entitling the broker to his commissions, within the rule already laid down.

The judgment of the appellate court is affirmed.

BROKERS—WHEN ENTITLED TO COMMISSIONS.—A real estate broker performs his duty and is entitled to his commission when a purchaser is introduced who is ready, willing, and able to buy on the terms authorized by the principal, and no binding contract of sale is required, if the principal is in a situation to execute it himself: *Gelatt v. Ridge*, 117 Mo. 553; 38 Am. St. Rep. 683, and note. To the same effect see, *Mattingly v. Pennie*, 105 Cal. 514; 45 Am. St. Rep. 87. See, also, the extended notes to *Kalley v. Baker*, 28 Am. St. Rep. 546; *Ward v. Cobb*, 12 Am. St. Rep. 589, and *Walker v. Osgood*, 93 Am. Dec. 175.

BROKERS—COMMISSIONS—STATUTE OF FRAUDS.—A broker is entitled to his commission on a sale made by him for an owner of real property, though the purchaser never enters into any enforceable contract of sale, if, as a matter of fact, he was willing to comply with his oral contract which was void by the statute of frauds, and his compliance was prevented by the refusal of the owner to receive the purchase price and make a conveyance of the property: *Holden v. Starks*, 159 Mass. 503; 38 Am. St. Rep. 451.

NORTON v. VOLZKE.

[188 ILLINOIS, 402.]

MASTER AND SERVANT.—INFANT EMPLOYEES are entitled at the hands of their employers to instruction as to the danger of their employment and how to avoid it, and, therefore, do not, in the absence of such instructions, assume all the usual dangers incident to the employment, nor take upon themselves the hazards of the use of defective tools and machinery.

NEGLIGENCE—INFANTS.—The law does not require one of tender years to exercise the same degree of care as a person of mature years. A child is only required to exercise that degree of care which one of his age would naturally and reasonably use in the same situation and under like circumstances.

MASTER AND SERVANT.—THE DUTIES WHICH THE MASTER CANNOT ASSIGN include the exercise of reasonable care to see that tools, appliances, and machinery, and the place where the servant works, are reasonably safe, and that the servant is informed of special dangers of his situation and of the appliances and machinery with and upon which he is employed.

PRACTICE.—It is not error for the court on its own motion to submit special issues to the jury proper in form and pertinent to the cause.

PRACTICE.—It is not error for the court to refuse to submit a special issue to the jury if their answer could not have tended to anything decisive in the case.

Action to recover compensation for personal injuries received by the plaintiff, Volzke, while employed in the defendant's factory. The plaintiff was less than eleven years of age, and claimed that he had been put to work around dangerous machinery, of the perils of which he was not advised by his employer, and that in consequence he was exposed to injury, consisting of the loss of the fingers of his hand, which were drawn into cogwheels that had been left in an unprotected and unguarded condition. The following instructions were given by the court: "1. The jury are instructed that in determining the relative degree of care or want of care manifested by the parties at the time of the injury, the age and discretion of the party injured are proper subjects for the jury. The law does not require that a child shall exercise the same degree of care and caution as a person of mature years, but only such care and caution as a person of his age and discretion would naturally and ordinarily use. 2. The jury are instructed that the rule as to contributory negligence of a child is, that it is required to exercise only that degree of care which a person of that age would naturally and ordinarily use in the same situation and under the same circumstances. 3. The court instructs the jury, as a matter of law, that if a person receives an injury as a combined result of an accident and of negligence on the part of another, and the accident would not have occurred but for such negligence, and the danger could not have been foreseen or avoided by the exercise of reasonable care and prudence on the part of the person injured, taking into consideration all the facts and circumstances of the case, then the person guilty of the negligence will be liable for the injury received. 4. If from the evidence in the case and under the instructions of the court, the jury shall find the issues for the plaintiff, and that the plaintiff has sustained damages as charged in the declaration, then, to enable the jury to estimate the amount of such damages, it is not necessary that any witness should have expressed an opinion as to the amount of such damages, but the jury may themselves make such estimate from the facts and circumstances in proof, and by considering them in connection with their own knowledge, observation, and experience in the business affairs of life." The defendant excepted to the action of the court in giving these instructions, and to the action of the court in submitting to the jury the question whether it was the duty of the defendants to have placed a guard or cover about the cogwheels, and whether the plaintiff was of sufficient age to know the danger of his employment. The defendants also excepted to the action of the

court in refusing to submit to the jury the question whether the defendants "omitted to do anything that ordinarily prudent and careful persons would have done under the circumstances," and whether the defendants did "anything that ordinarily prudent and careful persons would not have done under the circumstances."

R. S. Thompson, for the appellants.

Pease & McEwen, for the appellees.

407 PHILLIPS, J. It is not the province of this court to consider any questions of fact involved in this record. The case was tried in the circuit court before a jury, with a verdict for plaintiff, and the appellate court, by its judgment of affirmance, has settled all questions of fact, carrying with it also a finding of the negligence of appellants. By these facts we are bound, and a discussion of them is unnecessary. It is only necessary, therefore, to consider whether the jury were properly instructed by the trial court, or whether there was error in the giving or refusing of the special findings asked to be submitted to the jury.

All the instructions may be considered together. These instructions inform the jury that the age and discretion of the party injured are proper subjects for inquiry; that the law does not require one of tender years to exercise the same degree of care and caution as a person of mature years, and that a child is only required to exercise that degree of care which one of that age would naturally and reasonably use in the same situation and under like circumstances. In *Herdman-Harrison etc. Co. v. Spehr*, 145 408 Ill. 329 (a case similar, in many respects, to this), this court said: "If plaintiff had been an adult, with unimpaired natural faculties, he would, unquestionably, on the case made, be held to have assumed the risk of his employment, with the machinery uncovered as it was, when he entered the service of appellant. It is not claimed that the danger to which he was exposed by reason of the gear being left uncovered was not patent to every one of ordinary intelligence and experience. It is alleged in the declaration that for a year prior to the injury plaintiff had been in the same employment, the machinery remaining in the same condition. . . . That as between employer and employee, the latter assumes all the usual known dangers incident to the employment, and that he also takes upon himself the hazard of the use of defective tools and machinery, if, after his employment, he knows of the defects but voluntarily

continues in the employment without objection, are familiar rules of law often recognized by the decisions of this and other courts. That this general rule does not apply to employees who, from youth or want of the natural faculties, are unable to appreciate the danger incident to the employment, or which may result from the continued use of defective machinery or tools, is equally well settled. Such employees are entitled, at the hands of their employers, to instructions as to the danger and how to avoid it—in other words, they are entitled to be put in possession of that knowledge which to adults comes from experience and mature judgment: 2 Thompson on Negligence, 978; Deering on Negligence, sec. 197; Wood on Master and Servant, sec. 350." See, also, Jones v. Florence Min. Co., 66 Wis. 268; 57 Am. Rep. 269; Springfield etc. Ry. Co. v. Welsch, 155 Ill. 511.

It is urged that these instructions assume to prove matters which are in controversy, that they do not direct the minds of the jurors to the evidence in the case, and that they fail to introduce any comparison between the ⁴⁰⁰ negligence of plaintiff and that of defendants. We are not able to see that these instructions are subject to the objections urged against them. While it is true, perhaps, that these instructions might have been more skillfully drawn, they correctly state the law in this state, and the jury could not have been deceived or misled by them. The jury, in answering the special findings propounded to them under the direction of the court, found, as a question of fact, that the plaintiff was not of sufficient age to know the danger of his employment. The instructions on behalf of the defendants fully instructed the jury as to all the phases, and we are unable to perceive, from the injunction as a whole, and from the answers returned by the jury to the special findings, that the jury were in any manner misled, or that the interests of the defendants were in any way prejudiced by the instructions given in behalf of the plaintiff. They found negligence on the part of the defendants. We have heretofore held that there are certain duties of the master that are nonassignable. Among said duties are that he shall exercise reasonable care to see that tools, appliances, and machinery are reasonably safe, and must use reasonable care that the place where the servant works is reasonably safe; to inform the servant of special danger of his situation, and of the machinery and appliances with and about which he is employed, where he is not informed: Mobile etc. Ry. Co. v. Godfrey, 155 Ill. 78.

It is also urged as error that the court, on its own motion, submitted two special findings to the jury. We are unable to see the

impropriety, where special findings are requested to be submitted to the jury by either party, of the court adding or submitting such other special findings to the jury as in its judicial discretion may seem proper. The main object to be attained in all such cases is that substantial justice may be done between the litigating parties, and if the submission of such special findings, proper in form and pertinent to the case, by the ⁴¹⁰ court on his own motion, may tend to this, there is no error. The two special findings submitted by the court in this case were entirely proper and pertinent, and there was no error in the court submitting them to the jury on its own motion. The court has the same right, of its own motion, to submit to a jury special propositions on which to find, as to give instructions.

The two interrogatories submitted by defendants and refused by the court were as follows:

"Did the defendants do anything that ordinarily prudent and careful persons would have done under the circumstances?"

"Did the defendants do anything that ordinarily prudent and careful persons would not have done under the circumstances?"

The jury, by their answer to special finding 5, have answered that appellants should have placed a guard or cover about the cogwheels, which is equivalent to answering "yes" to the first question. Whether the jury had answered "yes" or "no" to the second question would not have tended to anything decisive in the case. If the answer had been "no," it still would have remained undetermined as to what had been done by defendants that ordinarily prudent and careful persons would not have done. We find no error in the trial court refusing to submit these two findings.

Perceiving no error in the instructions or in the special findings submitted and refused by the court, we do not find that there is any sufficient reason in this record why this cause should again be submitted to another jury, and the judgment of the appellate court is therefore affirmed.

MASTER AND SERVANT—DUTY OF MASTER TO INSTRUCT MINOR SERVANT AS TO DANGERS OF EMPLOYMENT.—When young persons without experience are employed to work with dangerous machines, it is the duty of the employer to give suitable instructions as to the manner of using them, and warnings as to the hazard of carelessness in their use. If an employer neglects this duty, or if he gives improper instructions, he is answerable for the injury resulting from this neglect of duty: *Tagg v. McGeorge*, 155 Pa. St. 368; 35 Am. St. Rep. 389, and note, with the cases collected.

MASTER AND SERVANT—DELEGATION OF DUTY BY MASTER—LIABILITY.—The delegation of a duty which the master owes to his servant of exercising reasonable and ordinary care and diligence

in providing and keeping in repair reasonably safe machinery and appliances cannot relieve him from liability to a servant injured by the failure to exercise such care and diligence on the part of the servant to whom the duty has been delegated: *Chicago etc. R. R. Co. v. Kneirim*, 152 Ill. 458; 43 Am. St. Rep. 259, and note; *Promer v. Milwaukee etc. Ry. Co.*, 90 Wis. 215; 48 Am. St. Rep. 905, and note.

NEGLIGENCE—DEGREE OF CARE REQUIRED OF CHILDREN.—The degree of care and diligence required from a child of tender years is not as high as that required from an adult of presumed judgment and discretion: *Pierce v. Conners*, 20 Col. 178; 46 Am. St. Rep. 279, and note. Children are required to exercise only such care and prudence as may be reasonably expected of those who possess only the intelligence and maturity of judgment which they possess: *Brinkley Car Co. v. Cooper*, 60 Ark. 545; 46 Am. St. Rep. 216, and note. The foregoing doctrine is applied to infant employees in *Luebke v. Berlin Machine Works*, 88 Wis. 442; 43 Am. St. Rep. 913, and note; and *Greenway v. Conroy*, 160 Pa. St. 185; 40 Am. St. Rep. 715, and note.

BARRETT v. BODDIE.

[158 ILLINOIS, 479.]

LANDLORD AND TENANT.—TO CONSTITUTE EVICTION there must be something of a grave and permanent character done by the landlord for the purpose and with the intention of depriving the tenant of the enjoyment of the leased premises.

LANDLORD AND TENANT.—NO EVICTION SUCH AS ENTITLES a tenant to resist an action to recover rents exists unless the premises are rendered useless by the positive act of the landlord, or the tenant has been deprived in whole or in part of the possession or enjoyment of the premises, actual or constructive, by the landlord.

LANDLORD AND TENANT.—WAIVER OF EVICTION.—Possession retained after an alleged constructive eviction is a waiver of the right of abandonment. Liability for rent therefore continues according to the terms of the lease.

LANDLORD AND TENANT.—EVICTION.—The fact that a flue in a building leased for use as a restaurant becomes filled up with brick and other materials so that the building can no longer be used for the purposes of the lease, and that the landlord or his agents did not clear out such flue, does not constitute an eviction where the tenant, by the terms of the lease, accepts the premises in the condition they were then in, and agrees that the landlord shall not be liable for any failure to keep them in repair.

LANDLORD AND TENANT.—EVICTION—AUTHORITY.—A landlord cannot be bound by the acts of his agent amounting to a constructive eviction if he was not present when those acts were done, and neither authorized nor ratified them.

Action against the defendants Barrett & Barrett, as guarantors of the payment of rent reserved in a lease entered into by the plaintiff, Boddie, and one Raquet, to recover moneys alleged to be due for rents according to the terms of a lease. The defendants resisted the action, on the ground that the premises were rented for the purposes of a restaurant and saloon, and that a chimney furnishing flues to the part so rented had become stopped up with

brick and other materials, so that the part rented became useless for the purposes for which it was leased. When the flues first became stopped up, the agents of the plaintiff were called upon and told that the chimneys must be fixed or the lessee would abandon the premises, because he could not conduct his business therein. The agents promised to attend to the flues, but failed to do so, and, upon further demand being made upon them, declined to take any action whatever. The lessee remained in possession, though not able to do any business, from the 1st of April until some time in June, 1893. At the latter date, the premises were abandoned and the keys delivered to the agents of the plaintiff of whom the premises had been rented. The lease declared that the premises had been received in good order and repair, and that no representations had been made as to their condition or repair, and that the lessor should not be held liable for any damages resulting from a failure to repair, nor for any damages arising from the act or negligence of other occupants of the building or of adjacent and contiguous property. The lessee covenanted to keep the premises in repair. Some evidence was offered tending to show a desire on the part of the plaintiff to get rid of the lease, and that he and those representing him were therefore willing to have the chimney remain in the condition in which it was, for the purpose of forcing the defendants to abandon the premises. The defendants also offered evidence which they claimed tended to show an eviction of the tenant by the landlord's agents. The court refused to receive such evidence, unless it was shown either that the landlord himself actually interfered with the premises, or that he authorized his agents to do so, or ratified some act of eviction on their part. The offered evidence was therefore excluded, and the defendants excepted.

The court instructed the jury in favor of the plaintiff, excluding the question of constructive eviction, and a verdict was returned in harmony with the instruction of the court. A motion for a new trial having been made and denied, the defendants appealed.

Hollett & Tinsman, for the appellants.

Woolfolk & Browning, for the appellee.

483 PHILLIPS, J. The term "eviction" is applied to every class of expulsion or amotion. The term is not applicable to a mere trespass on the tenant's possession by the landlord, but to constitute eviction there must be something of a grave and per-

manent character done by the landlord, for the purpose and with the intention of depriving the tenant of the enjoyment of the demised premises. The question is therefore one of fact, dependent on the circumstances ⁴⁸⁴ of the particular case, and to be determined by the jury: *Hayner v. Smith*, 63 Ill. 430; 14 Am. Rep. 124; *Lynch v. Baldwin*, 69 Ill. 210; *Morris v. Tillson*, 81 Ill. 607.

At common law, in the absence of a provision to that effect in the lease, the destruction of the building from any cause does not discharge the tenant from his liability to pay rent for the full term: *Smith v. McLean*, 123 Ill. 210. The landlord owes no duty and is under no obligation to repair in a case where he has expressly covenanted with the tenant he shall not be liable to make repairs: *Moffatt v. Smith*, 4 N. Y. 126; *Mumford v. Brown*, 6 Cow. 475; 16 Am. Dec. 440; *Corey v. Mann*, 6 Duer, 679; *Ely v. Ely*, 80 Ill. 532; *Wood on Landlord and Tenant*, 814.

The contract of the parties is the measure of their duties and liabilities. The contract is made with reference to the law as it exists, and the law thus becomes a part of the contract. Unless the premises are rendered useless to the tenant by the positive act of the landlord, or unless the tenant has been deprived, in whole or in part, of the possession or enjoyment of his demised premises, actually or constructively, by the landlord, no defense exists to a right to recover rents because of eviction, as none exists, in law or fact: *Keating v. Springer*, 146 Ill. 481; 37 Am. St. Rep. 175.

The eviction sought to be shown by appellant was constructive. The possession of the premises was retained by the tenant after the alleged acts of eviction. Possession retained after an alleged constructive eviction is a waiver of the right of abandonment. No constructive eviction exists without a surrender of possession. With retention of possession after constructive eviction, liability for rent exists, according to the terms of the lease, during occupancy thereunder: *Warren v. Wagner*, 75 Ala. 188; 51 Am. Rep. 446; *Dewitt v. Pierson*, 112 Mass. 8; 17 Am. Rep. 58; *Scott v. Simons*, 54 N. H. 426; *Boreel v. Lawton*, 90 N. Y. 293; 43 Am. Rep. 170; *Keating v. Springer*, 146 Ill. 481; 37 Am. St. Rep. 175.

⁴⁸⁵ By the terms of the lease the tenant accepted the premises as in good repair, and covenanted to deliver up the same in repair, etc. He also accepted a covenant that the landlord should not be liable for failure to keep the premises in repair, nor for damages arising from the act or neglect of cotenants or occupants of the same building, nor of owners or occupants of adjacent or contigu-

ous property. He further covenanted that he would keep the premises in repair, etc. Such being his contract, which is the subject matter of construction, his proposed proof was of no act on the part of the landlord or his agents at the time of the letting, nor subsequently, except a failure to repair. No positive act was proposed to be proven on the part of the landlord or his agents duly authorized. Eviction necessarily being the result of an intended, willful, wrongful act, it must be a willful omission of duty or a commission of a wrongful act. Where there is no duty not complied with, and no wrongful act committed by the landlord towards the tenant, no eviction occurs. It was not proposed to prove any positive act by the landlord, nor an omission of duty according to the terms of his contract, in person or by authorized agents. An offer to prove matter as a basis of surmise or suspicion is not evidence. Under the lease in evidence the offered proof was not matter of defense. It was not error to exclude the same.

The terms of the contract of leasing in this case are of that character it is not necessary to enter upon the discussion of the question as to whether a different rule exists in relation to the leasing of an entire building or only apartments therein. However the rule may be on that question, there is nothing in this record which presents it for consideration at this time. The examination of the evidence in this record discloses there is no conflict as to the time to which rent had been paid. Appellee's agents testified rent was paid to April 15th, and the amount due November 15th was sixteen hundred and twenty-five dollars. The tenant testifies no rent ⁴⁸⁶ was paid after April 15th. The lease, by its terms, shows the rent due, according to the tenant's testimony, is sixteen hundred and twenty-five dollars. In this condition of the evidence it was not error to instruct the jury to find a particular amount for the plaintiff.

The judgment of the appellate court is affirmed.

LANDLORD AND TENANT—EVICTION—WHAT CONSTITUTES.

Acts by a landlord in interference with his tenant's possession, to constitute an eviction, must clearly indicate an intention that the tenant shall no longer continue to hold the premises: *Grommes v. St. Paul Trust Co.*, 147 Ill. 634; 37 Am. St. Rep. 248, and note. Acts of a grave and permanent character which amount to a clear indication of intention on the landlord's part to deprive the tenant of the enjoyment of the demised premises amount to an eviction: *Keating v. Springer*, 146 Ill. 481; 37 Am. St. Rep. 175, and note. To the same effect, see *Sully v. Schmitt*, 147 N. Y. 248; post, p. 659, and note. See, also, the extended note to *Minneapolis Co-operative Co. v. Williamson*, 38 Am. St. Rep. 485.

LANDLORD AND TENANT—EVICTION—WAIVER.—If the tenant makes no surrender of the possession of the demised premises, but

continues to occupy them after the commission of acts on the landlord's part which would have justified him in abandoning them, he will be deemed to have waived his right to abandon: *Keating v. Springer*, 146 Ill. 481; 37 Am. St. Rep. 175; but see *Minneapolis Co-operative Co. v. Williamson*, 51 Minn. 53; 38 Am. St. Rep. 473.

LANDLORD AND TENANT—EVICTION.—WHEN A DEFENSE TO A CLAIM FOR RENT: See the notes to *Giles v. Comstock*, 53 Am. Dec. 378, and *Keating v. Springer*, 146 Ill. 481; 37 Am. St. Rep. 175.

WILSON v. WILSON.

[156 ILLINOIS, 567.]

WITNESSES AS AGAINST DECEDENT.—Defendants are not competent witnesses on their own behalf, by the law of Illinois, to testify to facts occurring in the lifetime of the ancestor of the plaintiffs who are suing to recover lands which they claim to have descended to them, but which the defendants claim were conveyed to them by such ancestor.

DEED—DELIVERY.—THE MERE PLACING OF A DEED IN THE HANDS OF ONE OF THE GRANTEEES does not necessarily constitute a delivery.

DEEDS—DELIVERY.—The placing of a deed in the hands of one of the grantees with the understanding that it shall be returned to the grantor if he should call for it, but if not it was to be placed upon record upon his death, does not constitute a delivery.

DEED.—TO CONSTITUTE THE DELIVERY OF A DEED it must appear that it was the intention of the grantor that the deed should pass title at the time, and that he should lose control of it.

A CONVEYANCE NOT TO TAKE EFFECT UNTIL THE DEATH OF THE GRANTOR is an attempt to make a testamentary disposition without complying with the statute of wills, and is void.

Agnew & Vose, for the appellants.

Sherman & Tunnicliffs, for the appellees.

⁵⁷¹ **BAKER, J.** William Wilson and others filed their bill, and afterwards their amended bill, against Samuel Wilson and others, to set aside a deed to and for partition of certain lands described in the bill, derived from a common ancestor, Samuel Wilson, who is referred to in the record as "Col. Wilson." The bill named one O. F. Piper, also, as a party defendant. The defendants answered, Piper filing a separate answer, claiming liens on the land in controversy represented by two different mortgages. He also filed his crossbill praying foreclosure of the same. Upon a hearing had before the chancellor, upon the amended and crossbills, answers, replications, exhibits, and proofs, a decree was entered dismissing the complainants' ⁵⁷² bill and amendment thereto for want of equity, and ordering foreclosure of the mortgages in accordance with the prayer of the crossbill. To reverse that decree the complainants prosecute this appeal.

No question is made of the justice of that part of the decree foreclosing the mortgages held by O. F. Piper. The complaint is that the court below erred in not decreeing partition of the lands in controversy in accordance with the prayer of the original and amended bills, and the "bone of contention" is a deed made by Col. Wilson, purporting to convey said lands to three of his children, Lizzie Elson, Ed, and Samuel Wilson, defendants herein, and claimed by them to have been delivered. Complainants deny that the deed was ever delivered, and upon the question of delivery rests the decision of this case.

The undisputed facts in the case are, that on September 2, 1889, Col. Wilson was the owner of a large farm situated in McDonough county; that on said day he made and acknowledged a deed, purporting to be an absolute and unconditional conveyance of said land, to the defendants Lizzie, Ed, and Samuel, and shortly thereafter handed the same to said Lizzie, in whose possession it has remained ever since; that said deed was never recorded until the day following the death of the grantor, who died intestate November 30, 1893, and left surviving him the complainants, and the defendants, Lizzie, Ed, and Samuel, his only heirs at law.

At the hearing a large number of witnesses were examined, most of whom were put upon the stand for the purpose of disproving, on the one side, and on the other of establishing, the fact of delivery of the deed in controversy. Lizzie Elson and Samuel Wilson were permitted to testify, over the objection of complainants. This was error. Complainants sue as the heirs of their deceased father, whose title is here disputed, and the defendants, seeking to disprove such title, were therefore ⁵⁷³ not competent witnesses: *Hayes v. Boylan*, 141 Ill. 400; 33 Am. St. Rep. 326; *Comer v. Comer*, 119 Ill. 170.

Disregarding such of the testimony as was incompetent, a clear preponderance of the evidence shows that Col. Wilson always treated the land in question as his own, as well subsequently as prior to the alleged delivery of the said deed. The land remained on record as his until after his death, up to which time he paid the taxes thereon with his own money. At different times subsequent to said alleged delivery he made repairs on the premises, leased the land to tenants, collected the rents for his own use, advertised the land for sale in a public newspaper, and on March 1, 1890, made and delivered to O. F. Piper a mortgage deed thereon to secure a loan of five hundred dollars. All of those acts were done with the knowledge and acquiescence of the defend-

ants. The evidence further shows that one of said leases was drawn up by defendant Samuel Wilson, and signed by him as agent for his father, who was named therein as owner and lessor. The defendants always spoke of the land as their father's, and so treated it. In a replevin suit wherein Col. Wilson was plaintiff, tried in September, 1891, Samuel Wilson swore that this land belonged to his father, and that he and his brother Ed were their father's tenants. There also appears in evidence the following letter written by defendant Lizzie Elson, and mailed by her to complainant Alice M. Tuck:

"Peoria, Ill., Feb. 28, 1894.

"Dear Alice: Your letter was received to-day noon. . . . I have had that deed in my possession for some time. Father gave it to me, and told me to keep it, and if he never called for it, which he never did, that at his death I must have it put on record. He saw the deed shortly before he went down to Jim's. He was well then, and it was still his desire that I should keep the deed. It is not likely he would change his mind in so short a time. . . . Lizzie."

574 Such a state of facts is not at all consistent with the claim that Col. Wilson delivered this deed to the defendants. The mere placing of the deed in the hands of one of the grantees did not, of itself, necessarily constitute a delivery. In such a case the inquiry is, What was the intention of the parties at the time?—and that intention, when ascertained, must govern: *Jordan v. Davis*, 108 Ill. 336; *Bovee v. Hinde*, 135 Ill. 137; *Oliver v. Oliver*, 149 Ill. 542. It seems clear that this deed was placed by her father in the hands of Lizzie Elson with the mutual understanding that if he, at any time, desired to withdraw it she should return it to him, but that "if he never called for it" she should at his death, have it recorded. In other words, there was no intention at the time, to convey a present absolute title to the defendants, but the intention was that the deed should take effect at the grantor's death and vest the title in the defendants, provided he died without having recalled the deed. This was in no sense an attempt to deliver to the grantees in escrow, as contended by counsel for the defendants, but was merely a transfer of the possession of the deed to one of the grantees, the grantor at the time, however, reserving a future control over it. To constitute delivery of a deed, it must clearly appear that it was the intention of the grantor that the deed should pass the title at the time, and that he should lose all control over it. A deed for an interest in land must take ef-

fect upon its execution and delivery, or not at all: *Bovee v. Hinde*, 135 Ill. 137; *Cline v. Jones*, 111 Ill. 563; *Stinson v. Anderson*, 96 Ill. 373.

We think the mortgaging of the land by Col. Wilson subsequently to his placing the deed in the custody of Lizzie Elson, his offering the land for sale, and exercising the other acts of ownership over it heretofore mentioned, were sufficient to constitute a withdrawal of the deed: *Stinson v. Anderson*, 96 Ill. 373. But even if they were not, the deed is nevertheless void, for it was not to take effect until the death of the grantor. That was an attempt ⁵⁷⁵ to make a testamentary disposition of property without complying with the statute of wills: *Cline v. Jones*, 111 Ill. 563.

The circuit court erred in dismissing the complainants' original and amended bills. The decree is therefore reversed and the cause remanded to that court, with directions to enter a decree in accordance with the prayer of said bills.

DEEDS TO TAKE EFFECT AFTER DEATH OF GRANTOR.—A deed duly executed and recorded which "conveys and warrants" certain land, and then provides that it shall be of no effect until after the death of the grantor, and then to be in full force, conveys a present interest in the land, but postpones its enjoyment, and is not void as a testamentary disposition: *Wilson v. Carrico*, 140 Ind. 533; post, p. 213, and extended note.

DEEDS—DELIVERY—SUFFICIENCY—INTENT.—To constitute a valid delivery, dominion over the instrument must pass from the grantor with the intent that it pass to the grantee. In determining the question of delivery in any case the intention with respect thereof is the controlling element: Note to *Hayes v. Boylan*, 33 Am. St. Rep. 330. The question of delivery is one of intention, and the delivery is complete when there is an intention manifested on the part of the grantor to make the instrument his deed: *Martin v. Flaharty*, 13 Mont. 96; 40 Am. St. Rep. 415, and note.

WITNESSES—PARTIES AS, AGAINST DECEASED PERSON.—In an action by an heir to recover possession of realty, the defendant is a competent witness in his own favor, notwithstanding the death of the plaintiff's ancestor under whom both parties claim, except as to such matters as transpired between defendant and such ancestor: *Terry v. Rodahan*, 79 Ga. 278; 11 Am. St. Rep. 420, and note. See, also, *Larsen v. Johnson*, 78 Wis. 300; 23 Am. St. Rep. 404.

DOSS v. PEOPLE.

[153 ILLINOIS, 660.]

LARCENY.—OBTAINING MONEY UNDER THE PRETENSE THAT IT IS TO BE BET ON A RACE, and with the intent at the time to convert it to the bailee's own use, the race being a mere sham to aid this purpose, is larceny.

CRIMINAL PRACTICE.—THE AGE OF THE DEFENDANT need not be stated in a verdict finding him guilty of an offense charged, though, to his guilt of such offense, it is necessary that he should have been twenty-one years of age when it was committed.

A. B. Garrett and W. A. Schwartz, for the plaintiff in error.

Maurice T. Moloney, attorney general, T. J. Scofield, M. L. Newell, and John M. Herbert, state's attorney, for the people.

660 CARTER, J. The plaintiff in error was convicted at the January term, 1895, of the circuit court of Jackson county of the larceny of five hundred and thirty dollars, the money of one John Devine, and sentenced to imprisonment in the penitentiary for the term of five years. The evidence showed that he went to Chester some time in November, 1894, where he got acquainted with Devine, a saloon-keeper, and that after an acquaintance of about two weeks Devine put fifty dollars in his hands to bet on a footrace, which Doss said was to come off at Pinckneyville, but which, for some reason, was put off and run at Murphysboro, on December 4th. Devine went with Doss to Murphysboro, and on Doss' 661 representations that they would bet the money on one Langdon, who Doss said was a very fast runner and would be sure to win, Devine placed four hundred and eighty dollars more in the hands of Doss to put up on the race. Doss said he would have to put up six hundred dollars, but that they would so fold the five hundred and thirty dollars as to count six hundred dollars. They did so and pinned it together. At Murphysboro they met Langdon and Simpson, who were the runners, and one Kiplinger, who acted as stakeholder, and one Walker or Hughes. The whole party proceeded to the place where the race was to be run, and some envelopes were placed in Kiplinger's hands, which he testified he did not open but that Doss put only twenty dollars in his hands, and the evidence fails to show that any money was put up against the money of Devine. The race came off, and Simpson, not Langdon, won. Kiplinger turned over the envelopes to Simpson, and the parties separated, Doss professing to be very angry with Langdon for losing the race. Doss and Kiplinger met outside of town, where the latter was arrested, but Doss ran away and escaped. Henry Lipe testified that he was driving

along the road about two miles southwest of Murphysboro when the defendant and another man came up; that the defendant had been running, and had a handkerchief with considerable money tied up in it, and said to witness, "We have skinned a couple of ducks"; that defendant gave the other man a couple of bills from the roll and told him to go back, and then got in the wagon with witness and rode with him about three miles, and told him he was making his way to the river, where he wanted the witness to take him. Witness declined, but gave him the names of others on the road. He found a man who took him to the river, for which he paid five dollars, and to whom he made statements somewhat similar to those made to Lipe. Kiplinger testified that he got forty dollars of the money, and that Doss told him he had given Langdon eighty-five dollars and Simpson twenty-five dollars. Kiplinger was in jail for the same offense, and had previously testified to a contrary state ⁶⁶² of facts. Plaintiff in error testified that he bet Devine's money in good faith and lost it, together with two hundred dollars of his own money, and other evidence was given tending, in some degree, to exculpate him, but the jury were doubtless satisfied, from the evidence (and in this we think they were fully justified), that the footrace and pretended wager were a mere sham, gotten up and manipulated to swindle Devine out of his money, and that plaintiff in error obtained the money in question from Devine, not for the purpose of really wagering it on the result of the race, for Devine, but to feloniously convert it to his own use—to steal it.

The jury were warranted in finding that possession of the money was fraudulently obtained by plaintiff in error, with the felonious intent, on his part, when he received it, to convert it to his own use, and that Devine, when he gave him the money, intended to part with his possession merely, and not with his title, relying on plaintiff in error to dispose of it, as agreed upon, for his, Devine's, benefit. It is the settled law of this state that this offense is larceny: *Murphy v. People*, 104 Ill. 528; *Kibs v. People*, 81 Ill. 599; *Stinson v. People*, 43 Ill. 397; *Welsh v. People*, 17 Ill. 339; *Johnson v. People*, 113 Ill. 99; *Moore on Criminal Law*, sec. 496. Analogous rulings elsewhere may be found in the cases referred to in *Murphy v. People*, 104 Ill. 528.

The jury were fairly instructed as to the law of the case, and plaintiff in error has no just cause to complain that his rights were not fully protected by the court.

It is insisted that the conviction was erroneous because the jury did not find, in the verdict, the age of the accused. No proof

was introduced on the trial to show that he was under twenty-one years of age, but the evidence all tended to prove that he was considerably over that age. It was not necessary for the jury to find his age in the verdict: *Sullivan v. People*, 156 Ill. 94.

The judgment of the circuit court will be affirmed.

LARCENY BY TRICK, ARTIFICE, OR FALSE PRETENSE.—

One may be convicted of larceny of property which he obtained from another by fraud, premeditated trick, or device: *Commonwealth v. Lannan*, 153 Mass. 287; 25 Am. St. Rep. 629, and note; *State v. Woodruff*, 47 Kan. 151; 27 Am. St. Rep. 285, and note. One who obtains money or goods of another by some fraudulent trick or artifice, and carries them away, is guilty of larceny: *Beasley v. State*, 138 Ind. 553; 46 Am. St. Rep. 418, and note.

CASES

IN THE

SUPREME COURT

OF

INDIANA.

INDIANAPOLIS v. CONSUMERS' GAS TRUST COMPANY.

(140 INDIANA, 107.)

MUNICIPAL CORPORATIONS—CONTROL OF STREETS—IMPAIRMENT OF CONTRACT.—A grant to a city of exclusive power to regulate and control the use of its streets, does not carry with it the right to prohibit, annul, or destroy rights arising out of a valid contract in relation to the use of such streets.

MUNICIPAL CORPORATIONS—EASEMENT IN STREETS—IMPAIRMENT OF CONTRACT.—A grant by a city to a company to lay and repair gas mains in its streets is a legislative contract investing the company with the right of property in the franchise thus granted, which the city cannot take away or impair, without the company's consent, by any subsequent act, unless such right is reserved.

MUNICIPAL CORPORATIONS.—EXCLUSIVE POWER TO REGULATE AND CONTROL the use of its streets vested in a city is not restricted to transit alone, but extends to the laying of gas and water-pipes and to the promotion of the public health and convenience.

MUNICIPAL CORPORATIONS—CONTROL OF STREETS—IMPAIRMENT OF FRANCHISE.—A grant of a franchise by a city to a company to lay and repair gas mains in its streets cannot be rescinded on the ground that new methods of improving streets have been adopted by the city subsequent to the grant. Nor can the city, by a subsequent ordinance, require such company to first obtain permission to lay or repair mains, when it has such right, without permission, under its franchise.

MUNICIPAL CORPORATIONS—CONTROL OF STREETS AND EASEMENTS THEREIN.—A city may, in granting to a gas company a franchise to use its streets, prescribe and impose terms and conditions which become, when accepted and complied with, a binding contract. By granting such franchise the city does not part with or bargain away its rights under the police power to protect the public health, morals, and safety.

MUNICIPAL CORPORATIONS.—PENAL ORDINANCES are not always construed literally, but the courts make necessary exceptions in certain cases.

L. Bailey, R. O. Hawkins, and H. E. Smith, for the appellant.

W. P. Fishback, W. P. Kappes, R. N. Lamb, and R. Hill, for the appellee.

¹⁰⁸ JORDAN, J. On the fourteenth day of November, 1890, the appellant, the city of Indianapolis, filed in the mayor's court its verified complaint against the Consumers' Gas Trust Company, appellee herein, whereby it charges said company with having violated section 1 of an ordinance of said city, passed by the common council and board of aldermen on the twenty-fourth day of March, 1890, by cutting and digging into a certain macadam pavement upon the roadway of Madison avenue, a public street of said city, without first having secured the consent of said council and board of aldermen so to do, and without having filed a bond with the city clerk. A trial was had in the mayor's court, upon a plea of not guilty by the appellee, and resulted in the conviction of appellee, and a fine of ten dollars was assessed and adjudged against it. An appeal to the circuit court was taken by the gas company, and in the latter court the company waived the general denial and all rights to introduce evidence without plea, and relied solely upon the defense set up in its answer filed in the circuit court. In the answer filed in that court the appellee alleged, substantially, the following facts: That on June 27, 1887, the city of Indianapolis passed a general ordinance, known as No. 14, which ¹⁰⁹ ordinance was set out and made a part of said answer; that in November, 1887, the appellee was organized as a corporation for the object of supplying gas to said city; that afterwards, the same year, it duly accepted said ordinance, filed its bond, and in all things complied with the provisions and conditions thereof; that in 1888, and early in 1889, the said gas company, at great expense and to the approval of the city, laid its mains in the streets thereof, and, among others, on Madison avenue, and is engaged in supplying over ten thousand consumers of natural gas; that later, in 1889, a macadam, or broken stone pavement was laid by the city on Madison avenue; that in March, 1890, the common council and board of aldermen of said city passed the ordinance referred to in the complaint and alleged to have been violated by the defendant, and that the same was passed without the knowledge or consent of the defendant, and that defendant has never accepted the same or consented thereto, and the appellee further alleges in its answer that it admits that it cut into the macadam pavement, and that it did not procure the consent of the council

and board of aldermen, other than the consent derived under the general ordinance No. 14, a copy of which is filed with the answer, that it did not file any bond, other than that provided for in said ordinance 14.

Said answer further alleged that the acts complained of as a violation of the ordinance mentioned in the complaint consisted only in the digging of a trench in the said street, for the purpose of making and maintaining necessary repairs in the service and connections with the premises, No. ——— Madison avenue, and in no other or different act; that said repairs were necessary in order to enable the consumer at No. ——— on said avenue to secure a sufficient supply of natural gas; that in order to make said repairs it was necessary for it to dig ¹¹⁰ such trench and to cut into the macadam pavement, and said repairs could not otherwise be made; that in doing said work defendant acted in all things under and according to said general ordinance No. 14, and did not act in violation thereof; that the work was done in a careful and prudent manner, according to the requirement of said ordinance No. 14, and that it restored the street and pavement and left it in as good condition as it was before it was open for making the repairs.

The appellant demurred to the answer, which was overruled by the court and an exception reserved. The appellant declined to plead further and elected to stand by its demurrer, and a judgment was rendered against it for costs. In this court the appellant has assigned for error the overruling of its demurrer to the answer.

The ordinance of 1890, upon which this prosecution was based, and a copy of which was made a part of the complaint, is as follows:

“Be it ordained by the common council and board of aldermen of the city of Indianapolis, That it shall be unlawful for any person, firm, or corporation to cut or dig into any street or alley that shall have heretofore been paved with brick or any form of block, macadam, or asphaltic pavement, until such person, firm, or corporation, for whose benefit such proposed opening is to be made, shall have first secured the consent of the common council and board of aldermen so to do, and shall have filed in the office of the city clerk a bond, with at least two freehold securities, to the approval of the mayor, guaranteeing the speedy completion and proper execution of said work, and binding the principal and sureties to protect the city from all liability whatsoever on account of injuries or accidents to persons or

property, or both, occasioned by any such proposed opening, and further ¹¹¹ binding themselves to keep and maintain such part of such street or alley, so cut into or opened, in good condition during the period yet to run on the contract under which said street or alley was originally paved.

"Any person violating any provision of this ordinance shall, upon conviction, be fined in any sum not exceeding one hundred dollars."

The ordinance No. 14, passed by the city of Indianapolis on the twenty-seventh day of June, 1887, a copy of which was set out in the answer of the appellee and made a part thereof, and upon which it relies in justification of its acts, is substantially as follows:

By section 1 it was provided that "Any corporation may lay, extend, and maintain mains, branches, pipes, and conduits through the streets, avenues, lanes, alleys, and public grounds of said city, and may take up for the purpose of altering, changing, or repairing the same, from time to time, as the necessities of the case may require, for the purpose of supplying said city and its inhabitants with natural gas, under and subject to the restrictions and upon the conditions hereinafter set out."

By section 2 a bond of fifty thousand dollars was required to be first filed, conditioned: 1. Not to molest other pipes or sewers; 2. To restore all streets, etc., "to as good condition as they were before, to maintain the same in such condition for one year," and, where the city "shall have taken a bond or agreement from any contractor to keep and maintain the pavements in any street in good repair for a given time, the said corporation shall keep that portion of any such street in good condition and repair for the same period of time stipulated in such bond or agreement between the city and the contractor"; ¹¹² 3. To clear away dirt and rubbish; 4. To reimburse the city for expenses in repairing or clearing away rubbish; 5. To indemnify the city against all claims for damages; 6. To begin work within sixty days after the acceptance of ordinance, and lay twenty-five miles of mains the first year.

By section 3 the mayor may require the renewal of the bond if insufficient by reason of insolvency or death of sureties. Section 4 to section 10, inclusive, prescribe minutely the method and safeguards to be used in doing the work, and that the city may enforce observance. By section 11 the prices of gas are fixed. By section 12 the city reserves the right to require a license fee to

be paid after five years. By section 13 the duty is imposed to supply gas and extend mains on certain conditions. By section 14 the corporation is required first to have a pipe line from the gas field. By section 15 the acceptance of the ordinance is required to be in writing, filed with the clerk. Section 16 imposes a penalty of one hundred dollars for violations. Section 17 reserves the right to the city to grant privileges to other gas companies. By section 18 the city reserves the right to buy the plant of the company after ten years.

The validity of an ordinance being called in question, the jurisdiction of the appeal is properly in this court. The contentions of appellant are: 1. That by the terms of the ordinance of June 27, 1887, the city reserved the right to bind the appellee by the ordinance of 1890; 2. That the macadamized pavement in question was laid after the adoption of the first ordinance, and hence the status was so altered as to change the right of appellee to make the cut or opening on Madison avenue; ¹¹³ 3. That although the first ordinance and the acceptance thereof, upon the part of the gas company, constituted a contract, yet it is subject to the exercise of the police power upon the part of the city, which power cannot be bargained away, and that the ordinance of 1890 is a valid exercise of that power.

These propositions are controverted by the appellee, and it further contends that the second ordinance is not valid and binding upon it, for the reason that it impairs the obligations of the legislative contract existing between the appellant and appellee by virtue of the ordinance of 1887, and its acceptance thereunder, and that it has in no way, under the alleged facts in its answer, violated the penal ordinance in question.

At the time of the passage of the two ordinances mentioned, the city of Indianapolis was operating under the general statute of this state applying to cities, and the exclusive power to regulate and control the use of its streets was clearly granted to it by the legislature: Rev. Stats. 1881, sec. 3161; Rev. Stats. 1894, sec. 3623. This power to regulate, however, must be held not to carry with it the additional right to prohibit, annul, or destroy rights arising out of contract. This we think must be accepted as a well-settled legal principle. Under an act of the legislature approved March 7, 1887, and in force on and after that date (Acts 1887, p. 36), cities were granted the power to regulate the supply, distribution, and consumption of natural gas, and to require persons, or corporations, to whom the privilege of using the streets is granted for the supply and distribution of such gas, to

pay a reasonable fee for such franchise. This power the council and board of aldermen of appellant seemed to have exercised in the passage of the ordinance of June 27, 1887. It is not controverted by the appellant's ¹¹⁴ learned counsel that this ordinance, when accepted by the gas company, constituted a contract, and was binding upon both the company and appellant. It was what is termed a legislative contract, and as such came within the provisions of that clause of the constitution of the United States which forbids the impairment of the obligations of a contract.

It invested the appellee with the right of property in the franchise granted, which appellant, unless the right was reserved, could not take away or impair without appellee's consent by any subsequent act: *Dartmouth College v. Woodward*, 4 Wheat, 518; *Mayor etc., of New York v. Second Avenue R. R. Co.*, 32 N. Y. 261.

This contract being within the scope of the power invested in appellant, and not in violation of public policy nor tainted with fraud, must be as binding and enforceable as that of a private corporation or person: *Indianapolis v. Indianapolis etc. Co.*, 66 Ind. 396.

While it is true, as herein stated, that the exclusive power to regulate and control the use of its streets is vested in the city, this use, however, is not restricted to that of transit alone, but it also extends to the laying of gas and water pipes and to the promotion of the public health and convenience: *Cummins v. Seymour*, 79 Ind. 491; 41 Am. Rep. 618; *Angell on Highways*, sec. 216.

Keeping in view these principles of law, as herein stated, we will consider the respective contentions of the parties to this action.

1. Did the appellant, by the terms of the ordinance of 1887, reserve the right to bind the appellee by the provisions of that of 1890? The clause in the former ordinance relied on by the appellant as giving it that power is as follows:

"It shall be, and is hereby made, the duty of the city ¹¹⁵ attorney to institute such legal proceedings as may be necessary to compel a compliance with the provisions of this ordinance and with all other ordinances now in force or hereafter passed, and all acts of the general assembly affecting such natural gas companies."

We do not think that the construction of this clause by the learned counsel for appellant can find any legal support to main-

tain it. Guided by a well-established rule, that the entire ordinance must be read and construed together, the meaning and object of this clause is obvious. In section 9 of the ordinance it is provided that, when work is being done in an improper manner, the council and board of aldermen shall have the power to pass and enforce such ordinances as will remedy the defects. In other sections it is provided that certain rights are to be exercised by the means of the adoption of ordinances, and we think it is the enforcement of these that are contemplated and which are in harmony with the first ordinance. In fact, this clause does not partake of the character of a reservation, but more properly defines the duties of the city attorney.

2. Does the fact that the pavement in question was laid upon the street after the passage of the ordinance of 1887 and its acceptance by appellee restrict the rights granted to it to lay, extend, and maintain its gas mains through the streets of appellant in a prudent and lawful manner, and from time to time to take up the same, repair, and replace them? We think not. The appellee had been granted the right to use the streets for the purpose mentioned, and the mere fact that any particular street was thereafter paved with brick or macadam would not deprive appellee of exercising its rights under the ordinance upon which it relies. This is manifest when we recognize that the conditions of the bond required of the corporation availing itself of the franchise granted were ¹¹⁶ that all streets should be restored to as good a condition as they were before, and to maintain the pavement in good repair, where the city had an agreement with the contractor to like effect. As said the learned counsel for appellee: "If a macadamized pavement covers up the appellee's rights, so would one constructed of gravel, and so would even slight repairs, for the condition of the streets would be changed from what it was when the ordinance was accepted." It is evident, we think, that this contention has no support.

3. Is the ordinance of 1890 a valid exercise of the police power which the city did not surrender in granting to appellee the franchise in question? There was no compulsion on the part of the appellant to grant the privilege to use its streets to any particular company. It was within its discretion to give or not to give its consent, and it had the right to withhold it from all gas companies: *Citizens' Gas etc. Co. v. Town of Elwood*, 114 Ind. 332.

It was not limited alone to the granting of this franchise, but it had the right to prescribe and impose terms and conditions:

Dillon on Municipal Corporations, sec. 706; 2 Wood on Railways, 986; Elliott on Roads and Streets, 565.

When these terms and conditions, proposed by the appellant, were accepted by the appellee and complied with, it became a binding contract: *Western etc. Co. v. Citizens' etc. R. R. Co.*, 128 Ind. 531; 25 Am. St. Rep. 462.

But the appellant contends that such grants are but the exercise of police power, and may be changed or repealed by the granting power. It is true that in grants to persons or corporations to supply gas and the like to the inhabitants of towns or cities, the municipality does not part with or bargain away its right under the police power to protect the public health, the public morals ¹¹⁷ and public safety, as the one or the other may be affected by the exercise of the franchise by the grantee": *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *Beach on Public Corporations*, secs. 713, 990, 1229, 1230.

In the case of *Indianapolis v. Indianapolis etc. Co.*, 66 Ind. 396, it was contended, upon the part of the city, that the contract in controversy was a restriction upon the legislative power to regulate the lighting of the streets.

But this court, in that case, drew the distinction between legislative and contractual powers of municipal bodies as follows: "These two powers need not be confounded. The exercise of the legislative power requires the consent of no person except those who legislate; while it is impossible to make a contract without the consent of another or others. We think, therefore, that when the city of Indianapolis made the contract in question with the gaslight company, it made it in the exercise of its power to contract, and not in the exercise of its power to legislate, although the power to make the contract was authorized by an ordinance; and, having the power to make a contract touching the subject matter, it had the right to make it according to its own discretion as to its prudence or good policy, within the limits of its franchise. Nor can we see that the contract in the least restricts the legislative powers of the city, except that, as the sanctity of the contract is shielded by the constitution of the United States, it cannot, in the exercise of its legislative power, impair its validity; for it would be a solecism to hold that a municipal corporation can impair the validity of a contract, when the state which created the corporation, by its most solemn acts, has no such power": See, also, *Ohio Life Ins. etc. Co. v. Debolt*, 16 How. 416.

The appellant cites *Stone v. Mississippi*, 101 U. S. 814, in ¹¹⁸

support of its contention that the grant to appellee to use the streets was the exercise of its police power, but this case decides only that the abolition of a lottery was clearly within this power, as lotteries are contrary to public morals. The case has no bearing upon the rule which the appellant insists ought to be applied in the case now before us.

Chief Justice Waite, in this case, speaking for the court, on page 818, said: "Many attempts have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself which will be in all respects accurate. No one, however, denies that it extends to all matters affecting the public health or the public morals."

This, we think, enunciates the true rule. We cannot agree and hold with the appellant that the second ordinance, upon which this prosecution is based, should be regarded as an exercise of the police power under discussion, so as to bind the appellee under the facts alleged in its answer, and thereby compel it to comply with its terms and conditions in the exercise of the rights granted to it by the first ordinance. The ordinance in question is "imperative and sweeping," and for no purpose can a cut be made in the pavements mentioned therein without the consent of the board of aldermen and council first obtained, and the filing of the bond. No one is excepted from its provisions.

We judicially know that by reason of changes occurring from extreme heat, cold, and pressure, leaks will and do occur in gaspipes, which require immediate repair. If, then, it should be held that in making these repairs—wherein it would be necessary to uncover the ¹¹⁹ mains—the appellee must await the pleasure of the council and board of aldermen in giving its consent, it would be virtually in the same condition as though it had not secured the rights and franchise under the ordinance of 1887.

Penal ordinances, like penal statutes, are not always, nor ought they to be, construed literally, and courts will make the necessary exception: *Donnell v. State*, 2 Ind. 658; *Nixon v. State*, 76 Ind. 524.

We are constrained to hold that the ordinance of 1890 is inoperative and void, so far as it may be invoked to abridge or restrict appellee in the exercise of the rights and privileges acquired by it under the ordinance of 1887.

In consonance with reason, it cannot be held that the appellee, which had already obtained the consent of the city by virtue of

the ordinance last mentioned, must be required to secure a new consent. The right on the part of the appellant to consent implies the right to refuse, therefore, it could, by refusing consent, effect a complete prohibition. This, evidently, is not the intent or spirit of the ordinance of 1890.

The case of *Lewisville Natural Gas Co. v. State*, 135 Ind. 49, favors and supports the conclusion reached by the court in this case.

We have examined the cases cited by the appellant, but they do not sustain their contention, and we do not deem it necessary to refer to them all in this opinion in detail. We, therefore, adjudge that the ordinance of 1890, as against appellee, in view of the facts set forth in its answer, is inoperative and so far void, and that the court did not err in overruling the demurrer.

Judgment affirmed, at the cost of appellant.

All concur.

MUNICIPAL CORPORATIONS—CONTROL OF STREETS—IMPAIRMENT OF CONTRACT.—When the right to use a street is acquired pursuant to a statute and under a license from the municipality, it is in the nature of a contract right and the municipality itself cannot destroy or materially impair it: *Williams v. Citizens' Ry. Co.*, 130 Ind. 71; 30 Am. St. Rep. 201, and note. A municipal ordinance granting to a company authority to construct and maintain telephone lines on the streets of a city, without any limitation as to time, and for a consideration named therein, is, when accepted and acted upon by the grantee, by complying with its conditions and constructing a valuable plant, a contract with the city, which cannot thereafter be abolished or altered in its essential terms without the consent of the grantee: *New Orleans v. Great Southern Teleph. etc. Co.*, 40 La. Ann. 41; 8 Am. St. Rep. 502. To the same effect, see *Gregsten v. Chicago*, 145 Ill. 451; 36 Am. St. Rep. 496, and note.

JACKSON v. PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY.

[140 INDIANA, 241.]

NEGLIGENCE CAUSING DEATH—RIGHT TO MAINTAIN ACTION.—At common law a civil action does not lie for causing the death of a human being. In an action by a father to recover for negligently causing the death of his child in another state, it is presumed that the common law prevails in that state.

PARENT AND CHILD—ACTION FOR LOSS OF SERVICE—INJURY CAUSING DEATH.—At common law a parent may recover damages from a wrongdoer for depriving him of the services of his child, and when the act causes death he may recover for the services of the child from the time of the injury until its death, together with any incidental damages he may have suffered, such as medical attendance, care and nursing up to that time, but when the death is instantaneous or practically so, no redress is possible. Funeral expenses are recoverable in this class of cases only by virtue of statute.

W. V. Rooker, for the appellant.

S. N. Chambers, S. O. Pickens, and C. W. Moores, for the appellee.

²⁴² MONKS, J. This is an action brought by appellant against appellee for negligently killing his child, aged one year. The complaint is in three paragraphs, each of which charges, as an element of damages, that appellant incurred and paid one hundred dollars' necessary expense in the burial of said child. A demurrer to each paragraph for want of facts was sustained and exception taken. Judgment was rendered on demurrer against appellant. The errors assigned call in question the ruling of the court below as to each paragraph of the complaint. It is averred in each paragraph that the alleged negligent killing of the child occurred in the state of Ohio.

There is no averment in the complaint that the common law of Ohio had been changed, or that any statute was in force there which authorized the father to maintain an action for damages for the death of his child.

There being no allegation that there is such a statute, the presumption is that the common law on this subject prevails in that state: *Smith v. Muncie Nat. Bank*, 29 Ind. 158, and authorities cited.

The right, therefore, of appellant to recover depends upon the common law and not upon any statute: *Buswell on Personal Injuries*, sec. 28.

It is settled law that a civil action would not lie at common law for causing the death of a human being: *Gann v. Worman*, 69 Ind. 458; *Burns v. Grand Rapids etc. R. R. Co.*, 113 Ind. 169; *Baker v. Bolton*, 1 Camp. 493; *Carey v. Berkshire R. R. Co.*, 1 Cush. 475; 48 Am. Dec. 616; *Cooley on Torts*, 15, 16, 307; *Hyatt v. Adams*, 16 Mich. 179; 1 *Shearman and Redfield on Negligence*, sec. 124; *Deering on Negligence*, sec. 387.

Counsel for appellant admit the rule, but contend that expenses necessarily incurred and paid by appellant ²⁴³ in the burial of the child could be recovered at common law, and that such averment in the complaint renders it sufficient to withstand the demurrer. Could the father recover at common law the necessary expense incurred and paid in the burial of his child from the wrongdoer whose negligence caused its death, when the same was instantaneous or practically so? The rule at common law is that a parent may recover from a wrongdoer damages for depriving him of the services of his child, upon the same

principle that the master recovers for loss of services of his servants.

When the act of the wrongdoer which deprives the father of the services of his child causes its death, the father may recover for the services of the child from the time of the injury until its death, and may also recover any incidental damages he may have suffered, such as medical attendance, care, and nursing up to that time: *Binford v. Johnston*, 82 Ind. 426; 42 Am. Rep. 508; *Mayhew v. Burns*, 103 Ind. 328; *Dennis v. Clark*, 2 Cush. 347; 48 Am. Dec. 671; *Hyatt v. Adams*, 16 Mich. 179; *Cooley on Torts*, 307, 308; *Buswell on Personal Injuries*, secs. 12, 13.

But when death is instantaneous, or practically so, no redress was possible at common law: *Osborne v. Gillette*, L. R. 84 Ex. 88; *Mayhew v. Burns*, 103 Ind. 328; *Hyatt v. Adams*, 16 Mich. 179; *Cooley on Torts*, 308; *Buswell on Personal Injuries*, sec. 15.

Under these authorities, appellant cannot, in this case, recover any damages on account of the death of his child. The burial expenses alleged being caused by the death of the child, it necessarily follows that appellant cannot recover therefor. Funeral expenses are recovered in this class of cases by virtue of the statute: *Murphy v. New York etc. R. R. Co.*, 88 N. Y. 445.

Counsel for appellant urges that this court has held ²⁴⁴ that such damages are recoverable at common law, and cites *Pennsylvania Co. v. Lilly*, 73 Ind. 252; *Binford v. Johnston*, 82 Ind. 426; 42 Am. Rep. 508; *Mayhew v. Burns*, 103 Ind. 328.

In the case of *Pennsylvania Co. v. Lilly*, 73 Ind. 252, which was an action by the father to recover damages under section 266 of the Revised Statutes of 1881 (Rev. Stats. 1894, sec. 267), *Niblack J.*, speaking for the court, said: "It is well settled that, in an action by a parent for the death of his child, he is entitled to recover only for the pecuniary injury he has sustained, and that the proper measure of damages is the value of the child's services from the time of the injury until he would have attained his majority, taken into consideration with his prospects in life, less his support and maintenance. To this may be added, in proper cases, the expense of care and attention to the child, made necessary by the injury, funeral expenses, and medical services."

We think all the damages defined in the above case may be recovered under section 266 of the Revised Statutes of 1881 (Rev. Stats. 1894, sec. 267), but there is nothing in the opinion indicating what part of the damages, if any, enumerated could have been recovered at common law. That is, however, clearly shown by the authorities cited to be for loss of services from time of

injury until death, and expense of medical attendance and care and nursing to that time. Section 266 of the Revised Statutes of 1881 (Rev. Stats. 1894, sec. 267) included these elements and conferred a new right to the extent of the others mentioned in *Pennsylvania Co. v. Lilly*, 73 Ind. 252.

In the case of *Binford v. Johnston*, 82 Ind. 426, 42 Am. Rep. 508, this court held that the averments in the complaint that the father had expended money and rendered services in an effort to cure his son, from the time he was injured until his death, stated a personal right of action in the father recognized by the common law, which was separate and distinct ²⁴⁵ from the right of action which was statutory: Citing *Cooley on Torts*, 1st ed., 262.

In *Mayhew v. Burns*, 103 Ind. 328, Mitchell, J., speaking of the right of the parent at common law, said: "A parent might and still may, without any statute, recover for loss of services resulting from a wrongful injury to his child during the period of disability occasioned by such injury, and, if death resulted, for the loss of services during the time between the injury and death. In addition, a parent had his common-law remedy to recover for such incidental damages, as for medical attendance, care, and nursing, up to the time of death, if death resulted. This was upon the theory that the parent was entitled to the services of the child at the time the injury was inflicted, and owed the child the corresponding obligation of care, nursing, and medical attendance. . . . Where death resulted instantaneously, or practically so, and no incidental expenses accrued, no action whatever was maintainable by the parent after the death of the child."

These cases give no support to the contention of the appellant, but are in harmony with and strongly sustain the legal propositions affirmed in this case. For the reasons given, the court did not err in sustaining the demurrer to the complaint. Other tenable objections are urged to the complaint, but it is not necessary to consider them.

Judgment affirmed.

NEGLIGENCE—ACTION IN ONE STATE FOR DEATH CAUSED IN ANOTHER.—An action to recover damages for injuries received in another state, resulting in the death of the person injured, can be maintained in the state of New York only upon proof that the statutes of such other state give the right and are similar in character and import to the New York statutes: *Wooden v. Western New York etc. R. R. Co.*, 126 N. Y. 10; 22 Am. St. Rep. 803, and note. The Pennsylvania statute giving the right of action for negligently causing death has no extraterritorial force: *Usher v. West Jersey R. R. Co.*, 126 Pa. St. 206; 12 Am. St. Rep. 863, and note. See, especially, the extended note to *Attrill v. Huntington*, 14 Am. St. Rep. 353, 354.

PARENT AND CHILD—PARENT'S ACTION FOR LOSS OF SERVICES OF CHILD.—A widowed mother with whom a minor child lives, and for whom the child works as a member of the family, is entitled to recover for the loss of services of the child so far as it is the consequence of an injury to the child negligently caused by the defendant: *Hogan v. Pacific Mills*, 158 Mass. 402; 35 Am. St. Rep. 504, and note; notes to *Lawyer v. Fritcher*, 27 Am. St. Rep. 528, and *Texas etc. Ry. Co. v. Brick*, 29 Am. St. Rep. 678; also the extended note to *Carey v. Berkshire R. R. Co.*, 48 Am. Dec. 622.

PRICE v. HALL.

[140 INDIANA, 314.]

COTENANCY—OUSTER BY ADVERSE POSSESSION.—A conveyance by one cotenant, purporting to include the entire land and estate, followed by possession and claim of title, taken, continued, and asserted as adverse for the period of limitation with intent to oust the other cotenants, constitutes an ouster as to them and bars their right to recover.

COTENANCY—OUSTER BY ADVERSE POSSESSION.—A purchaser from a cotenant in possession by a conveyance purporting to include the entire estate, who, after his purchase, and while in possession, executes notes to protect the interests of the cotenants out of possession, does not, by mere occupancy for the period prescribed by statute, thereby oust them, nor acquire their title by adverse possession.

S. O. Bayless and C. G. Guenther, for the appellants.

O. E. Brumbaugh and J. Combs, for the appellee.

³¹⁴ **HACKNEY, J.** This action was by the appellee, seeking to quiet the title to the lands in question. The issue in this court is as to the sufficiency of the appellants' reply to the appellee's answer to a cross-complaint, in which the appellants claimed an undivided one-fifth interest in said lands as tenants in common with the appellee, and ³¹⁵ as to the only heirs of Sarah Price, deceased, who held as a daughter and heir of Thomas Ramsey, deceased.

The answer to this cross-complaint was in two paragraphs, each setting up the appellee's ownership by purchase, the continuous and exclusive use and occupancy, under claim and color of title, with the knowledge of the appellants and without claim of title or interest on their part.

The first paragraph alleged the existence of such facts for fifteen years, and the second paragraph for twenty years, before the bringing of this suit. The reply to this answer, and which the lower court held bad upon demurrer, admitted the appellee's occupancy, as alleged in the answer, excepting that it was averred that such occupancy was without the knowledge and consent of

the appellants. It was further alleged that the appellee and her grantors recognized the rights and interests of the appellants, at the times of the several conveyances under which she and her grantors claim title, by estimating the value of such interests, and executing promissory notes in the amount of such value, and "for the purpose of protecting and preserving and continuing the cross-complainant's interests and protecting the parties purchasing and holding said real estate, and for the further purpose of protecting the parties giving warranty deeds in the sale and transfer of said real estate."

It is conceded by counsel for the appellee that the possession of one tenant in common is ordinarily the possession of all, and that mere lapse of time under such occupancy does not ripen into title by adverse possession. But it is insisted that a conveyance purporting to include the entire estate, by such occupying tenant in common, and a subsequent occupancy by the grantees for the period of limitation prescribed by statute, in the absence of a recognition of the claim of the tenant out of the actual ³¹⁰ occupancy, constitutes an ouster of, and title by adverse possession against, such tenant.

It is a general rule that a conveyance by one cotenant, purporting to include the entire land and estate, where possession and claim of title are taken and continued for the period of limitation, is regarded as constituting an ouster of the other tenants, and as creating a bar to recovery by them: *Unger v. Mooney*, 63 Cal. 586; 49 Am. Rep. 100; *Long v. Stapp*, 49 Mo. 506; *Hinkley v. Greene*, 52 Ill. 223; *Kinney v. Slatery*, 51 Iowa, 353; *Sands v. Davis*, 40 Mich. 14; *Higbee v. Rice*, 5 Mass. 344; 4 Am. Dec. 63; *Hodges v. Eddy*, 38 Vt. 327; *Forest v. Jackson*, 56 N. H. 357; *Clark v. Vaughan*, 3 Conn. 191; *Bogardus v. Trinity Church*, 4 Paige, 178; *Foulke v. Bond*, 41 N. J. L. 527; *Dikeman v. Parrish*, 6 Pa. St. 210; 47 Am. Dec. 455; *Caperton v. Gregory*, 11 Gratt. 508; *Covington v. Stewart*, 77 N. C. 148; *Gray v. Bates*, 3 Strob. 498; 1 Am. & Eng. Ency. of Law, 234, and numerous cases there cited. See, also, *Nelson v. Davis*, 35 Ind. 474; *English v. Powell*, 119 Ind. 93, and cases there cited, where the same general rule has been accepted and adopted in Indiana.

Has this general rule an exception, and does that exception exist in the case in hand? If such exception exists, it must be found in another general and equally well-settled rule, namely: that in the case of cotenants, an ouster is not effected unless the possession asserted as adverse has been taken and continued with the intent to oust the other tenants: *Maple v. Stevenson*, 122 Ind.

368; *Peter v. Stephens*, 11 Mont. 115; 28 Am. St. Rep. 448, note 451; *Evans v. Templeton*, 69 Tex. 375; 5 Am. St. Rep. 71; *Flynn v. Lee*, 31 W. Va. 487; *McDonald v. Fox*, 20 Nev. 364; *La Frombois v. Jackson*, 8 Cow. 589; 18 Am. Dec. 463; *Miller v. Myles*, 46 Cal. 535; *Culver v. Rhodes*, 87 N. Y. 354; *Newell v. Woodruff*, 30 Conn. 492; *Cummings v. Wyman*, 10 Mass. 464.

³¹⁷ In 1 American and English Encyclopedia of Law, page 227, it is said: "An adverse possession depends upon the intention with which it was taken and held": Citing many cases. In the same work, volume 17, page 289, it is again said: "The intention guides the entry and fixes its character." In the same valued work, volume 1, page 233, note 2, it is said: "Evidence must make the intention to hold adversely manifest and palpably display such intention: *Marcy v. Marcy*, 6 Met. 360; *Prescott v. Nevers*, 4 Mason, 326; *Hart v. Gregg*, 10 Watta, 185; 36 Am. Dec. 166; *Culver v. Rhodes*, 87 N. Y. 354."

The evidenceto sustain an ouster by a cotenant must be stronger than that to sustain ordinary adverse possession: *Barret v. Co-burn*, 3 Met. (Ky.) 510; *Forward v. Deetz*, 32 Pa. St. 69; *Bailey v. Trommel*, 27 Tex. 328." See, also, *Highstone v. Burdette*, 54 Mich. 329.

We have no doubt that under the first of these general rules, in the absence of any facts or circumstances from which a contrary intention might reasonably be inferred, the occupancy and exclusive enjoyment under a deed to the entire land and estate, with the knowledge, actual or constructive, of the tenant out of possession, would, prima facie, if continued for the statutory period of limitation, constitute an ouster and adverse possession. The circumstance, therefore, of the execution of promissory notes by the appellee, and previously by her grantors, for the purposes alleged in the reply, that is to say, to protect, preserve, and continue the interests of the tenants out of actual possession must be held sufficient to overcome the apparent intention arising from the prima facie case stated in order to uphold the reply. The reply was not as full and specific as its importance would seem to require, but this was excused by the allegation that the facts were not more fully known to the appellants. As we construe the facts pleaded, they constitute ³¹⁸ a specific denial of the allegation of the answers that the appellee's occupancy was under claim of title to the whole lands. It is not our province to suggest what evidence should be required, but we have no doubt that upon the reply the issue is made as to the intended ouster and adverse claim of title by the appellee.

The judgment of the circuit court is reversed with instructions to overrule the demurrer to said reply.

COTENANCY—ADVERSE POSSESSION—CONVEYANCE OF WHOLE TRACT BY ONE COTENANT.—A cotenant who sells and conveys the whole of the land held in common and gives possession, thereby creates in the grantee a title and possession adverse to the other cotenants, and if such grantee continues to hold for the period of time prescribed by the statute of limitations, he thereby acquires a good title as against them: *King v. Carmichael*, 136 Ind. 20; 43 Am. St. Rep. 303, and note with the cases collected.

MCGAHAN v. INDIANAPOLIS NATURAL GAS COMPANY.

[140 INDIANA, 335.]

EVIDENCE.—JUDICIAL NOTICE is taken by the courts of the fact that natural gas does not explode spontaneously.

NEGLIGENCE—PROXIMATE CAUSE—PLEADING.—A complaint to recover for injury caused by the escape and explosion of natural gas through negligence, without alleging what brought about such explosion, does not state facts sufficient to constitute a cause of action, and is bad on demurrer.

NEGLIGENCE—PROXIMATE CAUSE—INTERVENING AGENT.—A responsible agent, intervening between the original negligence and the injury, cuts off the line of causation, and relieves the originally negligent party from liability.

S. M. Shepard and J. P. Baker, for the appellant.

W. H. H. Miller, F. Winter, and J. B. Elam, for the appellee.

335 HACKNEY, C. J. This action was by the appellant, and by it he sought to recover damages for personal injuries **336** resulting from an explosion of natural gas. The complaint was in two paragraphs, to each of which the lower court sustained the appellee's demurrer, and that ruling is the only assigned error. The material facts alleged were that the appellee was engaged in supplying natural gas, for fuel and other purposes, to the citizens of the city of Indianapolis; that a tenement occupied by one Kilburn was supplied with natural gas by said company, through a service pipe of said company extending from its mains to the property line, and there connecting, by a valve, with the pipes of said tenement; that said tenant discovered that the gas was escaping from the pipes upon said premises, and after passing through said valve; that she employed the appellant, an experienced plumber, to locate and remedy the defect in the pipes which permitted the gas to so escape; that said valve was for the purpose, and was the only means, of cutting off the supply of gas

from the appellee's mains to said premises, and it was under the exclusive control of the appellee; that to repair said defect it became necessary to have said supply of gas cut off, and for that purpose the appellee was repeatedly requested, and promised, to have said valve turned without delay, but, through the negligence of said company, and its incompetent servants, said valve was not so turned, and said gas continued to escape within said tenement for more than twenty-four hours; that during that period, and while upon a second visit to said premises, the appellant was engaged in searching for said defect, and, while so engaged, said natural gas, then being inflammable and liable to explode, did explode with such violence as to produce the injuries complained of.

It is also alleged that appellant was free from contributory negligence, and that the appellee knew of the dangerous character of said natural gas, but there is no allegation as to the cause of such explosion, nor that the gas ³³⁷ would have exploded without some intervening agency.

That it was negligence to omit to turn off the gas from said premises when so requested is not controverted, and we do not decide, but it is insisted that this alleged negligence was not the proximate cause of the injury, and that the specific facts pleaded disclose the negligence of the appellant contributing to the injury.

That the injury complained of must appear, from the facts alleged, to have been the proximate result of the appellee's negligence is not questioned by the appellant, but it is argued that the injury resulted proximately from the failure to turn the gas from said premises. It is said that "had not the appellee been guilty of the negligence alleged, the injuries to the appellant would not have happened." This argument is not tenable, since it can be said, with equal propriety, that the injury would not have been sustained if the appellant had not undertaken the known dangerous experiment of searching for the defect while the gas was flowing into the pipes of the tenement. But we can say, as a matter of common knowledge, that the injury was not due to spontaneous combustion, and that it was impossible without some agency acting upon the leaking gas; therefore, we can say further that but for such agency the injury had not been.

We cannot say that the intervening agent was not a responsible agent, one not conscious of the presence and dangerous character of the explosive, as an infant or an insane person. The facts essential to a consideration of this important question are

wholly absent. The burden rested upon the appellant to allege facts showing that the injury was due to the appellee's negligence, and, from the facts alleged, we learn that the omission complained of supplied the condition upon which, necessarily, some ³³⁸ agent acted in producing the injury, the omission being an antecedent to the explosion.

If the omitted facts should disclose an agency for which the appellee was responsible, a different case would be made, and if such facts disclosed that the appellant sought the defect in the pipe carrying a lighted lamp, which caused the explosion, the question would then arise as to whether his own act was not the intervening agency, and whether the act so operating did not insulate the negligence of the appellee from the injury and establish contributory negligence. The facts alleged do not disclose peril to the appellant or any other person urging him to hazard his life in searching for the defect before the gas was cut off, and thereby possibly excusing the intervention of such agency.

The defective pipe is not charged to any negligence of the appellee, and the presence of the escaping gas, and its dangerous character, are not alleged to have been unknown to the appellant. The facts as they are presented raise the inquiry as to whether the alleged negligence of the company was the proximate cause of the injury, regardless of whatever agency intervened. If it can be said that the escaping gas was the direct and efficient or proximate cause of the injury, to the exclusion of every fact or circumstance that might have operated upon it, and that no agency could have taken it up and employed it so as to have become the dominating and effective cause, then this complaint is sufficient, so far as this question is concerned, otherwise it is not.

In *Cuff v. Newark etc. R. R. Co.*, 35 N. J. L. 17, 10 Am. Rep. 205, it was said in considering the question of intervening agencies: "A places a log in the highway, which B casts into an adjoining close, or puts an obstruction upon the sidewalk, which passers-by throw into the roadway of the street, and a traveler is injured by coming ³³⁹ in contact with it. A cannot be held for the trespass in the one case, nor for the injury in the other."

Mercer, J., in *Oil Creek etc. Ry. Co. v. Keighron*, 74 Pa. St. 320, said: "Natural and proximate cause . . . I understand to be, that the cause alleged produced the injury complained of, without any other cause intervening."

In *Carter v. Towne*, 103 Mass. 507, gunpowder had been sold to a boy, and subsequently came under the control of adults, who permitted the boy to fire it off. For the injury resulting to

the boy from the explosion of the powder, it was held that the merchant was not liable, because of the intervening negligence of the adults in so permitting the use of the powder. The rule that an intervening responsible agent cuts off the line of causation from the original negligence has been many times recognized by this court: *New York etc. R. R. Co. v. Perriquee*, 138 Ind. 414, and cases there cited; and this is not questioned by the learned counsel for appellant; therefore if we may indulge the ordinary presumptions against the pleading under consideration, in the absence of any allegation as to the agency necessary to have intervened, we will presume that it was a responsible agent. The presumption most favorable to appellee must be indulged, and that is that the intervening agency was the appellant's own act in carrying a lighted lamp, which caused the explosion. Leaving out of view the doctrine of contributory negligence, the skill of the appellant in the business of plumbing, and his acquaintance, necessarily, with the explosive character of natural gas, gives emphasis to his responsibility for the explosion, in the introduction of some intervening agency: See *Bartlett v. Boston Gas Light Co.*, 117 Mass. 533; 19 Am. Rep. 421; *Fitzgerald v. Connecticut River etc. Co.*, 155 Mass. 155; 31 Am. St. Rep. 537.

³⁴⁰ The complaint was insufficient, and the circuit court committed no error in sustaining the appellee's demurrer.

The judgment is affirmed.

NEGLIGENCE—PROXIMATE CAUSE—INTERVENING AGENCY.—When the independent act of a responsible person intervenes between the defendant's negligence and the injury sustained, such act breaks the causal connection between the negligence and the damage, and he who is guilty of the original negligence is not chargeable, but redress must be sought from him who directly caused the injury, unless the intervening act is such as might reasonably be anticipated as the natural or probable result of the original negligence: *Mahogany v. Ward*, 16 R. I. 479; 27 Am. St. Rep. 753, and note. See the full discussion of this subject in the extended notes to *Henev v. Dennis*, 47 Am. Rep. 882, and *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 836.

BOWEN v. RATOLIFF.

[140 INDIANA, 323.]

MORTGAGES—DESCRIPTION OF DEBT.—A mortgage to be valid must in some way describe and identify the indebtedness it is intended to secure. Literal accuracy is not required, but the description of the debt must be correct, so far as it goes, and full enough to direct attention to the sources of correct information in regard to it, and be such as not to mislead or deceive as to the nature or amount of it.

MORTGAGES—DESCRIPTION OF DEBT.—RENEWAL NOTES given for notes not described in a mortgage, or notes given for an indebtedness not secured by mortgage, are not secured by such mortgage.

MORTGAGES—DESCRIPTION OF DEBT—FORECLOSURE.—If the amount of the debt secured is not specified in the mortgage, the mortgagor can recover on foreclosure only so much as he shows affirmatively to be due.

M. Winfield, R. C. and C. R. Pollard, and C. E. Taber, for the appellants.

W. C. Smith, G. W. Julien, and M. A. Ryan, for the appellee.

323 **MONKS, J.** Harvey J. Ball made an assignment under the law to appellee, Abner Ratcliff, his assignee. Ratcliff, as assignee, on the first day of January, 1894, filed his petition in the Carroll circuit court, asking for the sale of the following described real estate in Carroll county, Indiana, to wit:

The northwest fractional quarter of section 31, township 24 north, range 1 west, containing 147 12-100 acres of land. He made the appellants Abner T. Bowen, John A. Cartwright, and Edward W. Bowen, a firm doing business under the name and style of A. T. Bowen & Co., and a firm doing business under the name and style of the Citizens' Bank, defendants to his petition, alleging **324** in his petition that Harvey J. Ball had executed a mortgage to the Citizens' Bank of Delphi, Indiana, bearing date of the fourth day of October, 1892, for the sum of \$1,500, with eight per cent interest; that the same became due on the fourth day of September, 1893; and one mortgage executed by Harvey J. Ball and wife to the said A. T. Bowen & Co., bearing date March 2, 1893; that the said mortgage executed by Harvey J. Ball and wife to the said A. T. Bowen & Co. does not set forth the amount secured by said mortgage, and your petitioner does not know what said mortgage secures; that the said Citizens' Bank and the said A. T. Bowen & Co. also held a large amount of notes which were assigned to them by the said Harvey J. Ball as collateral security, and he makes the said A. T. Bowen & Co's bank and the Citizens' Bank parties hereto, that the amount of their liens may be ascertained and fixed by the court, and that

he be authorized to pay the amount found due the said Citizens' Bank and the said A. T. Bowen & Co. out of the proceeds of said sale.

Other lienholders were also made parties, and the petitioner asks the court that the defendants, including appellants, be required to answer the petition and to set up the amounts of their liens.

Appellants appeared and filed answer. The substance of the answer is that appellants held several notes signed by the said Harvey J. Ball with others: One dated February 21, 1893, due one month after date, for \$1,434.98, upon which has been paid different amounts. Two notes for \$200 each, dated July 1, 1889, due on the 1st of January after date, which had been assigned in writing to appellants. One note, dated March 10, 1893, due two months after date, for \$840.60, with interest. ³⁹⁵ One note, dated December 22, 1890, due one year after date, for \$461, with interest at the rate of eight per cent. One note, dated March 12, 1890, due seven months after date, for \$147.87, with interest. One note, dated March 10, 1893, due in three months after date, for \$1,000, with interest, upon which some payments had been made. One note, dated November 19, 1888, due in nine months from date, for \$100, assigned to appellants in writing, with attorney's fees. One note, dated January 2, 1892, due on the first day of September, 1892, for \$35, with interest, and assigned to appellants. One note, dated January 2, 1892, due the first day of January, 1893, for \$35, with interest, and assigned to appellants. That all of these notes were secured by a mortgage upon the land described in the petition, executed by the said Harvey J. Ball and Eunice A. Ball, his wife, on the second day of March, 1893.

The description in the mortgage is as follows: "Harvey J. Ball and Eunice A. Ball, his wife, of Carroll county, state of Indiana, mortgage and warrant to A. T. Bowen and Company, of Carroll county, in the state of Indiana, the following real estate in Carroll county, in the state of Indiana, to wit [describing the land]; and to secure any notes that may be given for renewal of said notes, or any part thereof, or for interest thereon, and any future advances or other indebtedness due, or that may hereafter become due, the mortgagees or either of them from the mortgagors or either of them, to the amount of \$10,000."

The answer avers that appellants admit they have and hold a lien on the real estate described in said petitioner's ³⁹⁶ petition in the sum of \$3,999.90; that the same consists of promissory

notes made, executed, and delivered by the said Harvey J. Ball, upon different occasions and at different times, to the said A. T. Bowen & Co., and upon certain notes that were executed by the said Harvey J. Ball to different parties, and assigned by said parties in writing, to the said A. T. Bowen & Co., and upon certain other notes which were by the said Ball assigned, in writing, to said appellants herein; all of which notes are long since due, and remain wholly unpaid. Copies of each of said notes, and the mortgage securing the same, are each filed with and made a part of the answer, and that said notes were given for renewal of certain notes which were surrendered up at the time of the giving and assigning the notes to said Bowen by said Ball, and for other indebtedness due said Bowen and for advancements made to said Ball; appellants aver that said mortgage was duly recorded on the thirtieth day of March, 1893, in the records of the recorder's office of Carroll county, Indiana; that said notes are secured by said mortgage. And appellants ask in their answer that their lien be ascertained and protected in the decree ordering the sale of the property, and that the same be paid out of the proceeds of the sale. Appellee, Ratcliff, filed a demurrer to appellants' answer, which was sustained by the court, to which ruling appellants reserved an exception.

The court thereupon rendered judgment against appellants for costs, and ordered that said real estate be sold by said assignee. The objection urged in the answer of appellants was that there is no sufficient description of the debt secured by the mortgage.

A mortgage, to be effective, must in some way describe and identify the indebtedness it is intended to secure: ³⁹⁷ Philbrooks v. McEwen, 29 Ind. 347; Brick v. Scott, 47 Ind. 299.

Literal accuracy in describing the debt secured by the mortgage is not required, but the description of the debt must be correct so far as it goes, and full enough to direct attention to the sources of correct information in regard to it, and be such as not to mislead or deceive as to the nature or amount of it by the language used: *New v. Sailors*, 114 Ind. 407; 5 Am. St. Rep. 632; *Ogborn v. Eliason*, 77 Ind. 393; *Aetna Life Ins. Co. v. Finch*, 84 Ind. 301; *Jones on Mortgages*, secs. 70, 343.

In *New v. Sailors*, 114 Ind. 407, 5 Am. St. Rep. 632, this court said: "It is essential that the character of the debt and the extent of the encumbrance should be defined with such reasonable certainty as to preclude the parties from substituting other debts than those described, thereby making the mortgage a mere

cover for the perpetration of fraud upon creditors": *Pettibone v. Griswold*, 4 Conn. 158; 10 Am. Dec. 106.

An examination of the clause of the mortgage describing the indebtedness secured leads to the conclusion that the description of the indebtedness is not complete, that something is omitted. The clause is: "And to secure any notes that may be given for renewal of said notes, or any part thereof, or for any interest thereon, etc." The notes referred to by the words "said notes" are not described in the mortgage, and are, therefore, not secured thereby; that being the case, no notes given in renewal thereof would be secured by the mortgage held by appellants, under the allegations in the answer. The words, "or other indebtedness due, or that may hereafter become due, etc.," must be held to mean indebtedness other than future advances, or indebtedness evidenced by promissory notes.

The mortgage thus construed, in the light of the allegations in the answer, secures no indebtedness which ³⁹⁸ was evidenced by promissory notes when the mortgage was executed. There are, however, two notes filed with and made a part of the answer, dated March 10, 1893, one calling for \$840.60 and the other \$1,000. These notes were given after the mortgage was executed. The answer alleges that the notes filed therewith and made a part thereof "were given for advancements made to said Ball." This allegation could only apply to the two notes mentioned, and, if they were given for advances made after the execution of the mortgage and on the faith thereof, they are secured by it, but if given for, or in renewal of, indebtedness not secured by the mortgage, they are not secured by it.

Under the allegations of the answer, none of the notes filed with and made a part thereof come fairly within the terms used in the mortgage, except the two described. How much this could be changed by averment and explained by extraneous evidence we need not and do not decide: *New v. Sailors*, 114 Ind. 407; 5 Am. St. Rep. 632.

We think the two notes dated March 10, 1893, were sufficiently described in the mortgage, aided by the allegations in the answer, to render said answer good against the demurrer.

Whether the two notes named are secured by the mortgage can be determined from the evidence when the cause is tried. The rule in this class of cases is that the mortgagee is entitled to recover only so much as he shows affirmatively is due. Any doubt or uncertainty should operate against the mortgagee and not in his favor: *Kline v. McGuckin*, 25 N. J. Eq. 433; 1 Jones on Mortgages, sec. 378.

For the reasons given, the court erred in sustaining the demurrer to appellants' answer.

Judgment reversed, with instructions to overrule the demurrer to appellants' answer and for further proceedings in accordance with this opinion.

Description of Indebtedness in a Mortgage.

A Mortgage Must Identify the Indebtedness it is intended to secure: *Philbrooks v. McEwen*, 29 Ind. 347; *Brick v. Scott*, 47 Ind. 299. The mortgage debt must be described with sufficient certainty to enable subsequent creditors, purchasers, or encumbrancers to ascertain, either from the condition of the deed or by inquiry aliunde, the extent of the encumbrance: *Booth v. Barnum*, 9 Conn. 286; 23 Am. Dec. 339; *Merrills v. Swift*, 18 Conn. 257; 46 Am. Dec. 315. To render the mortgage valid as against third parties, the description of the indebtedness must be such as to give reasonable notice of the encumbrance on the land mortgaged: *Stoughton v. Pasco*, 5 Conn. 442; 13 Am. Dec. 72; *Pettibone v. Griswold*, 4 Conn. 158; 10 Am. Dec. 103; *Crane v. Deming*, 7 Conn. 387; *Bacon v. Brown*, 19 Conn. 29. The amount of the debt intended to be secured by a mortgage must be shown to a reasonable degree of certainty in the mortgage. If the amount is not ascertained, then such descriptive facts as are within the knowledge of the parties, and as tend to put one interested in the inquiry upon the track leading to a discovery, must be set out in the mortgage: *Pearce v. Hall*, 12 Bush, 209. But to constitute such reasonable notice it is not requisite that the description should be so completely certain as to preclude the necessity of extraneous inquiry. It is sufficient to state the subject matter of the debt secured by the mortgage, and that from which, by the exercise of common prudence and ordinary diligence, the extent of the encumbrance may be ascertained: *Stoughton v. Pasco*, 5 Conn. 442; 13 Am. Dec. 72. The rule is thus summed up in *Bullock v. Battenhausen*, 108 Ill. 36: "The record of a mortgage should disclose, with as much certainty as the nature of the case will admit, the real state of the encumbrance. If a mortgage is given to secure an ascertained debt, the amount of that debt should be stated, and if it is intended to secure a debt not ascertained, such data should be given respecting it as will put any one interested in the inquiry upon the track leading to the discovery. If it is given to secure an existing or a future liability, the foundation of such liability should be set forth." It has been held that where the mortgage provides that the mortgagor shall pay all notes which the mortgagee may indorse or give for the mortgagor, and all receipts which the mortgagee may hold against the mortgagor, such mortgage is void against creditors of the mortgagor for indefiniteness of description of the indebtedness secured by the mortgage: *Pettibone v. Griswold*, 4 Conn. 158; 10 Am. Dec. 106. Literal exactness in describing the indebtedness is never required. It is sufficient if the description is correct, so far as it goes, and full enough to direct attention to the sources of correct and full information in regard to it, and the language used is not liable to deceive or mislead as to the nature or amount of it. It is generally sufficient if the debt is described with reasonable certainty, and it appears from the mortgage that a debt is secured, and that the amount of it may be ascertained by reference to other instruments, or by inquiry otherwise: *Ætna Life Ins. Co. v. Finch*, 84 Ind. 301; *Ricketson v. Richardson*, 19 Cal. 330; *Sheafe v. Gerry*, 18 N. H. 245; *Curtis v. Flinn*, 46 Ark. 70; *Gilman v. Moody*, 43 N. H. 239; *Morris v. Murray*, 82 Ky. 36; *Winchell v. Coney*, 54 Conn. 24; *New v. Sailors*, 114 Ind. 407; 5 Am. St. Rep. 632.

A mortgage is not invalid as to third persons on account of uncertainty in the description of the debt intended to be secured, when, upon the ordinary principle allowing extrinsic evidence to apply a written con-

tract to its subject matter, the debt intended to be secured may be shown as between the parties: *Hurd v. Robinson*, 11 Ohio St. 252; *Gill v. Pinney*, 12 Ohio St. 38. While literal accuracy in describing the debt secured is not required, it is essential that the character of the debt and the extent of the encumbrance should be defined with such reasonable certainty as to preclude the parties from substituting other debts than those described, thereby making the mortgage a mere cover for the perpetration of a fraud upon creditors: *New v. Sailors*, 114 Ind. 407-410; 5 Am. St. Rep. 632; *Pettibone v. Griswold*, 4 Conn. 158; 10 Am. Dec. 106; *Bramhall v. Flood*, 41 Conn. 68. In this case last cited the mortgage described the mortgage debt as a note for one thousand dollars. No such note had ever been given, but the mortgagor was indebted to the mortgagee in the amount of seven hundred and fifty-six dollars for goods, and the latter had agreed to furnish additional goods up to the sum of one thousand dollars, and the mortgagor had made this mortgage as security therefor. It was held void as against subsequent attaching creditors. This, however, is an extreme case, and would not probably be followed as authority elsewhere, because it is everywhere conceded that the Connecticut law is unduly strict in requiring the mortgage to disclose the nature and amount of the indebtedness secured. In a subsequent case, with almost parallel facts, the description was held to be sufficient: *Hill v. Banks*, 61 Conn. 25. The debt described as secured must, however, fairly come within the terms used, and the mortgage cannot be extended so as to cover other or entirely different debts: *Tunno v. Robert*, 16 Fla. 738; *Storms v. Storms*, 3 Bush, 77; *Doyle v. White*, 26 Me. 341; 45 Am. Dec. 110; *Stoddard v. Hart*, 23 N. Y. 557; *Van Wagner v. Van Wagner*, 7 N. J. Eq. 27. A mortgage given to secure all past indebtedness due and owing from the mortgagor to the mortgagee contains a sufficient description of the indebtedness to enable the mortgagee to recover a debt shown to be due at the time of the execution of the mortgage: *Machette v. Wanless*, 1 Col. 225; *Belloc v. Davis*, 38 Cal. 242; *Michigan Ins. Co. v. Brown*, 11 Mich. 265; *Vanmeter v. Vanmeter*, 3 Gratt. 148. If a mortgage is given to secure the payment of notes, the fact that such notes are not correctly described in the mortgage does not avoid it as against a subsequent mortgagee: *Porter v. Smith*, 13 Vt. 492. Although the debt secured is not described with literal exactness, yet, if the amount thereof may be ascertained by reference to some other instrument, as a note or a bond, that is generally held to be sufficient, and to put subsequent parties upon inquiry: *Hurd v. Robinson*, 11 Ohio St. 232; *Pike v. Collins*, 33 Me. 38. Yet some of the cases maintain that if the mortgage is given to secure an ascertained debt, the amount of that debt must be specifically stated: *Hart v. Chalker*, 14 Conn. 77; *Bullock v. Battenhausen*, 108 Ill. 38. If the securities or debts exist in a known definite form they must be described with reasonable and practical precision so as to show their identity; but if, from the nature of the obligation, the indebtedness is incomplete and its extent cannot be accurately ascertained at the time of the execution of the mortgage, it is sufficient if there is suitable reference to the subject matter to put an inquirer for further information upon a certain track, which, if followed, would lead to a discovery of the true amount of the indebtedness: *Merrills v. Swift*, 18 Conn. 257; 46 Am. Dec. 315; *Mix v. Cowles*, 20 Conn. 420. A mortgage which states the indebtedness secured as a certain gross sum is sufficiently specific, if such indebtedness is in fact upon certain promissory notes, which, with accrued interest aggregate the amount stated: *Clark v. Hyman*, 55 Iowa, 14; 39 Am. Rep. 160. The notes secured by the mortgage need not be described therein with minute exactness. It is sufficient if they can be thoroughly identified by parol evidence: *Boyd v. Parker*, 43 Md. 182. A mortgage which describes the note it secures by giving the date, the amount, the time of payment, and the rate of interest, is sufficient without giving the names of the makers: *Ogborn v. Eliason*, 77 Ind. 393. Defects in the description of mortgage notes which can be readily remedied by parol evidence are immaterials

Aull v. Lee, 61 Mo. 160; *Williams v. Moniteau Nat. Bank*, 72 Mo. 292. It is not essential to the validity of a trust deed that it should truly state the debt it is intended to secure, but it may stand as security for the real equitable claims of the cestui que trust if they appear to be bona fide, and are satisfactorily proven to be the debts intended in fact to be secured: *Riggs v. Armstrong*, 23 W. Va. 760; *Shirras v. Craig*, 7 Cranch, 34; *Keagy v. Trout*, 85 Va. 390. If a mortgage is executed in good faith and for a valuable consideration, its validity is not affected as to creditors or subsequent purchasers by the fact that it is given for a larger sum than is actually due, or in some particulars misdescribes the note in fact secured or intended to be secured. In such case parol evidence is admissible to show the real consideration, and what note was intended to be described: *Nazro v. Ware*, 38 Minn. 443; *Burnett v. Wright*, 135 N. Y. 543; *McCaughrin v. Williams*, 15 S. C. 505. A mistake in the amount secured by a deed of trust, even to the extent of one-half thereof, does not vitiate the deed if it does not assume to state the amount with accuracy, and the claim is of that character about which the party might well be mistaken as to what the indebtedness was: *Bumpas v. Dotson*, 7 Humph. 310; 46 Am. Dec. 81. In Minnesota the liberal view is taken that the validity of a mortgage does not depend upon the description of the debt, nor upon the form of the indebtedness; it depends rather upon the existence of the debt it is given to secure. It may be valid without a note or bond, although it purports to secure, and substantially describes, a note or bond. The true state of the indebtedness need not be disclosed by the instrument, but in cases free from fraud may be shown by parol: *Lee v. Fletcher*, 46 Minn. 49. A mortgage so drawn as to cover any demands which the mortgagee may hold against the mortgagor, does not authorize the mortgagee to buy up claims against the former and enforce them, unless the stipulation that he may do so is very clearly expressed. Such a stipulation can ordinarily cover only such demands as arise directly out of dealings between the parties to the mortgage: *Lashbrooks v. Hatheway*, 52 Mich. 124. In the absence of fraud a mortgage to secure against future liabilities or advances described with reasonable certainty is valid: *Hubbard v. Savage*, 8 Conn. 214; *Summers v. Roos*, 42 Miss. 749; 2 Am. Rep. 653; *Brooks v. Lester*, 36 Md. 65; *Tulley v. Harloe*, 35 Cal. 302; 95 Am. Dec. 102; note to *Diver v. McLaughlin*, 20 Am. Dec. 659.

SKAGGS v. MARTINSVILLE.

[140 INDIANA, 476.]

CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS—ORDINANCES.—A city ordinance providing penalties against owners or occupants of lots for permitting water from any flowing well or spring to flow upon any of the streets or alleys of the city does not constitute a taking of property, but is a simple requirement that every property owner shall so control it as not to impair the usefulness of the public streets and jeopardize the public health.

MUNICIPAL ORDINANCES.—COURTS DO NOT INQUIRE INTO THE REASONABLENESS of city ordinances when power exists to pass them. The inquiry must be confined to the existence of such power.

MUNICIPAL CORPORATIONS—CONTROL OF STREETS.—Power expressly given to a city to control its streets and enforce sanitary regulations necessarily implies power to require the citizen to so control the uses of his property as not to impair or defeat the powers so expressly given. Such incidental powers are implied when

essential to the accomplishment of the purposes for which municipal corporations are created.

APPEAL.—OBJECTION TO THE ADMISSION OF EVIDENCE which contains no reference to the admitted evidence cannot be entertained nor reviewed on appeal.

EVIDENCE.—AN IMPEACHING QUESTION without foundation as to time, place, or circumstance for the inquiry is insufficient.

W. R. Harrison, for the appellant.

J. H. Jordan and O. Matthews, for the appellee.

477 HACKNEY, J. The appellant has appealed from a judgment of the circuit court assessing a penalty for the violation of an ordinance of the appellee.

The ordinance provides penalties against owners or occupants of lots for permitting the water from any flowing well or spring to flow upon any of the streets or alleys of said city.

The validity of this ordinance is attacked as violating section 21 of the bill of rights (Rev. Stats. 1894, sec. 66), which provides that "no man's property shall be taken by law without just compensation; nor, except in case of the state, without such compensation first assessed and tendered."

The theory of the appellant is, that a flowing well or spring upon one's lot is property; that to prohibit the flowing of the water therefrom into a public street and through the ditches and drains of such street, without regard to the absence of any other natural course of drainage therefor, is to deprive him of that property, and that this under the guaranty of the bill of rights, cannot be done by a penal ordinance providing no compensation. The necessity for pure water in the occupancy of the lot, the value of a flowing spring or well, the requirement for drainage, the servient character of the lower lands in supplying drainage for the adjacent upper lands, and the harmless influence of the slight, pure stream upon the streets, and the absence of injury to ~~478~~ health of the citizens have been urged in support of the appellant's theory.

This argument, however, is against the reasonableness of the ordinance, and is remote from the question of power to pass and enforce the ordinance. The rule is firmly settled in this state that the courts will not inquire as to the reasonableness of an ordinance when power exists to pass it: *Steffy v. Monroe City*, 135 Ind. 466; 41 Am. St. Rep. 436; *Champer v. Greencastle*, 138 Ind. 339; 46 Am. St. Rep. 390; *A Coal-Float v. Jeffersonville*, 112 Ind. 15; *Cleveland etc. Ry. Co. v. Harrington*, 131 Ind. 426.

These cases hold, with equal firmness, that the inquiry must be confined to the existence of power. The fallacy in the appellant's insistence against the existence of power is in the position that the appellant must be deprived of his property, whereas, he is but required to control the flowage. If we were permitted to inquire into the reasonable operation of the ordinance, it would occur to us at once to suggest the means of caring for the overflow, if a well, in preventing it by capping and valves, and, if a well or a spring, by conducting to through pipes or tile to the most convenient outlet. But, in considering the question of power to maintain the ordinance regulation, it is conceded by appellant's learned counsel that municipal corporations, in this state, have received the express power of exclusive control over streets and alleys: Rev. Stats. 1894, secs. 3541, 3623; Rev. Stats. 1881, secs. 3106, 3161.

It must be conceded, also, that questions of public health and safety are proper subjects of municipal legislation, and that cities may "carry out and enforce sanitary regulations": Rev. Stats. 1894, secs. 3615, 3616.

The control of streets implies proper drainage and the maintenance of a hard, smooth, and even street surface. ⁴⁷⁹ It is manifest that such control may be materially interfered with by the flooding constantly of the gutters, making the earth therein soft, so that vehicles, in crossing, stopping in, and passing along them, will cut them and break their surface. Such disturbance necessarily creates pools, and impedes the flowing of the drainage from the streets. In addition to this, it is manifest that continued pools and damp gutters impregnate the air with impure, foul, and unwholesome odors, breeding miasma and malaria; that a well may put forth pure water, or that the quantity is slight, cannot affect the question, since, if one property owner may maintain a flowing well upon his lot, the overflow from which, though slight, is turned upon the street, many may do the same, and the question of quantity or comparative quantities of water so turned upon the street would become of impossible regulation or control.

The power expressly given to control the streets and enforce sanitary regulations necessarily implies the power to require the citizen to so control the uses of his property as not to impair or defeat the powers so expressly given. Such incidental powers are not unusual, but are implied when essential to the accomplishment of the purposes for which municipal corporations are created: *Champer v. City of Greencastle*, 138 Ind. 339; 46 Am. St. Rep. 390; *Steffy v. Monroe City*, 135 Ind. 466; 41 Am. St.

Rep. 436; Kyle v. Malin, 8 Ind. 34; Beach on Public Corporations, sec. 637; Cooley's Constitutional Limitations, 6th ed., 231; 1 Dillon on Municipal Corporations, 4th ed., sec. 89; Angell & Ames on Corporations, 346, 364; 15 Am. & Eng. Ency. of Law, 1040.

If the appellant's position were correct, that the requirement that he should control the overflow from his well is "the taking of property," it does not follow that compensation was not assessed and paid in the condemnation of the way for street purposes, in which event no ⁴⁸⁰ question could be made, reasonably, against the validity of the ordinance. It is perfectly clear, however, that the regulation is not a taking of property, but is a simple requirement that the property owners shall so control it as not to impair the usefulness of the public streets and jeopardize the public health.

It is but the assertion of the well-known rule that every man must so use his own property as not to unreasonably impair the use by others of their property, with the exception that in this instance he is forbidden to interfere with the enjoyment of public rights. The case of Barnard v. Sherley, 135 Ind. 547, 41 Am. St. Rep. 454, is urged as fully supporting the appellant's claim of right to flow the water from his well upon the street. That was a case between individuals, involving the violation of no expressed inhibition of the law, but involving the extent to which an upper proprietor might employ natural resources of the earth upon his own premises, the degree to which such use might affect a lower proprietor, and the instances in which equity would interfere to deny such uses. Here we have the violation of an authorized ordinance, passed in the interest of the public, and an act which involves an unfounded private demand against a proper and legal public right.

An objection is made to the ruling of the circuit court in admitting certain evidence referred to as on "p. —, l. —." This objection is not entertained, for the reason that no reference is made to the admitted evidence, as required by the rules and practice in this court.

One of the witnesses for the appellee was asked, upon cross-examination, if he had not bored upon his lot for the purpose of securing a flowing well, and he stated that he had bored for a well, but had not desired a flowing well. A witness, subsequently called by the appellant, was asked by appellant's counsel to state what the ⁴⁸¹ above witness had said of his disappointment in not getting a flowing well. To this question the

court sustained the appellee's objection. The alleged error in this ruling does not present in form, substance, or subject matter a proper effort at impeachment. The inquiry of both witnesses was immaterial, and there was no foundation as to time, place, or circumstance for the inquiry of the second witness.

Finding no error in the record, the judgment of the circuit court is affirmed.

MUNICIPAL CORPORATIONS.—REGULATION OF THE USE OF STREETS, and the prohibition of obstructions and nuisances therein, are the subjects of the extended note to *Callanan v. Gilman*, 1 Am. St. Rep. 840.

MUNICIPAL CORPORATIONS—ORDINANCES—JUDICIAL INQUIRY INTO REASONABLENESS OF.—The reasonableness of a municipal ordinance is a proper subject for judicial inquiry if enacted under a general grant of authority not prescribing the manner of its exercise: *Champer v. Greencastle*, 138 Ind. 339; 46 Am. St. Rep. 390, and note. See the note to *Walker v. Jameson*, post, p. 222.

WITNESSES—IMPEACHMENT—LAYING FOUNDATION.—Depositions of witnesses taken before a trial are inadmissible to impeach the testimony of the same witnesses given at the trial, unless the proper foundation is first laid by directing the attention of the witnesses to the particular matters involved in the supposed contradiction, and giving them an opportunity to explain: *Hammond v. Dike*, 42 Minn. 273; 18 Am. St. Rep. 503. The declarations of a party to a suit can be offered in evidence to impeach him without laying any foundation therefor: *Owens v. Kansas City etc. Ry. Co.*, 95 Mo. 169; 6 Am. St. Rep. 39, and note. See, especially, the note to *Allen v. State*, 73 Am. Dec. 762.

WILSON v. CARRICO.

[140 INDIANA, 533.]

DEEDS TO TAKE EFFECT AFTER DEATH OF GRANTOR. A deed duly executed and recorded which "conveys and warrants" certain land, and then provides that it shall be of no effect until after the death of the grantor, and then to be in full force, conveys a present interest in the land, but postpones its enjoyment and is not void as a testamentary disposition.

CONSTRUCTION.—IF AN INSTRUMENT IS AMBIGUOUS, the subsequent acts of the parties are to be considered in construing it.

J. S. Bays, for the appellant.

W. S. Maple and J. T. Hays, for the appellee.

533 JORDAN, J. Action in ejectment by appellant to recover certain real estate and to quiet title thereto. The error assigned is that the court erred in sustaining a demurrer to appellant's complaint. A condensed statement of the facts as they appear in the complaint are as follows:

That on November 18, 1867, one Bazzle Carrico was the owner in fee simple of certain described lands situated in Sullivan county, Indiana. On that day he and his wife, Frances, duly executed to one Elza Carrico a deed ⁵³⁴ for the real estate sought to be recovered in this action, said deed being as follows, to wit:

"This indenture witnesseth that Bazzle Carrico and Frances Carrico, his wife, of Sullivan county, in the state of Indiana, convey and warrant to Elza Carrico, of Sullivan county, in the state of Indiana, for the sum of one hundred and fifty dollars, the following real estate in Sullivan county, in the state of Indiana, to wit: The northeast quarter of the northeast quarter of section thirty-one, township seven north of range eight west, with the exception of ten acres off the east side of the forty acres, containing thirty acres, more or less. The above obligation to be of none effect until after the death of the said Bazzle Carrico and Frances Carrico, then to be in full force. In witness whereof the said Bazzle Carrico and Frances Carrico have hereunto set their hands and seals this 18th day of November, 1867.

[Seal] "BAZZLE CARRICO.

her

[Seal] "FRANCES X CARRICO.

mark

"State of Indiana, }
"Sullivan County, } ss:

"Before me, Benson Usrey, a justice of the peace in and for said county, this 18th day of November, 1867, came Bazzle Carrico and Frances Carrico, and acknowledged the execution of the annexed deed.

"Witness my hand and official seal.

[Seal] "BENSON USREY, J. P."

This deed was recorded in a few days after its execution in the recorder's office of Sullivan county, Indiana. On March 9, 1870, Elza Carrico and wife conveyed the land in controversy, by a warranty deed, to appellant, for and in consideration of the sum of two hundred and fifty dollars, and they provided in this deed that ⁵³⁵ the land was conveyed subject to the life estate of Bazzle and Frances Carrico. This deed was also acknowledged and recorded. Bazzle Carrico died on September 6, 1872, and his wife, Frances, died on January 11, 1892. Other facts not necessary to be considered in the determination of this case are omitted. We are informed by the briefs of the parties that the trial court held the deed void, upon the ground that in its char-

acter it was testamentary. The learned counsel for the appellant denies that the deed is in any respect testamentary, and insists that by it there was a conveyance of the premises therein described to the grantee, and that the subsequent and questionable clause therein contained was intended by the grantor as a reservation or postponement of the full use and enjoyment of the realty by the grantee until after the death of the grantors; that after the demise of each of these the deed in question was to be in full force, or, in other words, that the complete enjoyment of the use and occupation of said land by the provision of the clause in controversy was postponed until after the death of Carrico and wife, and was then fully to vest in the grantee. Upon the other hand, the learned counsel for appellee say that they do not controvert but what the instrument in question was intended by the parties as a deed, and not as a will, and concede that it has all the formalities of the former. But they contend that it was the evident purpose and intent of the grantor to reserve all the estate which he intended to convey, and that the deed was not to take effect until after the death of himself and wife, and that hence it must be held to be testamentary in its character, and therefore void, for the reason that it is not executed in accordance with requirements of the statute on wills. The instrument in question calls for a judicial construction, and in this the court must seek for and be guided by the intention of ~~the~~ the grantor. And this intention must be deduced and arrived at by consideration of all of its parts, and in this construction we must observe and adhere to the rule that this deed, in both the granting part and the clause under consideration, must be construed most strongly against the grantor and in favor of the grantee.

It was a principle recognized by the feudal law that there should always be a known owner of every freehold estate, and that the title thereto should never be in abeyance. Hence at common law a freehold to commence in futuro could not be conveyed, for the reason that the same would be in abeyance from the execution of the conveyance until the future estate of the grantee should vest.

Under the statute of this state a freehold estate may be created to commence in futuro: Rev. Stats. 1881, sec. 2959; Rev. Stats. 1894, sec. 3379; and hence the common-law principle above stated has been entirely abrogated. This deed is in the statutory form, and in the granting part accords with the provisions of section 2927 of the Revised Statutes of 1881 (Rev. Stats.

1894, sec. 3346), and contains what are, by law, made operative words of conveyance, and in effect transfers all the estate or interest of the grantors in the lands in suit to the grantee. The terms "convey and warrant," when given their legal purport or acceptation, fully indicate an intention to convey a present estate to the grantee, and defend the title thereto; and in no way is it apparent or to be inferred from these words that the grantors intended to devise the real estate in question. The instrument was acknowledged and recorded in like manner as are other deeds, therefore we fail to recognize anything which signifies that it was intended to serve the purpose of a will. The question then arises, What was the purpose intended to be served by the inapt expression, namely: "To be of none effect until after the ⁵³⁷ death of said Bazzle Carrico and Frances Carrico, then to be in full force"?

It is evident that the drafting of the indenture in question was not skillfully performed, and that thereby it very closely approximates to what may be termed the "danger line" by which a judicial construction might result in adjudging the deed to be a nullity.

While it may be said, in regard to the point under consideration, that the authorities "fight on both sides" of the question, however, we find that in the later decisions the courts are inclined to uphold a deed of this character, if, upon a reasonable interpretation of all its parts, it can be said that the grantor did not intend to create, or in other words execute, that which must be construed and held to be void.

In construing written instruments courts frequently do—and properly, too—give to an expression a meaning different from that which it ordinarily bears, in order to import sense into it and make it speak that which, upon an inspection of the whole, the parties really intended that it should.

We find that there is no ambiguity in the granting clause of the deed in the case at bar, and, consequently, we are left free to effectuate the intention of the grantor expressed in the subsequent clause or condition. The grantors had, as we have seen by operative words, clear and significant, conveyed an interest or fee in praesenti to the grantee; having done this they could not, in legal parlance, "blow hot and cold," or in other words, reserve or take back that which they had granted.

In the case of *Owen v. Williams*, 114 Ind. 179, the instrument in contest was in the form of a deed, and in the granting clause, by its terms, "did convey and warrant to Williams after my de-

cease and not before." This court held that the phrase "after my decease and not before" ⁵³⁸ did not make the deed testamentary, but was meant and operated to show that the grantee's use and enjoyment of the realty would not begin under the deed until after the death of the grantor.

In the case of *Cates v. Cates*, 135 Ind. 272, the deed therein in controversy was also in the statutory form, but contained the following reservation: "The grantor, Prior Cates, hereby expressly excepts and reserves from this grant all the estate in said lands, and the use, occupation, rents, and proceeds thereof, unto himself during his natural life." This court, in that case, upon a full review and consideration of many authorities upon the question involved, held that such an instrument must be construed as conveying a present interest in the real estate, the full enjoyment of which was postponed until after the grantor's death.

In the case of *White v. Hopkins*, 80 Ga. 154, cited in *Cates v. Cates*, 135 Ind. 272, the deed contained this clause or condition: "The title to the above-described tract of land to still remain in the said Lemuel Hopkins [grantor], for and during his lifetime, and at his death to immediately vest in the said Lewis Hopkins [grantee]." It was held by the supreme court of Georgia in that case that an absolute title was, by this deed, conveyed to the grantee, that it passed a present interest in the land, and took effect immediately, and that after its execution it was irrevocable by the grantor.

In *Graves v. Atwood*, 52 Conn. 512, 52 Am. Rep. 610, the deed contained the following: "The condition of this deed is such that I hereby reserve all of my right, title, and interest in the aforesaid described pieces of land, with all the buildings thereon, during my natural life." It was held by the court that this condition, read in the light of the grant, was to be interpreted as a reservation of the same measure ⁵³⁹ of use thereafter as tenants for life as the grantor had before enjoyed it as owner.

In *Webster v. Webster*, 33 N. H. 18, 66 Am. Dec. 705, the condition was: "Reserving all the right, title, and interest in and unto the above-named land, etc., for and during my natural life."

In *Bunch v. Nicks*, 50 Ark. 367, the deed contained the following clause: "And the deed shall go into full force and effect at my death." The court held this deed to be a valid one, conveying a present title to the grantee, with the right of possession and use postponed until the grantor's death.

In *Wyman v. Brown*, 50 Me. 139, the deed was as follows:

"This deed not to take effect during my lifetime—to take effect and be in force from and after my death." This was held to be valid.

In the case of *Abbott v. Holway*, 72 Me. 298, the instrument contained this clause: "This deed is not to take effect and operate as a conveyance until my decease." This was held to be a good and valid conveyance.

In *Shackelton v. Sebree*, 86 Ill. 616, the deed contained covenants of warranty, and also this clause: "This deed not to take effect until after my death—not to be recorded until after my decease."

This instrument was held operative as a deed, and not intended as a testamentary disposition of property. These authorities, most of them at least, were cited with approval by this court in *Cates v. Cates*, 135 Ind. 272.

It is a settled legal rule that in the interpretation of an instrument, where the terms employed are ambiguous, or susceptible of more than one meaning, the court will consider the subsequent acts of the parties to ascertain how they understood it, and as indicating what construction they have placed upon it: *H. G. Olds Wagon & Works v. Coombs*, 124 Ind. 62, and cases there cited; *Lyles v. Lescher*, 108 Ind. 382.

However, while it is proper to resort to this rule to show a practical construction by the parties, still, after all, the intention must be determined from the words of the instrument.

The manner in which this deed was treated by the parties in this case, as it appears, is briefly as follows: It was executed in 1867 for a valuable consideration and duly recorded. In 1870, during the lifetime of the grantors, for a valuable consideration, the grantee sold and conveyed the land to the appellant, subject to the life estate of the former. This deed was also recorded. Bazzle Carrico died in 1872, two years and over after the conveyance to the appellant. Frances, his wife, died in 1892, nearly twelve years after this second conveyance, and not until after her death, so far as it is disclosed, was this deed called in question. These subsequent acts of the grantors, in suffering the deed to be placed upon record, and in permitting the land to be sold and conveyed by their grantee to the appellant, subject to their life estate, are incompatible with the contention of appellee and hostile to the theory now advanced and advocated by him.

In *Broom's Maxims*, star page 540, in translating a fundamental maxim of the law, it is said: "A liberal construction should be placed upon written instruments, so as to uphold them,

if possible, and carry into effect the intention of the parties." Applying the reason and principle, as laid down by the authorities cited, and guided by the rule of construction, that the clause in controversy must be construed most favorable to the grantee, we cannot hold that the grantors intended that this obligation was to be null and void; but we are constrained to decide that it conveyed a present ⁵⁴¹ interest in the real estate to the grantee, the full enjoyment of which was, by the subsequent clause, intended to be postponed until after the death of both of the grantors. By so holding we carry into effect the intention of the parties, and we fail to recognize wherein this construction works an injury or injustice to anyone. This interpretation, we think, will simply carry out the intention of Carrico and his wife, and give protection to the rights of a purchaser acquired on the faith of their deed and their acts. The conclusion we have reached renders it unnecessary to consider the repugnancy, if any, existing between the grant and the exception. However, when such does exist, it is well settled that the latter is void: See cases cited in *Cates v. Cates*, 135 Ind. 272.

It therefore follows that the court erred in sustaining the demurrer to the complaint.

Judgment reversed at the cost of the appellee, with instruction to the lower court to overrule the demurrer to the complaint and to proceed in accordance with this opinion.

Conveyance to Take Effect After Grantor's Death.

Whether Deed or Will.—Many instruments are drawn in the form of absolute deeds which contain a provision that they are not to take effect until after the death of the grantor. The question then arises whether such instrument is to be considered and construed as a conveyance, or is to be deemed of a testamentary character only. The general rule is that, if the deed passes a present interest to the grantee, it is operative as a deed of conveyance, and such contingent provision does not convert it into a will. In determining whether such an instrument is a deed or a will, the main question is, Did the maker intend to convey any estate or interest whatever to vest before his death and upon the execution of the paper, or, on the other hand, did he intend that all the interest and estate should take effect only after his death? If the former, it is a deed; if the latter, it is a will: *Wall v. Wall*, 30 Miss. 91; 64 Am. Dec. 147. In order to constitute it a deed it must take effect in *presenti*, but this may occur without the present enjoyment or possession passing either in fact or in right. If a vested right to the present or future enjoyment passes, it is sufficient as a deed, but the right thus passing must be to some specific thing then owned by the person executing the conveyance, and to the grantee designated in the instrument. An instrument possessing these requisites, and wanting nothing in form, substance, or legal ceremony to give it effect, is a deed, and not a testamentary paper: *Swails v. Bushart*, 2 Head, 560; *McDaniel v. Johns*, 45 Miss. 632; *Mattocks v. Brown*, 103 Pa. St. 16; *Watson v. Watson*, 22 Ga. 460; *Meek v. Holton*, 22 Ga. 491; *Bunn v. Bunn*, 22 Ga. 472; *Moye v. Kittrell*, 29 Ga. 677; *Johnson v. Hines*, 31

Ga. 720; *White v. Hopkins*, 80 Ga. 154; *Dismukes v. Parrott*, 56 Ga. 513; *Worley v. Daniel*, 90 Ga. 650; *Gorham v. Daniels*, 23 Vt. 600; *Blanchard v. Morey*, 56 Vt. 170; *Jenkins v. Adcock*, 5 Tex. Civ. App. 466; *Dreisbach v. Serfass*, 126 Pa. St. 32; *Shackelton v. Sebree*, 86 Ill. 616; *Mitchell v. Mitchell*, 108 N. C. 542; *Wyman v. Brown*, 50 Me. 139.

The above authorities involve the conveyance of real estate, but the same rule prevails when personal property is the subject-matter of the deed: *Wallis v. Ward*, 2 Swan, 647; *Williams v. Sullivan*, 10 Rich. Eq. 217; *Watson v. Watson*, 22 Ga. 460; *Meek v. Holton*, 22 Ga. 491.

An instrument in form a deed, which conveys to the grantee an interest in present, though to be enjoyed in possession in futuro, is operative as a deed, and not as a will, and the interest of the grantee cannot be defeated by the grantor after the execution of the deed, even though it is voluntary: *McDaniels v. Johns*, 45 Miss. 632; *Mattocks v. Brown*, 103 Pa. St. 16. Thus a voluntary instrument purporting on its face to be a deed, by which land and slaves are conveyed by terms in the present tense, reserving a power of revocation to the maker, to be exercised in a certain specific mode, at any time during his life, and also declaring that it should not take effect as to the delivery of the property until after the maker's death, vests in the grantee an estate in present to be enjoyed in futuro, and is, therefore, a deed, and not a will: *Wall v. Wall*, 30 Miss. 91; 64 Am. Dec. 147. A deed containing words of present grant, followed by a clause providing that the grantee is "to have, to hold after my death, the aforesaid property," is a clear grant in present, and the words "after my death," in the habendum clause are to be construed as postponing the possession and enjoyment by the grantee until the grantor's death, or as a reservation of an estate for life, but not as an attempt to make a testamentary disposition of the property: *Johnson v. Hines*, 31 Ga. 720. A clause in an instrument containing all the terms and provisions of a deed, that the grantor and his wife are to have the use, benefit, and control of the land conveyed, for and during their natural lives, does not render the instrument testamentary: *Bass v. Bass*, 52 Ga. 531. An instrument in form a deed, by which the grantor undertakes to dispose of all his lands, and providing that "this conveyance to be put to record, but not to take effect so as to give possession until after my death," is a deed, and not a will: *Rawlings v. McRoberts*, 95 Ky. 346. A deed containing an absolute grant, followed by a condition that "the grantor hereby expressly excepts and reserves from this grant all the estate in said lands, and the use and occupation, rents, and proceeds thereof unto himself during his natural life," is a conveyance, and not a will, and must be construed as conveying a present interest, the enjoyment of which is postponed until the grantor's death: *Cates v. Cates*, 135 Ind. 272. A conveyance of grant made upon the express condition that the grantor should have and retain the entire use and control of the granted premises so long as they or either of them should live, is valid as a deed to take effect upon their death: *Chandler v. Chandler*, 55 Cal. 267. A warranty deed containing a clause that "the condition of this deed is such that I hereby reserve all my right, title, and interest in said pieces of land during my natural life," is not void as containing a reservation repugnant to the grant, and is a valid reservation of a life estate out of the land granted, and not of a testamentary character: *Graves v. Atwood*, 52 Conn. 512; 52 Am. Dec. 610. A deed to take effect "after my decease and not before," does not make the deed testamentary in character, but operates merely to show that the grantee's use and enjoyment of the land does not begin under the deed until after the grantor's death: *Owen v. Williams*, 114 Ind. 179. If a deed contains a condition that it is not to take effect and operate as a conveyance until the grantor's death, it can be upheld as a feoffment to commence in futuro, giving the estate in fee simple to the grantee on the happening of the contingency named: *Abbott v. Holway*, 72 Me. 298. A deed conveying land in fee simple, but containing a reservation of "all the right, title, and interest in and unto the above-named land and buildings for and

during my natural life," is valid, and conveys a present interest to the grantee: *Webster v. Webster*, 33 N. H. 18; 66 Am. Dec. 705. A deed executed in expectation of death, the grantor adopting that mode of distribution of his property rather than by will, there being no unlawful purpose in contemplation, is to be treated as valid as a disposition of the property by deed, and not by will: *Brown v. Atwater*, 25 Minn. 520.

INSTRUMENT, WHEN A WILL.—The fact that a written instrument is in the form of a deed is always persuasive that a deed, and not a will, is intended, but it is not conclusive, and if it appears that no interest was intended to vest until after the death of the person named as grantor, the writing must, notwithstanding its form, be held to be a will and not a deed. In such instruments words expressly limited to take effect only after the death of the grantor are necessarily revocable words, and "the doctrine of the cases is, that whatever the form of the instrument, if it vests no present interest, but only appoints what is to be done after the death of the maker, it is a testamentary instrument. It signifies nothing that the parties meant to make a deed instead of a will. If they have used language which the law holds to be testamentary, their intention is to be gathered from the legal import of the words they have employed": *Turner v. Scott*, 51 Pa. St. 126; *Frederick's Appeal*, 52 Pa. St. 338; 91 Am. Dec. 159; *Rowlings v. McRoberts*, 95 Ky. 346; *Millican v. Millican*, 24 Tex. 427; *Shepherd v. Nabors*, 6 Ala. 631; *Dunne v. Bank of Mobile*, 2 Ala. 152; *Babb v. Harrison*, 9 Rich. Eq. 111; 70 Am. Dec. 203. An instrument in form a deed must, in order to take effect as such, pass some present interest in the property. Hence, an instrument in writing which is not to take effect until the death of the maker, and contains a direction that the beneficiary pay the maker's debts and have only the remaining property, is testamentary in its character, though it be in the form of a deed acknowledged as such, and styled a deed by its own language: *Cunningham v. Davis*, 62 Miss. 366. An instrument which, though in the form of a deed, duly acknowledged and recorded, conveys no property of which the grantor is then the owner, but only such property as he may die seised and possessed of, is testamentary in character and not a deed, as it fails to pass any present interest: *Watkins v. Dean*, 10 Yerg. 320; 31 Am. Dec. 583; *Hall v. Bragg*, 28 Ga. 330; *Gage v. Gage*, 12 N. H. 371; *Brewer v. Baxter*, 41 Ga. 212; 5 Am. Rep. 530. A conveyance containing words purporting to convey real estate in the usual form, but also containing a condition that it is "to commence after the death of both of said grantors," and "it is hereby understood and agreed between the grantors and the grantee that the grantee shall have no interest in the said premises so long as the grantors, or either of them, shall live," is testamentary in character, and not a deed, as it fails to convey any present interest in an estate to be enjoyed at a future day. Such instrument can be revoked by the grantors at their option, although a valuable consideration may have been paid therefor: *Leaver v. Gauss*, 62 Iowa, 314. An instrument with general warranty for a tract of land in fee, in consideration of love and affection, performing certain services and maintaining the grantor's wife if she survives him, reserving the land to the grantor for his life, the "conveyance in no way to take effect until after his decease," is testamentary and revocable: *Turner v. Scott*, 51 Pa. St. 126. An instrument in the form of a deed, containing a condition in favor of the grantor that he reserves "all the within-named estate both real and personal, during his natural life," is testamentary and inoperative as a deed if the intention of the maker is that it shall take effect only on his death: *Carlton v. Cameron*, 54 Tex. 72; 38 Am. Rep. 620. An instrument purporting to convey land, but providing that it shall remain the property of the grantor during his lifetime, and go to the grantee on the death of the grantor, provided the former survives the latter, is a mere devise revocable at will, and passes no title, and the grantor's promise to pay the grantee to recon-

vey the land is without any consideration: *Bigley v. Souvey*, 45 Mich. 370. An instrument in the form of a deed containing a condition upon the performance of which the property is to revert to the grantor, and, after his death, be divided share and share alike between his two grandsons, is a testamentary paper, and not a deed: *Mallery v. Dudley*, 4 Ga. 52. An instrument purporting to be a deed acknowledged and delivered on the date of its execution, conveying by present words of gift in consideration of love and affection to the maker's children certain property at his death, but reserving the right of ownership until that time, and declaring that at that time "this deed shall take effect," is a will, and not a deed: *Walker v. Jones*, 23 Ala. 448. An instrument in form a deed, purporting to convey certain property therein named, in which it is declared by the maker that she "reserves to herself the use of all of the property during her natural life, then to go to the grantees, and from thenceforth to be their property absolutely without any manner of condition," is a testamentary paper, and not a deed: *Symmes v. Arnold*, 10 Ga. 506. A writing in the form of a deed executed by husband and wife, purporting to convey to their children by the words "have given and granted, and by these presents do give and grant, all the real and personal property composing the wife's separate estate," "under the following restrictions, reservations, and conditions," reserving to the wife a life estate in all the property, and further providing "that the foregoing gift is to take effect" at her death, that her husband, as her executor, "shall keep the property together for two years for the benefit of the children until all of the estate can be wound up, when the said gifts are to be distributed," is a will, and not a deed: *Mosser v. Mosser*, 32 Ala. 551. The subject of the validity of deeds to take effect after the death of the grantor, if not delivered in his lifetime, is treated at length in notes to *Jones v. Jones*, 16 Am. Dec. 43-45, and *Wellborn v. Weaver*, 63 Am. Dec. 243-246.

WALKER v. JAMESON.

[140 INDIANA, 591.]

MUNICIPAL CORPORATIONS—GARBAGE ORDINANCES.—

Under a statute authorizing it, a municipal ordinance requiring all householders in the city to place all garbage, not destroyed by them on the premises, in proper receptacles convenient for removal by a public contractor, at the expense of the householder, and forbidding any person other than the contractor to interfere with or remove such garbage, is valid as a health and sanitary regulation.

MUNICIPAL CORPORATIONS—GARBAGE ORDINANCES—
COST OF REMOVAL—ASSESSMENT.—A statute authorizing a city to provide for the removal of all garbage or other offal therefrom by contract or otherwise, empowers it to fix by ordinance the price of such removal by a public contractor, and the price or cost of removal thus fixed, is not an assessment upon the premises from which the garbage is removed.

ASSESSMENT—DEFINITION.—An assessment is a charge laid upon individual property for the reason that the property upon which the burden is imposed receives a special benefit different from the general one enjoyed by the owner in common with others as a citizen. An assessment is levied only upon the property benefited, and is uniformly restricted to the means for paying local burdens arising by reason of the wants of small communities.

POLICE POWER—MUNICIPAL CORPORATIONS—HEALTH AND SANITARY REGULATION.—It is within the general power of the state to preserve and promote the public welfare and health,

even at the expense of private rights, and this power may be delegated to municipal corporations.

POLICE POWER—EXERCISE OF, DISCRETIONARY.—It rests solely within legislative discretion, inside of constitutional limits, to determine when public safety or welfare requires the exercise of the police power. Courts can interfere only when such exercise conflicts with the constitution; with the wisdom, policy, or necessity of such enactment they have nothing to do.

MUNICIPAL CORPORATIONS—POWER TO DECLARE NUISANCES.—A municipal corporation has no power to treat a thing as a nuisance which cannot be one, but it has the power to treat as a nuisance a thing that, from its character, location, and surroundings, may or does become such, and in doubtful cases, when a thing may or may not be a nuisance, depending upon a variety of circumstances, and requiring judgment and discretion to determine the action of the municipal authorities in declaring it a nuisance, in the exercise of their legislative functions under a general delegation of power, is conclusive and binding on the courts.

MUNICIPAL CORPORATIONS—DISCRETION IN EXERCISE OF DELEGATED POWER.—If power is conferred upon a municipal corporation by statute silent as to the method of its exercise, the municipality is clothed with all reasonable discretion to determine the methods of exercising such power.

J. E. McCullough, H. N. Spaan, J. F. Carson, and C. N. Thompson, for the appellants.

W. H. H. Miller, F. Winter, and J. B. Elam, for the appellee.

⁵⁹² **DAILEY, J.** On July 12, 1893, the city of Indianapolis, by its board of public works, by contract (a copy of which is in the complaint), clothed James H. Woodward with the exclusive right and obligation to remove the garbage from the premises of all persons in said city, ⁵⁹³ and to transport the same through the streets thereof to the crematory.

On August 18, 1893, with the written consent of the city, said Woodward assigned the contract to the appellee, Jameson. The circuit court, at the suit of Jameson, after due notice and hearing on complaint and affidavits, enjoined appellant from interfering with or removing such garbage. By this appeal appellants attack the ruling of the circuit court granting that injunction.

The general ordinance of the city, No. 5, 1893, designed to effectuate the contract, is set out in the complaint. The contract makes it the duty of the contractor to remove all the garbage. The ordinance requires the householder to place the garbage in proper receptacles, convenient for removal, and forbids any person, other than the contractor, to interfere with or remove the same. The ordinance is expressly authorized by section 23 of the charter (Acts 1881, pp. 143, 144, 146), wherein it is provided that the common council shall have the power to

enact ordinances "to prevent the deposit of any unwholesome substances, either on private or public property, compel its removal to designated points, and to require slops, garbage, ashes, waste, or other material to be removed to designated points, or to require the occupants of premises to place them conveniently for removal."

In strict pursuance of this expressly authorized power, the ordinance in question was passed. Section 59 of the city charter (Acts 1891; pp. 167-169, etc.), expressly authorizes the board of public works "to remove all dead animals, garbage, filth, ashes, dirt, rubbish, or other offal from such city, either by contract or otherwise." Accordingly, the common council having authority to pass the ordinance providing for the collection and ⁵⁹⁴ storage in proper receptacles of the garbage, and the board of public works having authority to remove the same, the ordinance was passed and the contract was made, each supplementing the other, to carry out the common duty imposed on the two bodies for the protection of the public health in the prompt and efficient removal of all garbage in an inoffensive manner.

The contract was let to the lowest bidder, as section 61 of the charter provides. It fixes the price for removal by the contractor at two hundred and forty-nine thousandths, practically one-fourth of a cent per pound, this being the maximum, permits the contractor to collect the same from the householder, the party producing the garbage, and expressly exempts the city from any liability in the premises.

Appellants contend that this contract is invalid for several reasons: 1. The contention is that the contract is invalid because the board of public works had no authority to make it.

The first reason given in support of this claim is that the provision for payment by the householder for the removal of his garbage is an "assessment" against him or his property, and, as the charter does not confer the power to make an assessment of this kind, therefore it cannot be made. If the premise were correct, the conclusion would necessarily follow. The infirmity is in the assumption that this contract provides for an assessment, either upon person or property. An assessment is a charge laid upon individual property, because the property upon which the burden is imposed receives a special benefit which is different from the general one which the owner enjoys in common with others as a citizen: Elliott on Roads and Streets, 370.

When the legislature so declares, a lien in the amount fixed fastens upon the property, as against the owner and ⁵⁹⁵ all who

acquire rights subsequently to the time it attaches: *Elliott on Roads and Streets*, 432.

An assessment is levied only upon the property benefited. It has been uniformly restricted to the means for paying those local burdens arising by reason of the wants of small communities. The general meaning of the word "assessment" is authoritative imposition: *Welty's Law of Assessments*, 2, 3.

In this case there is nothing of the kind. No householder is required to have garbage removed or pay for its removal. Every householder may destroy all his garbage on his own premises, taking care not to create a nuisance in so doing. If he do not destroy all he may reduce it to a minimum. This ordinance and contract simply provide that if he does produce garbage which has to be carted through the streets, the city or its agent, the contractor, shall do the work at his expense. Whatever else it may be, it is certainly not an assessment. It has not a single element of an assessment for the reasons: 1. That except by the voluntary act of the householder, nothing is to be paid at all; 2. No definite amount, in any event, is to be paid; 3. Nothing is made a charge upon the property. The whole arrangement is simply a provision by the ordinance: 1. That garbage shall be collected and carted through the streets only by a licensed agent of the city. 2. That parties producing the garbage needed to be thus carted away shall place the same in proper vessels, convenient for the removal by such agent; and 3. That such agent shall charge not exceeding the price named for removing the same.

It is no more an assessment than is the provision of the ordinance fixing the rate of payment for gas, or water, or street car fare, as authorized by section 59 of the city charter, or the numerous provisions of section 59 23, specifying that the common council may require things done by the parties, and, if not so done, have the city do them at their expense, as taking down dangerous buildings, removing snow from the walks, etc. It cannot be said that the charter does not expressly authorize the fixing of prices for removal of garbage, because the same section which confers upon the board the power "to remove all dead animals, garbage, filth, ashes, dirt, rubbish, or other offal from such city, either by contract or otherwise," impliedly authorizes the fixing of a price therefor; that is the very essence of the power to contract.

The appellants' learned counsel say: "But the charter never gave the board of public works power to contract for removal of

garbage on behalf of anyone, except on behalf of the municipal corporation. Had it undertaken to confer upon them the power to fix prices which should be paid by citizens for its removal, then it would have said so in express terms, just as it did with reference to water, gas, etc. The fact that it did not do so is evidence that it contemplated or conferred no such power."

It is within the general power of a government to preserve and promote the public welfare, even at the expense of private rights: 18 Am. & Eng. Ency. of Law, 739, 740. Police power is defined in *New Orleans Gas Light Co. v. Hart*, 40 La. Ann. 474, 8 Am. St. Rep. 544, where it is said: It is the right "of a state functionary to prescribe regulations for the good order, peace, protection, comfort, and convenience of the community which do not encroach on the like power vested in Congress by the federal constitution."

In *Commonwealth v. Alger*, 7 Cush. 53, the court lays down the rule that "rights of property, like all other social and conventional rights, are subject to ⁵⁹⁷ such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient."

In *Thorpe v. Rutland etc. R. R. Co.*, 27 Vt. 140 (149), 62 Am. Dec. 625, it is said: "By this general policy power of the state, persons and property are subjected to all kinds of restraints and diligence in order to secure general comfort, health, and prosperity of the state."

In *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191, 22 Am. Rep. 71, the court say: "The police power of the state is coextensive with self-protection, and is applicably termed the law of overruling necessity. It is the inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort and welfare of society": *Hale v. Lawrence*, 21 N. J. L. 714; 47 Am. Dec. 190; *Tiedeman's Limitation of Police Power*, sec. 1.

It is said in 18 American and English Encyclopedia of Law, 744, 745, that a law which might be invalid as an exercise of the right to tax for revenue might be sustainable where its purpose was the promotion of the general public health or morals. In exercising the power of taxation, no discriminations are to be made; while in the exercise of police power the state is ordinarily

to be governed only by considerations of what is for the public welfare. It rests solely within legislative discretion, inside the limits fixed by the constitution, to determine when public safety or welfare requires its exercise. This must be determined by recognized principles. "Courts are authorized to interfere and declare a statute unconstitutional only when it conflicts with the constitution; with the wisdom, policy, or necessity of such an enactment, they have nothing to do": 18 Am. & Eng. Ency. of Law, 746.

⁵⁹⁸ It resolves itself solely into a question of power, and not of mere reasonableness. We recognize the rule that a municipal corporation has no power to treat a thing as a nuisance which cannot be one; but it is equally well settled that it has the power to treat as a nuisance a thing that, from its character, location, and surroundings, may or does become such. In doubtful cases, where a thing may or may not be a nuisance, depending upon a variety of circumstances requiring judgment and discretion on the part of the town authorities in exercising their legislative functions, under a general delegation of power like the one we are considering, their action, under such circumstances, would be conclusive of the question: *Baumgartner v. Hasty*, 100 Ind. 575 (578); 50 Am. Rep. 830.

In 15 American and English Encyclopedia of Law, 1173, it is said: "Municipal corporations are usually given authority to pass ordinances providing for the preservation of public health. This is one of the police powers of the state, and there can be no doubt that the sovereignty has the right to delegate this power to municipal authorities."

In 2 Beach on Public Corporations, section 995, it is said: "A by-law of a city prohibiting any person not duly licensed by its authorities from removing the house dirt and offal from the city is not in restraint of trade, but reasonable and valid, on the ground that, in the interest of the public health, a city is justified in providing for some general system for removing offensive substances from the streets by persons engaged by the city, and responsible for the work at such times as they are directed to attend to it."

So Dillon on Municipal Corporations, section 369, is as follows: "Our municipal corporations are usually invested with power to preserve the health and safety of the inhabitants. This is, indeed, one of the purposes of local government, ⁵⁹⁹ and reasonable by-laws in relation thereto have always been sustained in England as within the incidental authority of corporations to

ordain. It will be useful to illustrate the subject by reference to some of the adjudged cases. An ordinance of a city prohibiting, under a penalty, any person not duly licensed therefor by the city authorities from removing or carrying through any of the streets of the city any house dirt, refuse, offal, or filth, is not improperly in restraint of trade, and is reasonable and valid. Such a by-law is not in the nature of a monopoly, but is founded on a wise regard for the public health. It was contended that the city could regulate the number and kind of horses and carts to be employed by strangers or unlicensed persons, but practically it was considered that the main object of the city could be better accomplished by employing men over whom they have entire control, night and day, who are at hand, and able from habit to do the work in the best way and at the proper time." It has been often held to be reasonable to grant to one or more the exclusive right to remove the carcasses of dead animals and other offal of a city: *Vandine*, Petitioner, 6 Pick. 187; 17 Am. Dec. 351; *Cooley's Constitutional Limitations*, 6th ed., 739; *Tiedeman's Limitation of Police Power*, 316; *Dillon on Municipal Corporations*, secs. 141, 142.

In the case of *Boehm v. Mayor etc. of Baltimore* (1883), 61 Md. 259, it was held that the city, under the power to preserve the health and safety of its inhabitants, had the undoubted right to pass ordinances creating boards of health, appointing health commissioners, with other subordinate officers, regulating the removal of house dirt, night soil, refuse, offal, and filth by persons licensed to perform such work, and providing for the prohibition, abatement, and suppression of whatever was intrinsically and inevitably a nuisance. The case of *Vandine*, Petitioner, 600 6 Pick. 187, 17 Am. Dec. 351, is in point here. It directly adjudges that a by-law of the city of Boston, prohibiting anyone not licensed by the city from removing house dirt and offal from the city is valid. On the trial, the court instructed the jury that the subject of regulation was one on which it was proper for the city to legislate, it having reference to the public convenience and the health of the inhabitants; . . . that it was the duty of the city to remove from the streets and houses all nuisances which might generate disease or be prejudicial to the comfort of the inhabitants, and it was both reasonable and proper that it should be in their discretion to contract with persons to perform the work so that it might be done on a general system. If it were found, on experiment, that the duty would not be thoroughly and faithfully performed, or would be

attended with more expense to the city, if individuals should remove these substances in their own carts and upon their own account, it was competent for the city government to enact a by-law which should subject all persons to the vigilance of that government, and which should require them to be first licensed. The jury were further instructed that, so far as, by virtue of the general laws of the commonwealth, the city council had power to make by-laws for governing the city, these regulations were binding on all persons actually resident within its limits, either for business or pleasure, and whether inhabitants or strangers; that the object of the by-law being to secure to the city the regular and effectual removal, by public authority, of all sources of nuisance which are collected and accumulated in the houses in the city by not suffering individuals, under no obligation of trust, to interfere in the same, it amounted to the prohibition of a nuisance, and that, so far as it affected trade, it was not a restraint, but only a regulation of it. The ⁶⁰¹ defendant excepted to these instructions, and, on appeal, urged chiefly that the by-law was void, being in restraint of trade; also, that it created a monopoly, and that the city had no right to say it should be removed only by a person having a license. In ruling upon this question, the court upheld the instructions of the trial court and said: "The great object of the city is to preserve the health of the inhabitants. To attain that, they wisely disregard any expenses which are deemed to be requisite. They might probably have these offensive substances carried out of the city without any expense, if they would permit the people from the country to take them away at such times and in such manner as would best accommodate them. Every one will see that if this business were thus managed there would be continual moving nuisances at all times and in all the streets of the city, breaking up the streets by their weight and poisoning the air with their effluvia. . . . It seems to us . . . that the city authority has judged well in this matter. They prefer to employ men over whom they have entire control by night and by day, whose services may be always had, and who will be able, from habit, to do this work in the best possible way and time. Practically, we think the main object of the city government will be better accomplished by the arrangement they have adopted than by relying upon the labor of others, against whom the government would have no other remedy than by a suit for a breach of contract. The sources of contagion and disease will be speedily removed in small loads, which will not injure the pavements nor

annoy the inhabitants. We are satisfied that the law is reasonable, and not only within the power of the government to prescribe, but well adapted to preserve the health of the city."

⁶⁰² In view of the great weight of authorities, we are of the opinion that the contract and ordinance assailed are both within the long settled and clearly recognized lines of police power, which is as broad as the power of taxation, and, being simply a sanitary regulation, they cannot be considered as in the nature of confiscation or an attempt to create a monopoly. The provision for the removal of the garbage at the expense of the property holder is an extreme exercise of this power, but is an incident to its existence.

It is a familiar rule that if the power is conferred upon a municipal corporation by the laws of the state, and the law is silent as to the mode of doing such act, the corporate authorities are necessarily clothed with a reasonable discretion to determine the manner in which such act shall be done; all the reasonable methods of executing such power are inferred: *Lewisville Natural Gas Co. v. State*, 135 Ind. 49; *Thornton's Municipal Law*, sec. 3102, note 3, and cases cited.

The right of removal, by contract or otherwise, being vested in the city, it was for the common council to determine whether the work should be paid for out of the city treasury or by the person producing the garbage, and their action is not subject to review here. It may be that the hotel and restaurant keepers will lose money on their garbage under the workings of this contract, where they before derived a revenue, but if, under this plan, the sources of contagion and disease will be more speedily and effectively removed, the city was empowered to make this contract.

It may be the common council thought it unjust that the householders who produced a small amount of garbage should be taxed to assist in removing the large accumulations of hotels and restaurants, but we have ⁶⁰³ nothing to do with the motives that prompted the act in question.

We find no error in the record.

The judgment is affirmed.

ON PETITION FOR A REHEARING.

Per CURIAM. The question whether or not the appellee could recover from the citizen the contract price, or any other sum, for the removal of garbage is not involved in this case.

The right of the appellee to recover in this action does not

depend upon the liability of the citizen to pay for the removal of his garbage. Any expression or reasoning in the opinion that there is such liability was not necessary to the determination of this cause. It will be time to decide that question when it arises, if ever, between the appellee and the citizen in an action to recover for the removal of such garbage.

If it were admitted that the garbage producers are not bound by the terms of the contract, and cannot be compelled to pay for the removal of the garbage, such fact would not be available as a defense to this action by appellants. No one, unless it be the appellee, could take advantage of such fact. For all that appears in the record, he may be willing to comply with the terms of the contract, even if the persons on whom he has agreed to rely for payment are not bound thereby and nothing can be collected from them. If so, he has the same right to recover in this action against the appellants as if he were to be paid out of the general fund of the city or could compel payment by the citizen.

The appellee, by this action, does not seek to avoid the contract, but to protect the rights he claims under it.

604 We adhere to our opinion that the judgment of the court below should be affirmed.

Petition for a rehearing is overruled.

ASSESSMENT FOR LOCAL IMPROVEMENTS.—The constitutionality of, generally, is the subject of the extended note to *People v. Mayor*, 55 Am. Dec. 286.

MUNICIPAL CORPORATIONS—POWER TO MAKE HEALTH AND SANITARY REGULATIONS.—The legislature, by the act authorizing the organization of a municipal corporation, expressly delegates to the municipality the power to preserve the health, safety, and property of its inhabitants: *Crawfordsville v. Braden*, 130 Ind. 149; 30 Am. St. Rep. 214. A municipal corporation has incidental power to enact sanitary regulations, but, if an ordinance goes beyond or outside of this power, it cannot be sustained thereunder: *Note to Littlefield v. State*, 47 Am. St. Rep. 702.

MUNICIPAL CORPORATIONS—EXERCISE OF DISCRETION—JUDICIAL CONTROL.—The discretion of municipal corporations within the sphere of their powers is not subject to judicial control, except in cases where fraud is shown, or where the power or discretion is being grossly abused to the oppression of the citizen: *Crawfordsville v. Braden*, 130 Ind. 149; 30 Am. St. Rep. 214. Courts do not inquire into the reasonableness of a city ordinance where power exists to pass it. The inquiry must be confined to the existence of such power: *Skaggs v. Martinsville*, 140 Ind. 476, ante, p. 209, and note. Where municipal authorities are acting within their well-recognized power, or are exercising a discretionary authority, a court of equity has no jurisdiction to interfere, unless the power or discretion is being manifestly abused to the prejudice of a citizen: *Mt. Carmel v. Shaw*, 155 Ill. 87; 46 Am. St. Rep. 311.

MUNICIPAL CORPORATIONS—NUISANCES—POWER TO DECLARE WHAT ARE.—Under a general grant of power over nuisances, town authorities have no power to adopt an ordinance declaring a thing a nuisance, which, in fact, is clearly not one, but, in doubtful cases depending upon a variety of circumstances requiring judgment and discretion, their action is conclusive: *Harmison v. Lewistown*, 153 Ill. 313; 46 Am. St. Rep. 893, and note. See, also, the extended note to *Milne v. Davidson*, 16 Am. Dec. 194.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

TAYLOR V. BLEAKLEY.

[55 KANSAS, 1.]

ELECTIONS—LEGISLATURE MAY ADOPT REASONABLE REGULATIONS.—The legislature, within the terms of the constitution, may adopt such reasonable regulations and restrictions for the exercise of the elective franchise as may be deemed necessary to prevent intimidation, bribery, and fraud, if the voting is by ballot and the voter is allowed to cast his vote in absolute secrecy.

ELECTIONS—AUSTRALIAN BALLOT LAW—PROVISION AS TO MARKING OF BALLOTS IS MANDATORY.—A provision of the Australian ballot law declaring that a ballot shall not be counted if the voter fails to mark it as required, is mandatory, and does not conflict with a constitution requiring all elections by the people to "be by ballot."

ELECTIONS—AUSTRALIAN BALLOT LAW—BALLOTS NOT MARKED WITH A (X) SHOULD NOT BE COUNTED.—Ballots not marked with a cross (X) substantially in or upon the square or place designated by the Australian ballot law should not be counted.

APPEAL—DIRECTING JUDGMENT.—If the supreme court is able, from an examination of the admitted facts, to direct judgment, it will do so without sending the case back for a new trial.

Election contest. At the general election, in 1893, Bleakley and Taylor were candidates for the office of county treasurer. They had an equal number of votes, and a higher number than any other person. It was determined by lot that Taylor should have the office, and a certificate of election was awarded to him. A contest was thereupon instituted by Bleakley before a contest court. The election was held under what is commonly known as the "Australian ballot law," and the contest court, in counting the ballots, construed that law, decided in favor of Taylor, and disposed of the entire number of official ballots cast at the election as follows:

Counted for Bleakley without objection.....	2,057
Counted for Bleakley against Taylor's objection.....	695
Counted for Taylor without objection.....	2,196
Counted for Taylor against Bleakley's objection.....	579
Ballots objected to, but not counted for either party.....	24
Ballots not indicating a vote for either party.....	1,206
Total.....	6,757

By the count of that court, according to the rule of construction finally adopted, Bleakley received 2,752 votes and Taylor 2,775 votes, a plurality of 23 votes for the latter. On writ of error to the district court the ruling of the contest court was reversed, and it was decided that Bleakley was elected. The requirement of the statute was plainly printed at the top of each official ballot, thus: "Electors will make a cross-mark, thus (X), in the square at the left of the name of the candidate for whom they wish to vote." At the left of the name of each candidate on the official ballot was a square ([]) for the electors to mark a cross, thus (X), therein. Taylor excepted to the rulings of the district court and appealed.

Robert Crozier, Fenlon & Fenlon, J. H. Atwood, and L. B. & S. E. Wheat, for the appellant.

Lucien Baker, W. A. Porter, and William C. Hook, for the appellee.

⁸ HORTON, C. J. The contention in this case is over the construction of the following provision of section 25, chapter 78, of the Laws of 1893: "If a voter . . . fails to mark the ballot as required by other section of this act, . . . his ballot shall not be counted for such office," in connection with the other sections of that act. The contest court found that Taylor had received 2,775 votes, and Bleakley 2,752, giving Taylor a majority of 23 votes. There were sufficient ballots counted by the contest court for Taylor, after deducting similar ballots counted for Bleakley, where the cross (X) or mark of the voter was entirely outside of the designated square or place at the left of his name, to change the result declared by that court. The district court ruled that the requirement of section 25 was mandatory, and therefore refused to count the ballots in which the cross (X) or the mark of the voter was entirely outside of the designated place. This ruling is complained of.

It is insisted that the provision is directory only, and that, if

the purpose of the voter can be ascertained with reasonable certainty from the ballot cast by him, effect should be given to it. Unquestionably, prior to the passage of chapter 78 by the legislature of 1893, the rule that the intent of the voter, as evidenced by his ballot, is controlling in the count thereof, was, by a long course of judicial determination, firmly imbedded in the jurisprudence of this state: ⁹ *Jones v. State*, 1 Kan. 273; *Gilliland v. Schuyler*, 9 Kan. 569; *Wilds v. State Board*, 50 Kan. 147. But the legislature of 1893 adopted what is known as the "Australian ballot system." The enactment of that statute was designed to inaugurate an important departure from the mode of voting and counting votes which had existed in this state prior to its passage. If the legislature intended to say that a ballot which had failed to accord with certain specifically enumerated requirements on the part of the voter could not be counted, the purpose of the legislature, irrespective of all considerations as to the intent or effect of such failure, if not unconstitutional, cannot be disregarded by courts. If the statute is harsh in its terms, the remedy is with the legislature. Our statute was taken almost bodily from the Iowa law. The supreme court of that state has recently passed upon the pivotal question involved in this case: *Whittam v. Zahorik* (Iowa, May 15, 1894), 59 N. W. Rep. 57. That court ruled "that ballots not marked with a cross in any circle or square should not be counted." That decision was followed in *State v. Hagen* (Iowa, Sept. 29, 1894), 60 N. W. Rep. 108. See, also, the following cases: *Lindstrom v. Board of Canvassers*, 94 Mich. 467; *State v. Russell*, 34 Neb. 116; 33 Am. St. Rep. 625; *Parvin v. Wimberg*, 130 Ind. 561; 30 Am. St. Rep. 254; *Curran v. Clayton*, 86 Me. 42; *Bechtel v. Albin*, 134 Ind. 193; *Sego v. Stoddard*, 136 Ind. 297; *In re Vote Marks*, 17 R. I. 812; *In re Ballot Marks*, 18 R. I. 822; *Fields v. Osborne*, 60 Conn. 544.

In *Parvin v. Wimberg*, 130 Ind. 561, 30 Am. St. Rep. 254, it is observed: "If a statute expressly declares any particular act to be essential to the validity of an election, or that its omission shall render the election void, the courts, ¹⁰ whose duty it is to enforce the law as they find it, must so hold, whether the particular act in question goes to the merits or affects the result of the election or not; for such a statute is mandatory, and the court cannot enter into the question of its policy. In this instance it has declared that the mode by which the elector shall express his choice shall be by stamping certain designated squares on the ballot. There is nothing unreasonable in the requirement, and it is sim-

ple and easily understood. Furthermore, if he is illiterate, or is in doubt, the law makes ample provision for his aid. If he does not choose to indicate his choice in the manner prescribed by law, he cannot complain if his ballot is not counted: *Kirk v. Rhoads*, 46 Cal. 399. If we hold this statute to be directory only, and not mandatory, we are left entirely without any fixed rule by which the officers of election are to be guided in counting the ballots."

In *Curran v. Clayton*, 86 Me. 42, it was decided that under the statute of Maine, giving the voter a clear opportunity to designate by a cross-mark (X) his choice of candidates, the place and method of marking the ballot being regulated and defined in the statute, ballots defectively and illegally marked should be rejected.

The provision of chapter 78, requiring the voter to make a cross-mark (X) to the left of the name of the candidate of his choice for the office to be filled, was construed by the house of representatives of the state at its last session. In the contest brought by W. M. Glenn against C. E. Wightman, claiming to have been legally elected representative from Greeley county, a written report was filed by the election committee. From that report we take the following excerpt:

"After a very careful consideration of the 'Australian ballot law,' and an exhaustive examination of the authorities of this and other states construing its provisions, your committee has reached the unanimous ¹¹ conclusion that none of the ballots [those in dispute] should have been counted for either candidate. The great innovation upon the prior law made by the Australian law is that the intention of the voter shall be ascertained by an application to the ballot of the directions contained in the statute, and the provisions of our statute directing the manner in which the voter shall express his choice are mandatory. Another object of the law is to prevent the putting upon the ballot by the voter, or any other person, any mark, save and except the cross in the proper space, which will designate that ballot from any other ballot cast. Should the door be open to permit the counting of ballots containing any other than the marks permitted by the statute, it would enable persons who had bargained for votes to agree upon a distinguishing mark whereby it could be determined, by a mere inspection of the ballot, whether or not the voter had carried out his part of the contract, thereby thwarting one of the main objects of the law."

The report of the election committee was adopted by the house

without dissent, the membership of which contained over 40 persons who were members of the legislature of 1893, which enacted chapter 78.

In *Boyd v. Mills*, 53 Kan. 594, 42 Am. St. Rep. 306, where all the ballots used by the voters of one township were printed on colored paper instead of white, this court ruled that the ballots were properly counted, but remarked: "They were furnished by the judges to the voters, and were the only ballots furnished to or used by any voter at the voting place, and therefore the color of the ballots was not sufficient to prevent the counting thereof"; and added:

"The secrecy of the ballot has been in nowise impaired; the voters themselves have manifested no disposition to disregard the law, and it may be fairly inferred that the use of the colored ballots was an ¹² honest mistake on the part of the judges of the election. Had a part of the ballots been white and a part colored, so as to afford some grounds for identification of the votes cast by the individual electors, a different question would be presented.

"In considering the statute, we are to keep steadily in mind the evident purpose of the legislature in its enactment. It is plain that among the most prominent ends sought to be attained was that of absolute secrecy. Any mark or distinguishing feature on the ballots which would enable a person other than the voter himself to identify the ballot and find out how the elector had voted was intended to be strictly prohibited.

"By this decision we do not intend to say that any of the provisions of the law may be disregarded, or that any officer may escape liability to punishment for violating any of its provisions."

As sustaining the final ruling of the contest court, our attention is called to *Coleman v. Gernet*, 14 Pa. Co. Ct. Rep. 578; *Johnson v. Board of Canvassers*, 101 Mich. 187; *State v. Russell*, 34 Neb. 116; 33 Am. St. Rep. 625; *Spurgin v. Thompson*, 37 Neb. 39. *Coleman v. Gernet*, 14 Pa. Co. Ct. Rep. 578, was decided by an inferior court, but follows the decision of *Woodward v. Sarsons*, L. R. 10 Com. P. 733. In that case, the statute referred to differs from ours. Lord Coleridge, in the opinion, said: "The second section enacts as to what the voter shall do; that 'the voter, having secretly marked his vote on the paper, and folded it up so as to conceal his vote, shall place it in an inclosed box.' This is all that is said in the body of the act about what the voter shall do with the ballot paper. That which is absolute, therefore, is that the voter

shall mark his paper secretly. How he shall mark it is in the directory part of the statute."

The cases of *State v. Russell*, 34 Neb. 116, 33 Am. St. Rep. 625, and ¹³ *Spurgin v. Thompson*, 37 Neb. 39, were decided by the supreme court of Nebraska. The statute of that state does not provide, if the ballot is not marked as required, it shall not be counted. That statute has the provision that "when a ballot is sufficiently plain to gather therefrom a part of the voter's intention, that it shall be the duty of the judges of election to count such part."

Post, J., in referring to that provision, observed: "It may be, as contended by respondents' counsel, that the proviso in the last section was intended to apply only to ballots otherwise regular, but on which the voter has failed, through negligence, illiteracy, or other cause, to clearly express his intention as to every office named thereon. The inference is strong, however, from the language of the several sections to which reference has been made, that the legislature, by declaring a limited number of provisions to be mandatory, and a compliance therewith essential to a legal ballot, intended the other provisions as directory only."

Johnson v. Board of Canvassers, 101 Mich. 187, gives some support to the rule adopted by the contest court in finally counting the ballots, but even that case differs from this. In that case, the official ballot contained the name of but one candidate for each office. A number of ballots voted were not marked in any manner. The court ruled that, in the absence of names of opposing candidates on the ballot, those referred to should be counted. An examination of the various decisions construing the Australian ballot law, adopted by so many states of the Union, shows that the current and great weight of authority in this country supports the construction adopted by the Iowa and Maine courts.

It is next insisted if the provisions of sections 22 and 25, ¹⁴ referred to, are mandatory, that the statute is in conflict with section 1, article 5, of the constitution, which ordains that "all elections by the people shall be by ballot, and all elections by the legislature shall be viva voce." It is conceded that the word "ballot" means "a bit of paper having printed or written thereon the designation of an office, and the name of a person to fill it, and that the person casting it has a right to do so in absolute secrecy." The cardinal features of chapter 78 are two: 1. An arrangement for polling by which compulsory secrecy of voting is secured; 2. An official ballot containing the names of all candidates, printed and distributed under official authority. The act compels a vote by

ballot and absolute secrecy. The marking of the vote in seclusion, and in such a uniform way as not to be readily used for identification, reaches effectively a great class of evils, including violence, intimidation, bribery and corrupt practices, dictation by employers or organizations, the fear of ridicule and dislike, or of social or commercial injury, all coercive and improper influence of every sort depending on a knowledge of the voter's political action. Voting according to a bargain or understanding is especially aimed at. No man has ever placed his money corruptly without satisfying himself that the vote was cast according to the agreement, or, in a phrase which has become only too common in elections, without proof that "the goods were delivered"; and when there is to be no proof by any distinguishing mark, sign, or otherwise, but the word of the bribe-taker (who may have received thrice the sum to vote for the briber's opponent), it is idle to place any trust in such a use of money: Wigmore's Australian Ballot System, 52. A ballot ought to be cast by ¹⁵ the voter intelligently and thoughtfully. If so cast, there is no trouble in complying with the provisions of chapter 78. If a person is illiterate or physically disabled, he may have assistants to mark his ballot. No one is disfranchised by the act, nor are the provisions concerning the marking of the ballot difficult to understand. The legislature, within the terms of the constitution, may adopt such reasonable regulations and restrictions for the exercise of the elective franchise as may be deemed necessary to prevent intimidation, bribery, and fraud, providing the voting be by ballot, and the person casting the ballot may do so in secrecy: *Curran v. Clayton*, 86 Me. 42; *Whittam v. Zahorik* (Iowa, May 15, 1894), 59 N. W. Rep. 57; *Parvin v. Wimberg*, 130 Ind. 561; 30 Am. St. Rep. 254; *Boyd v. Mills*, 53 Kan. 594; 42 Am. St. Rep. 306; *Blair v. Ridgley*, 41 Mo. 63; 97 Am. Dec. 248. We do not think that the provisions of chapter 78, referred to, even if mandatory, conflict in any way with the constitution.

Finally, it is insisted that the district court, after reaching the conclusion it did concerning the counting of the ballots, should have sent the case back to the contest court for a new trial, and not rendered final judgment. The case as presented to this court is upon admitted facts. The ballots in dispute are truly copied in the record. The case is before us in the nature of an agreed statement of facts. This court is able, from the examination of the admitted facts, to direct the judgment. There appears no necessity for reconvening the contest court.

The counting of the ballots by the district court is approved and the judgment of the court is affirmed.

All the justices concurring.

ELECTIONS.—THE LEGISLATURE HAS POWER to prescribe the manner of holding elections and the mode in which electors shall express their choice: *Parvin v. Wimberg*, 130 Ind. 561; 30 Am. St. Rep. 254; *State v. McElroy*, 44 La. Ann. 796; 32 Am. St. Rep. 355, and note. It has power to make reasonable regulations as to ballots, to the end of preserving the purity of elections and the independence of voters: *State v. Saxon*, 30 Fla. 668; 32 Am. St. Rep. 46, and note.

RENDITION OF JUDGMENT BY APPELLATE COURT.—If the facts are not in dispute, and all the matters appear on the face of the record, enabling the appellate court to ascertain and declare the justice of the case, it will render such a judgment as will secure to each party his just rights, instead of remanding the cause for a new trial: *McAfee v. Reynolds*, 130 Ind. 33; 30 Am. St. Rep. 194.

Australian Ballot Law; Distinguishing Marks which Invalidate Ballot.

Ballot Reform Laws, Generally.—Within the last eight years ballot reform laws have been adopted in a majority of the states of the American union, embodying the main features of what is known as the "Australian ballot system." There are minor variations of detail in the numerous statutes, but the cardinal features of the system, as everywhere adopted, are two: 1. An arrangement for polling by which compulsory secrecy of voting is secured; 2. An official ballot containing the names of all candidates, printed and distributed under state or municipal authority: *Wigmore's Australian Ballot System*, 50. Secrecy, therefore, is one object of such statutes, and the other is to secure the independence of voters and purity of election.

Legal Marks—The Cross (X)—Mandatory and Directory Provisions.—One feature of the statute under consideration is that the voter must mark a cross (X) on his ballot, either to the right or to the left of the name of the candidate for whom he wishes to vote, and it is sometimes provided that the cross (X) must be put in the square or circle reserved for that purpose. This is the legal mark which the voter is authorized by law to make, and before depositing his vote he must fold his ballot so as to conceal such marks. If an elector does not choose to indicate his choice in the manner prescribed by law, he cannot complain if his ballot is not counted: *Parvin v. Wimberg*, 130 Ind. 561; 30 Am. St. Rep. 254. Instead of leaving the voter to make such cross (X) with a pen or pencil, he is sometimes provided with a stamp wherewith to stamp certain designated squares on the ballot to indicate his choice of candidates; and the question has frequently arisen whether the statute requiring the voter to indicate his choice by crossing the square or circle reserved for that purpose, or by stamping it, is mandatory or merely directory. It is a general principle that if a statute simply provides that certain things shall be done within a particular time, or in a particular manner, and does not declare that their performance shall be essential to the validity of an election, they will be regarded as mandatory if they affect the merits of the election, and as directory only if they do not affect its merits. But if it expressly declares any particular act to be essential to the validity of an election, or that its omission shall render the election void, the courts must so hold, whether the particular act in question goes to the merits or affects the result of the election or not, for such a statute is mandatory, and the courts cannot consider the question of its policy: *Parvin v. Wimberg*, 130 Ind. 561; 30 Am. St. Rep. 254; *Bowers v. Smith*, 111 Mo. 45; 33 Am. St. Rep. 491. And, with respect to the

Australian ballot law, every positive requirement which, if disobeyed, would necessarily defeat the controlling object of that law, which is to secure an absolutely secret ballot, should be held mandatory; but such as do not have that effect should be treated as directory, and a failure of the elector to comply strictly therewith should not be held to invalidate his vote, if the spirit of the law in the particular case is not violated: *Hall v. Schoenecke*, 123 Mo. 661. The sweeping ballot reform laws were not designed to drown the voter's intention: *Parker v. Orr*, 158 Ill. 609. They were intended to improve the methods for giving expression to the popular will in the choice of public officers, and should be construed so as to promote, not destroy, the great objects of their passage: *Bowers v. Smith*, 111 Mo. 45; 33 Am. St. Rep. 491. On the other hand, the requirement of the voter to designate his choice by a cross, or stamp, is exceedingly simple and easy to comply with; and "to permit a total neglect of all the requirements of the statute, and still sustain the proceedings, is to forego the lessons of experience, and invite a disregard of all those provisions which the wisdom of years has found conducive to the purity of the ballot-box": *Parvin v. Wimberg*, 130 Ind. 561; 30 Am. St. Rep. 254. Hence, there is some little diversity of opinion as to what latitude will be allowed a voter in making his cross or placing his stamp. If the statute requires the cross or stamp to be on or in the square or circle reserved for that purpose, the weight of authority is in conformity with the principal case, that the cross or stamp must be substantially in or upon the square or circle, and that it cannot be put elsewhere, and leave the election board to guess at his intention. In other words, the statute relating to the place of marking the cross or stamping the ballot is mandatory, and the ballot is invalid unless so marked: *Sego v. Stoddard*, 138 Ind. 297, followed in *Sego v. State*, 136 Ind. 700; *Parvin v. Wimberg*, 130 Ind. 561; 30 Am. St. Rep. 254; *Bechtel v. Albin*, 134 Ind. 193; *Taylor v. Bleakley*, 55 Kan. 1; ante, p. 233, followed in *Richardson v. Jamison*, 55 Kan. 16. So, if the statute requires the cross (X) to be marked at the right of the name of each candidate, instead of at the left, a ballot cannot be counted where the cross (X) is placed at the left of the name: *Curran v. Clayton*, 86 Me. 42; *In re Vote Marks*, 17 R. I. 812. The validity of the ballot ought not to turn upon the distance of the cross or stamp mark from the square, for, in that event, if a quarter of an inch is near enough, why not twice that distance or thrice that distance, or even an inch and one-half, as ballots are sometimes marked. The only rule free from embarrassment is to follow the language of the statute, and reject the ballot unless the cross or stamp at least touches the square. The voter has no greater right to stamp his ballot in a manner different from that prescribed than he has to decline to go into a booth to stamp it: *Bechtel v. Albin*, 134 Ind. 193, 203. In Nebraska, a contrary conclusion has been reached. While the statute there provides that the cross which signifies the preference of the elector shall, in ink, be placed in a space designated for that purpose, it is held that a ballot upon which such preference is indicated by a cross made with a lead pencil, outside of the space designated, but opposite the name of the choice of the elector, should be counted according to such manifest intention: *Spurgin v. Thompson*, 37 Neb. 39, 45. There is great danger, under the Australian ballot law, in giving the voter such latitude in marking his ballot, as it gives too much room for the use of distinguishing marks under the guise of an innocent mistake. It is due the court, however, to say that they did not in this case follow any chimerical notions in giving effect to that frequently visionary and uncertain quantity known as the voter's intention, because the statute in that state provides that "when a ballot is sufficiently plain to gather therefrom a part of the voter's intention, that it shall be the duty of the judges of election to count such part," and the court were bound to give effect to this enactment.

While statutory provisions as to the marking of ballots are in their nature mandatory, all statutes tending to limit the citizen in the exer-

cise of the right of suffrage should be liberally construed in his favor. Hence, if there is no mandatory provision requiring the voter to mark the cross in the square to the right of the candidate's name, and all that is required of him is that he shall mark a cross after the name of the person for whom he intends to vote, he has complied with all that is mandatory in the law after he has so placed his cross. If no such provision exists, it is not an essential prerequisite to the marking of a legal ballot that it shall be done in the square to the right of the name: *Tebbe v. Smith*, 108 Cal. 101; ante, p. 68. Sometimes there is no express statutory provision as to placing a square upon the ticket, and, of course, no direction as to placing the cross within it. If all that the statute requires to make the cross effective as a vote is, that it shall be inscribed in the right-hand margin, opposite the name of the person intended to be voted for, a cross placed in the margin of the ballot, on the right of the names of the candidates, opposite a candidate's name, should be counted as a vote for the candidate opposite whose name it is placed, whether the margin has any square in it or not, and if there is a square in it, the vote should be counted, though the cross is without, or partly without, the square: *In re Vote Marks*, 17 R. I. 812; *Tebbe v. Smith*, 108 Cal. 101; ante, p. 68. If the statute, therefore, makes no provision as to putting the cross in a designated square, the question whether the cross is or is not within the square usually provided for it is immaterial: *In re Vote Marks*, 17 R. I. 812. A statute which does not mention squares or circles opposite the names of candidates, and does not say with what the cross shall be made, but merely requires it to be made "in the appropriate margin or place opposite the name," etc., is simply directory, and, under it, the voter's intention should be given effect if it can be gathered from his ballot, having due regard to the requirement of secrecy: *Parker v. Orr*, 158 Ill. 609.

The statutory provision requiring the voter to mark his ballot by means of a stamp, by putting a cross opposite the name of each candidate thereon for whom he intends to vote, is mandatory. There must be a cross (X) mark: *Lay v. Parsons*, 104 Cal. 661; but the statute is not mandatory as to the exact form of cross to be used. Thus, the capital in parenthesis "(X)" used in directing the manner of voting, is merely directory, and indicates to the voter how the cross may be made; but the law is satisfied by complying with its language, and "making a cross" in some other form. Imperfect success in marking a cross in the proper places to indicate a choice of candidates, if there is a clear intention to conform to the statute and not to distinguish the ballot, does not authorize its rejection. A mark, however, on a ballot which bears no resemblance to a cross, and is not an attempt to make a cross of any kind, is cause to reject the ballot. But a mark made with ink and somewhat blurred, even if it cannot be said to be a cross, strictly speaking, may, if it shows an attempt to make a cross, be sufficient to allow the ballot to be counted. An honest attempt, however, to follow the directions of the law requiring a cross to be made in the appropriate margin or place opposite the name on the ballot, must appear, in order to permit the ballot to be counted: *Parker v. Orr*, 158 Ill. 609. A ballot marked with two pencil lines, commencing in the circle preceding the party title and running through it and each of the squares opposite the names of candidates, but without anything like a cross in the circle or in the squares, does not substantially comply with the ballot law. So, a cross to the right of the name of a candidate between such name and the square opposite the name of an opposing candidate, does not sufficiently show the intention of the voter to permit the ballot to be counted for either candidate: *Apple v. Barcroft*, 158 Ill. 649.

If the statute does not provide with what the cross shall be made, it may, of course, be made with either pen and ink or in pencil marks. In fact, it has been held that, under the "Australian ballot system," a provision of a statute that the voting mark shall be made with ink is directory merely, and if the mark is made with pencil the ballot is not

thereby rendered void: *State v. Russell*, 34 Neb. 116; 33 Am. St. Rep. 625; *Spurgin v. Thompson*, 37 Neb. 39. Marking the cross on the ballot in pencil does not, it is said, violate a provision of the statute that "no elector shall place any mark upon his ballot by which it may afterward be identified as the one he voted": *State v. Russell*, 34 Neb. 116; 33 Am. St. Rep. 625. If the statute prescribes that the cross shall be made with a stamp, a ballot marked with a lead pencil and not with the official stamp, is invalid: *People v. Sausalito*, 106 Cal. 500; *Lay v. Parsons*, 104 Cal. 661.

Distinguishing Marks—What Prohibited.—Under the Australian ballot law one thing is especially prohibited, and that is the use of marks whereby one ballot may be distinguished from another. This principle is enforced by the courts, though the statute is silent on the subject. The use of a mark furnishing means of avoiding the secrecy of a ballot requires its rejection, though the law contains no direct prohibition of distinguishing marks; and this is so although the mark used may indicate the voter's candidate or party choice: *Parker v. Orr*, 158 Ill. 609. And when the statute distinctly declares that ballots having a distinguishing mark upon them shall not be received, or shall be rejected, it is to be construed as mandatory and not as directory: *State v. Saxon*, 30 Fla. 663; 32 Am. St. Rep. 46. We have seen above that the only mark which the voter can lawfully use in designating his choice of candidates on a ticket is a cross (X) or stamp, marked opposite a name, and either in or outside of a designated circle or square, depending upon the provisions of the state. Hence a statute forbidding marks which may serve to distinguish the ballots, does not include the cross legally placed upon the ballot; and when a legal mark is placed upon the ballot in a legal place, whether at the right of the name or in the square, the ballot cannot be rejected because the mark, as placed, may serve some ulterior purpose to distinguish the ballot: *Tebbe v. Smith*, 108 Cal. 101; ante, p. 68. Under a statute providing that "no elector shall place any mark upon his ballot by which it may afterward be identified as the one he voted," the mark prohibited is such a one, whether letters, figures, or characters in ink or in pencil, as shows an intention on the part of the voter to distinguish his particular ballot from others of its class, and not one that is common to, and not distinguishable from, others in that class, and the ballot itself must furnish evidence of an unlawful intention on the part of the voter, such as his initials, or a mark known to be his, or the like: *State v. Russell*, 34 Neb. 116; 33 Am. St. Rep. 625. As the primary object of the ballot reform acts is to enable the voter to cast his ballot without the possibility of revealing, by the act of voting, the identity or political complexion of the candidates voted for, it seems that any construction of such acts which permits votes to be cast and counted which contain any caption or word revealing what is so sought to be kept secret should be avoided. Any ballot, therefore, easily distinguishable from all others cannot be counted: *People v. Board of Canvassers*, 129 N. Y. 395. And the conclusion seems to be almost inevitable that any mark upon a ballot, other than the legal, appropriate, and necessary one, which is a cross or stamp, to designate the intention of the voter, must be regarded as a distinguishing mark: *Attorney General v. Glaser*, 102 Mich. 396; though, on rehearing, in *Attorney General v. Glaser*, 102 Mich. 405, 409, this rule was considered too rigid. Under the Michigan statute, the only instance in which an unnecessary mark is recognized as possible is where an elector votes for more than one person for the same office, in which case his ballot shall not be counted for those persons, but shall be, as to them, null and void: *Attorney General v. Glaser*, 102 Mich. 396.

What Marks on Face of Ballot Invalidate It.—Distinguishing marks may appear either upon the inside of a ballot or upon its outside. The following illustrations show what distinguishing marks upon the face of a ticket will invalidate it. For example, if a letter on a ballot is written in pencil in a blank space left for the initial of a name, though

It may have been the intention of the voter to write a name, and he may have abandoned his intent after setting down an initial letter, yet, the mark being one having no lawful right on the ballot, and one which could serve as a distinguishing mark, it renders the ballot void. The voter's only remedy, having improperly marked the ballot, is to call for the issuance to him of a fresh ticket: *Tebbe v. Smith*, 108 Cal. 101; ante, p. 68. Writing the word "Democratic" at the head of a ticket; making a single mark through the circle or square; making a circle or other irregular character, not being any form of a cross, within the circle or square; making a cross opposite the names but outside the square, with no attempt by the voter to indicate his choice by making a cross in the appropriate place, and signing the name of the voter to the ballot, are all modes of marking which disregard the directions of the law besides destroying the ballot's secrecy, and ballots so marked should be rejected: *Parker v. Orr*, 158 Ill. 609. So, if, upon all the ballots cast in a certain precinct, a name appears written in the blank space under the office of the peace, which was done by the same person, and there was but one person in the precinct lawfully assisted in the making of his ballot under the provisions of the statute, and it does not appear whether the writing was upon the tickets when they were put into the voter's hands, it must be presumed that the public officers did their duty. It will be presumed that they put legal tickets into the hands of the electors, and that the writing was afterward put upon them. Hence, in the absence of proof removing such objection, all the ballots, other than the ballot of the voter lawfully assisted, should be rejected: *Tebbe v. Smith*, 108 Cal. 101; ante, p. 68. In this case, *McFarland and Garoutte, JJ.*, dissenting, could not see that there were any presumptions upon which the problem could be solved. They considered that if there is a distinguishing mark on a ballot when it is voted, it should not be counted; but that if the mark is placed on a ballot after it is properly voted, then it should be counted at the trial of a contest. The justices were, therefore, of the opinion that the votes of the precinct in question should not have been rejected without "some evidence" tending to show that the marking of the votes for justice of the peace was done before the ballots were voted. In *Sego v. Stoddard*, 136 Ind. 297, followed in *Sego v. State*, 136 Ind. 700, the following were held to be distinguishing marks rendering the ballot invalid: A lead pencil mark across the name of a candidate on the ballot; a hole in a ticket, caused by partially erasing the stamp mark in the small square to the left of the name of a candidate, though the ticket was otherwise properly stamped at other places on the ballot; a stamp in a square containing a device, and also to the left of the name of a candidate in the list under such stamped device; a stamp in a square containing a device, and also to the left of two names in another list of candidates, the list under the stamped device being complete; a stamp in the square to the left of the candidates voted for, in the various lists, and also in a square opposite to which there is no candidate's name printed; a stamp in a square opposite no candidate's name; and more than one stamp mark in a square containing a device. The statute, as in Indiana, sometimes prescribes what shall be treated as a distinguishing mark; and it may here be observed, with respect to ballots in that state, that it is only the squares to the left of names on the various tickets and the square inclosing the device that can be lawfully stamped. If the voter desires to vote for all the candidates of one party or group of petitioners, he may place the stamp on the large square inclosing the device and preceding the title under which the candidates of such party or group of petitioners are printed. The Indiana statute further provides that "if the voter stamps the large square inclosing the device he shall not stamp elsewhere on the ballot, unless there be no candidate for some office in the list printed under such stamped device, in which case he may indicate his choice for such office by stamping the square to the left of the name of any candidate for such office on any other list; a stamp on a ballot in violation of this provision shall be treated

as a distinguishing mark. If a stamp touches a square it shall be counted on the square, but a stamp that touches no square shall be treated as a distinguishing mark": *Sego v. Stoddard*, 136 Ind. 297. A cross (X) is the only mark that can be lawfully counted as a vote. It is the only mark authorized by the statute to be used to designate the person voted for, and it is only by force of the statute that it gets its significance for that purpose. "If another mark," says the court in *In re Vote Marks*, 17 R. I. 812, "be used, there is nothing to certify its meaning. It might be conjectured that it was used inadvertently, instead of a cross, but, in our opinion, such a conjecture would not justify the counting of it. The statute declares: 'No voter shall place any mark upon his ballot by which it may be afterward identified as the one voted by him.' If marks other than crosses were counted, they might be used both to answer the purpose of crosses and to identify the ballots."

Ballots Folded in an Unusual and Striking Manner and creased by the folding, so that they may be readily separated and distinguished from other ballots folded in the ordinary manner, and at a greater distance than if marked with a pencil or with ink, should be rejected. So ballots found with printed party circulars in the same envelope should be rejected if they are so numerous as to preclude the idea that they were the result of ignorance, accident, or mistake. Nineteen such circulars, advising the voter to vote early, and giving the location of the voting place, etc., leave the presumption pretty strong that the circulars were there by design; and if by design, it is difficult to conceive of any honest motive in it. A ballot with a part torn off is to be rejected. So ballots with another name written under the printed name of a candidate, but without striking out the printed name, are to be rejected. The same with ballots having two pasters, one on top of the other, as this may be a device arranged to enable the purchaser to prove that the purchased voter had fulfilled his corrupt agreement. Fourteen ballots, all of the same party, and each having a different name from the others for lieutenant governor, put upon the ballots by a paster, the name being in writing and all of the same hand, should be rejected, as said pasters may constitute a device for identifying the voter who cast each of said ballots, and is a distinguishing mark within the meaning of the law: *Phelan v. Walsh*, 62 Conn. 260. The Michigan election law of 1891 provides that "any elector may mark or stamp a cross in the space below the party name printed at the head of the ballot. If marked thus, such ballot shall be counted for all the nominees of such party whose names appear on the ballot in that column. If the voter shall have erased some name in the column, or marked a (X) before the name of a candidate in some other column for the same office, or written in a name under the name of any candidate, the name of such candidate shall not be counted as voted for by such ballot; but if the name of the candidate shall have been erased, such vote shall be counted for the candidate whose name in another column shall have been marked, or whose name shall be written under the name erased." It also provides that "any ballot which shall bear any distinguishing mark or mutilation shall be void, and shall not be counted, and any ballot, or part of a ballot, from which it is impossible to determine the elector's choice of candidates, shall be void as to the candidate or candidates thereby affected." Under these statutory provisions ballots should not be counted if more than a single cross appears under the party name of one of the tickets; if a cross appears in the square under the party name of a ticket, and two marks similar to commas appear in the square under the party name of another ticket; if a cross, with a half circle drawn around it, appears under the party name of a ticket, and a figure 9 appears in the square under the heading of another ticket; if a cross appears in the body of the ticket outside of any square thereon; if a cross appears under the party name on a ticket and a horizontal line is drawn through the square under the party name of each of the other tickets; if a cross appears under the party name on a ticket, and also opposite the name of a candidate on another ticket, and a line is drawn

under the name of the candidate for the same office on the first-named ticket; if the ballot has no cross upon it, but a blot appears in the center thereof; if a ballot has no cross upon it, but a straight line is drawn through the square under the party name on one of the tickets; and if a cross appears at the right of the square under the party name of one of the tickets, and a large circle is drawn around said square—as such marks, at least, fail to express the voter's intent: *Attorney General v. Glaser*, 102 Mich. 405.

What Marks on Face of Ballot do not Invalidate It.—But ballots are not invalidated under the Michigan statute above quoted if the name of a candidate appears on two tickets, and a cross is placed in the square opposite his name on each ticket; or if the names of the candidates on one ticket appear on another ticket, and a cross appears in the square under the heading of both of said tickets, or under the party name of one ticket and opposite a portion or all of the names on the other; or if a cross appears opposite the names of the candidates on one ticket, or in the square under the party name of such ticket, and the names of the candidates on the opposing tickets are erased, either by horizontal lines or by a cross extending over all of said names; or if two tickets are identical, and crosses are placed opposite all the names on each, and a line is drawn through each name on the opposing ticket and through one of the names on the duplicate ticket; or if a cross appears in the square under the party name of a ticket, and the name of a candidate thereon is erased, and the surname of the candidate for the same office on the opposing ticket is written in; or if a cross appears in the square at the head of a ticket, and the name of one of the candidates on said ticket is partially erased, and another name written thereon with a lead pencil, such ballots should be counted, as the marks designated are not distinguishing marks prohibited by law: *Attorney General v. Glaser*, 102 Mich. 405. The word "for" prefixed to the name of the office on ballots does not necessarily render them invalid, although it could be so used as to become a distinguishing mark: *Phelan v. Walsh*, 62 Conn. 260; *Fields v. Osborne*, 60 Conn. 544. So the words "Regular Prohibition Ticket," printed at the head of a ballot, on its face, though not adopted legally as a caption under the vignette law, do not constitute a part of the ticket, and do not make the ticket illegal, under a statute providing that the word, "for" shall constitute the top line of the ticket, if the remainder of the ticket consists of words showing for whom and for what officers the ballot was cast. It being evident that such words were not designed for the purpose of distinguishing the ballots from others, and thus destroying their secrecy, they are not thereby rendered illegal as being illegally marked and calculated to distinguish the persons, or class of persons, voting them; and the fact that the device might have been used with that intention does not justify the rejection of the ballots: *Coffey v. Lyman*, 92 Cal. 135. Ballots containing slight but visible marks, having the appearance of being made with a pen, but a part of which are found to have been made by the plates in the printing, and remainder to be specks in the paper, should be counted: *Phelan v. Walsh*, 62 Conn. 260. A statutory provision prohibiting distinguishing marks upon ballots does not conflict with a provision requiring all ballots to be numbered: *State v. Connor*, 86 Tex. 133. And though the statute requires ballots to be numbered consecutively, yet if ballots properly indorsed and otherwise regular in form, except that their stubs are not consecutively numbered, have been voted, and the stubs detached, and the ballots cast into the box and their identity lost, they must be counted, in the absence of any provision prohibiting it. Assuming that certain ballots deposited with high numbers are "marked ballots," they do not operate to render void the ballots that are regular and in accordance with the provisions of the statute: *People v. Bidelman*, 69 Hun. 596. Ballots with the name of the candidate for judge of probate erased and another name written in in ink, all by the same hand, and others where the same change is made in pencil, and all by the same hand, are valid.

So are ballots valid that contain the words "Judge of Probate," but with no name of any candidate for the office. And ballots wholly omitting these words and the name of any candidate for the office are valid. So ballots are valid that contain the name of a person as candidate for the probate judgeship who is not a resident of the probate district: *Phelan v. Walsh*, 62 Conn. 260. The ballot reform act does not prevent a voter from voting for any candidate he chooses; and he may "write or paste upon his ballot the name of any person for whom he desires to vote for any office," although such person has not received a proper nomination by any political party. Hence the presence of such person's name on "paster ballots" does not vitiate them if they have the proper official indorsement, and they should be counted, as the effect is not to mark or identify the ballot within the meaning of the act: *People v. Shaw*, 133 N. Y. 493. Ballots in one senatorial district, which contain the name of a person, as candidate for the state senate, who is not a resident of the district, but is a candidate in another district, are valid: *Phelan v. Walsh*, 62 Conn. 296. Ballots on which the name of a candidate is printed "DE FOREST," are not invalidated by a statute requiring the names to be printed in "type of uniform size." At an election in Connecticut, such ballots were used at the polls until about 10 o'clock, when it was suggested that they were wrong. Thereupon the Democratic committee, for the sole purpose of correcting the supposed error, had pasters printed changing the small "e" to a capital of the same size with the other letters, and pasted them over the name as originally printed. After that two hundred and forty-seven of these ballots were cast, and forty were cast before. All were counted. "We have no doubt," said the court, "that they were properly counted. The first section of the act requiring type of uniform size was strictly complied with in all other respects. In that there was a violation of the strict letter of the law, but it was not a violation of its spirit and intent. We do not feel justified in throwing out votes for such a cause. It is a matter of common knowledge that this name, and many others of like character, are often, if not usually, printed in a similar manner. We cannot believe that the legislature intended to prohibit it in such cases. We cannot impute to it an intention to interfere with the ordinary mode of writing or printing a name. The ballot as first printed was a substantial compliance with the statute, and the amendment, though unnecessary, was fairly justified by the twelfth section": *Phelan v. Walsh*, 62 Conn. 260, 295. In the case last cited, one Rathbun was the Republican candidate for judge of probate. The Democrats adopted the nomination, but in printing his name spelled the last syllable with an "r." The mistake was discovered and the "r" erased in ink. In that condition the ballots were used by the voters. "Bad spelling," said the court, "does not vitiate; correcting it ought not to. The transaction carries on its face the explanation, which is consistent with the honesty of the voters, and there is no ground for supposing that it was designed for the purpose of identification. Nor is it additional matter within the prohibition of the first section of the statute. The ballots were properly counted": *Phelan v. Walsh*, 62 Conn. 260, 296. The mere fact that the paper on which all the ballots used in one election district were printed was of a color other than white, where the ballots were not only printed by the authorities designated by law, and by them furnished to the judges of election, but were furnished by the judges to the voters, and were the only ballots furnished to, or used by, any voter at that voting place, is not sufficient to prevent the counting of the votes. The use of such ballots, all being alike, does not impair that secrecy which is one of the prominent ends sought to be attained by the "Australasian ballot law." It may be fairly inferred that the use of the colored ballots was an honest mistake on the part of the judges of election. But, of course, if a part of the ballots had been white and a part colored, so as to afford some grounds for identification of the votes cast by the individual electors, a different question

would be presented. A single ballot printed on colored paper, if the official ballots printed on white paper are used by the other electors, could not be counted. "In that case it would be plain that the object of the law was contravened:" *Boyd v. Mills*, 53 Kan. 594; 42 Am. St. Rep. 306. In a statute providing that a ballot shall be of plain white paper, clean and even cut, without ornament, designation, mutilation, symbol, or mark of any kind whatsoever, except the name or names of the person or persons to be voted for, and the office to which such person or persons are intended to be chosen, the word "designation" is to be construed to intend only designations in the nature of ornaments, mutilations, symbols or marks, as distinguished from words and writing. Hence, ballots containing the words "National Republican Ticket," and "Free Suffrage Ticket" on the inside and body of the ballot are not illegal, nor within the condemnation of the statute: *State v. Saxon*, 30 Fla. 668; 32 Am. St. Rep. 46. A voter has a right to vote for whom he pleases, but some voters are illiterate and need aid in selecting their candidates. In this fact seems to have originated the idea of devices or emblems. They are resorted to for the purpose of enabling the illiterate voter to vote for whom he may see fit, to enable him to exercise his will as far as he may be able to do so. As evidence of this each party is limited by statute to a single device: *Fernbacher v. Roosevelt*, 90 Hun, 441. And the statute provides that but one vignette shall be printed on ballots used at a general election. But an unauthorized vignette is not necessarily a distinguishing mark. The object of the law prohibiting distinguishing marks was to provide against voters marking the individual ballot which they cast in such a manner as to distinguish it: *Lindstrom v. Board of Canvassers*, 94 Mich. 467.

What Marks on Outside of Ballot Invalidate It.—Distinguishing marks may be upon the outside of a ticket as well as upon the inside. Hence, a ballot on which is indorsed the word "Eagleham," possibly the name of an elector, violates a statute that "no elector shall place any mark upon his ballot by which it may afterward be identified as the one voted by him," and is void: *Spurgin v. Thompson*, 37 Neb. 39. So, if the statute requires the same indorsement upon all the official ballots used at any polling place, any ballot cast having a different indorsement, and one disclosing the candidates voted for, is void, and must not be counted. And this is true without regard to the question as to whether the change was made with intent to render the ballot distinguishable, or as to whether the elector had knowledge, or means of knowledge, of the proper indorsement: *People v. Board of Canvassers*, 129 N. Y. 395. A different, distinct, or peculiar indorsement upon the ballots, or any of them, used by any party or candidate, or set of candidates, would, of course, remove all secrecy from the act of voting as to the electors using a ballot with such an indorsement, and thus the fundamental purpose of the law would be defeated. An elector must not blindly rely upon any one, even the election officers, in the preparation of his ballot. If he is handed an official ballot with a distinguishing mark upon it, or an improper indorsement, he is not obliged to vote it, but may procure a proper ballot: *People v. Board of Canvassers*, 129 N. Y. 395, 408. A ballot is illegal if the envelope has no indorsement, or bears a distinguishing mark or the name of the voter: *Mallett v. Plumb*, 60 Conn. 352. Ballots marked "O. K." on the outside or back are illegal: *Baxter v. Ellis*, 111 N. C. 124.

What Marks on Outside of Ballot do not Invalidate It.—A ballot should not, however, be rejected because there is on its back a faint type-impression of a portion of the face of a similar ticket, produced, when there is too much ink upon the type used in printing, by placing one ticket face downward upon the back of another which preceded it from the press, if there is no evidence tending to show that the ticket was marked for the purpose of distinguishing it from other ballots. So, under a statute declaring that "when a ballot found in any ballot-box bears upon the outside thereof any impression, device, color, or thing,

or is folded in a manner to distinguish such ballot from other legal ballots found therein, it must be rejected," a ballot should not be rejected because there is on the outside of it a stain, piece of wax, or any other mark apparently placed there by accident, if there is nothing in the evidence to indicate that it was on the ballot for the purpose of distinguishing it from other ballots, or to impart knowledge of the person who voted it: *Rutledge v. Crawford*, 91 Cal. 526; 25 Am. St. Rep. 212.

Proof of Intent in Marking for Identification.—Under the provision of the "reform ballot law" of New York, prohibiting marks of identification from being placed upon ballots, and providing that any ballot having marks of identification placed upon it "by the voter, or any other person to his knowledge," with the intent that the ballot may be identified, it is necessary, in order to condemn a ballot, to prove that it was marked either by the voter, or by another with his knowledge, with his intent, or the intent known to him of such other person, that it might afterward be identified. It is not necessary, however, to call the voter, or any person acting in complicity with him, to prove the requisite facts, but the same may be proved, like other facts, by any competent evidence. Nor is it necessary to show who the voter was who cast the ballot. It is sufficient to show that the ballot was marked with the illegal intent, no matter who cast it. The marks upon a ballot, or a series of ballots, may be of such character as to furnish, of themselves, strong proof that they were placed thereon for the purpose of identification, and, with other circumstances, even slight, may establish the illegal intent: *People v. Board of Supervisors*, 135 N. Y. 522.

MISSOURI PACIFIC RAILWAY COMPANY v. KEYS.

[56 KANSAS, 205.]

WATERS—DITCH AS A WATERCOURSE.—If a landowner, for the purpose of straightening a stream, cuts a ditch through his land, and over and along a highway, with the acquiescence and common consent of all, it is governed, in the matter of interference and obstruction, by the same rules as a watercourse.

WATERS—RIGHT TO DIVERT IF RETURNED.—A landowner has a right to change the channel and divert the water in a stream flowing through his land, if he returns it to the original channel before it reaches the land of the proprietor below.

WATERS—OWNER CANNOT DIVERT AND PRECIPITATE ON ADJOINING OWNER TO HIS INJURY.—A landowner has no right to divert the water of a stream flowing through his land from its channel and precipitate it in a body upon the adjoining land to the injury of the owner.

SURFACE WATER IS AN OUTLAW—PROTECTION AGAINST. Water which has overflowed the banks of a stream during a freshet, on account of the channel not being large enough to hold and carry it off, is surface water, to be regarded as an outlaw, and against which any landowner affected may protect himself.

SURFACE WATER—OWNER MAY PROTECT HIMSELF AGAINST—RAILROAD EMBANKMENT—DAMNUM ABSQUE INJURIA.—An owner of land has the right to obstruct and hinder the flow of mere surface water upon his land from the land of other proprietors, and may even turn the same back upon his neighbor without incurring liability. Hence, a railroad company may protect its right of way by building an embankment without openings or waterways to prevent surface water from lands above crossing its right of way, and any injury caused by the accumulation of such water is *damnum absque injuria*.

Action by Keys to recover damages resulting from the alleged obstruction of a watercourse by the railway company. The case was tried by the court without a jury. There was a judgment for the plaintiff, and the company appealed.

J. H. Richards, C. E. Benton, and S. S. Kirkpatrick, for the appellant.

Sutherland & Young, for the appellee.

214 JOHNSTON, J. In his petition Keys averred that, ever since the settlement of the section of the country in which the farm is situate, there has been a distinct natural watercourse running in an easterly and northeasterly direction through his land, which conducted large quantities of water from the hills lying west and northwest of his land, and that prior to the building of the railroad the water passed freely and unobstructedly eastwardly from plaintiff's land along the watercourse, but since the building of the railroad, and owing to the incomplete, inadequate, and improperly located openings for the passage of water coming down the natural watercourse across the right of way of the railway company, and beneath its tracks, the water had accumulated and remained in great quantities over the plaintiff's land, damaging and destroying his crops, for which he asked judgment in the sum of nineteen hundred and ninety-nine dollars.

It appears that the plaintiff's land is situated in section 31, while the railroad is constructed on section 32. Between sections 31 and 32 there is a highway, and immediately east and running parallel with the highway the railroad was constructed. The watercourse, which came from the hills on the west, was known as "Crow creek"; and, while there was some controversy as to the character of the stream, the testimony is sufficient to show that it should be treated and regarded as a natural watercourse. The creek formerly meandered through Keys' farm in an easterly and northeasterly direction, being somewhat crooked, and flowed out across the section line into section 32, until it found its outlet in the Verdigris river. For the purpose of straightening the course of the creek **215** through his premises, Keys dug a large ditch directly east through the center of his land, which carried the water into the highway, and from that point he dug two ditches in a southerly direction along the highway until they reached the original channel of the creek. After this new channel was made, the original channel of the creek through plaintiff's premises, and which passed across the highway and under the point where the railroad was built, was completely filled up and water no longer

flowed there. This was the situation when the railroad was built. It was constructed parallel with the ditches that were dug in the highway, and not across the artificial channel which was dug through Keys' premises. Some claim is made by the railway company that the artificial channel through Keys' land is not to be treated as a watercourse, and that the obstruction of the same would give no right of action for the resulting injury. It appears that the ditch was dug not merely for the drainage of the land, but as a channel for the flow of the water of a natural watercourse. It had remained open and had been treated as a watercourse for a number of years before the construction of the railroad, and therefore is to be governed by the same rules as other watercourses. Keys, as the owner of the land, had a right to change the channel and divert the water of Crow creek, provided he returned the water to the same channel before it reached the land of the proprietor below. It appears, however, that Keys did not return the water to the channel of Crow creek upon his own land, but carried it out into the highway and conducted it down the highway in ditches to the original channel. It is true, as contended, that he has no right to divert the water of the stream from its channel and precipitate it in a body upon the adjoining land, to the ²¹⁶ injury of the owner. The proprietor of the adjoining land would have the right to erect an embankment across the course of the water and thus keep it off his land, and the party who had wrongfully diverted the water of the stream could not complain if the embankment thus made would have the effect of turning the water back upon his own land. No complaint, however, is made by the public authorities in charge of the highway by reason of the diversion of the stream and the discharge of the water into the highway; and if the ditches dug were reasonably sufficient for the purpose, and there has been acquiescence and consent to such diversion by the public authorities, the railway company cannot complain for them nor derive any advantage from the change of the channel in the lands above its right of way. The turning of the stream from its original channel gave the railroad company no right to interrupt or obstruct the new channel, and if it was interrupted or obstructed to the injury of an upper landowner, he is entitled to recover for any damages he may suffer in consequence of such obstruction. The railroad, however, was not built across the ditch upon Keys' land, nor does it appear from the findings of the court that it was built across the ditches constructed by him in the public highway. As we have seen, the highway lay between Keys' land and the right of way of

the railroad company, and we do not understand that the ditches or watercourse were crossed or changed by the company in the building of its road. The case appears to have been decided upon the theory that it was the duty of the railroad company to make an opening through its embankment to carry off the water which might overflow the ditches which Keys had constructed, and, because it failed to make an opening which would discharge the overflow in a ²¹⁷ body upon the land below, the company was held liable. The court found that in time of high water, before the construction of the railroad, when there was an overflow of the stream, it flowed over the public highway, through openings under the highway, and made its escape into the original channel, and thence into the Verdigris river. The court finds, as the cause for the injury, and as a basis for the recovery which was allowed, that "the railroad grade of defendant's railroad along the east side of plaintiff's premises is about three or four feet high, and in times of heavy rains it dams up the mouth of plaintiff's ditch where it emerges from his premises, fills it with mud and sediment, and the accumulated water backs up from the railroad grade and overflows nearly all of plaintiff's premises and destroys his growing crops." As we have seen, the railroad was not constructed over the ditch which emerges from plaintiff's premises, nor did that ditch reach the right of way of the railroad upon which its grade was constructed. There was no duty resting on the railroad company, or any proprietor of the lower land, to provide an outlet for the overflow of Crow creek or of the ditches into which it was turned. In changing the channel of the creek it was the duty of Keys to make the new channel sufficient, not only for the ordinary flow of water in the stream, but also for such as might be reasonably expected to occur. The overflow of the stream where it emerged from Keys' land, and which spread out over the highway and crossed the land upon which the railroad was built, was not confined to any channel, and had none of the characteristics of a watercourse. It was practically surface water, which is regarded as an outlaw, against which any landowner affected may fight.

²¹⁸ "The simple fact that the owner of one tract of land raises an embankment upon it which prevents the surface water falling and running upon the land of an adjoining owner from running off said land, and causes it to accurelate thereon to its damage, gives to the latter no cause of action against the former; nor is the rule changed by the fact that the former is a railroad corporation, and its embankment is raised for the purpose of a railroad track,

nor by the fact that a culvert could have been made under said embankment sufficient to have afforded an outlet for all such surface water": *Atchison etc. R. R. Co. v. Hammer*, 22 Kan. 763; 31 Am. Rep. 216. See, also, *Chicago etc. Ry. Co. v. Steck*, 51 Kan. 737; *Missouri Pac. Ry. Co. v. Renfro*, 52 Kan. 237; 39 Am. St. Rep. 344.

While a landowner cannot obstruct a watercourse, or divert a stream of water so as to cause injury to another, without being responsible therefor, it is well settled, under the common law which prevails in this state, that an owner has the right to obstruct and hinder the flow of mere surface water upon his land from the land of other proprietors, and he can even turn the same back upon the land of his neighbor without incurring liability for injuries caused by such obstruction. Under this rule, Keys had no right to have the surface water flow across the right of way of the railroad company, but, on the contrary, it had a right to protect itself by building an embankment without openings or waterways, in order to prevent the water crossing its right of way, and any injury caused thereby is *damnum absque injuria*: *Pettigrew v. Evansville*, 25 Wis. 236; 3 Am. Rep. 50; *Hoyt v. City of Hudson*, 27 Wis. 656; 9 Am. Rep. 473; *O'Connor v. Fond Du Lac etc. R. R. Co.*, 52 Wis. 526; 38 Am. Rep. 753; *Turner v. Dartmouth*, 13 Allen, 291; *Bowlsby v. Speer*, 31 N. J. L. 351; 86 Am. Dec. 216; *Swett v. Cutts*, 50 N. H. 439; 9 Am. Rep. 276; *Preston v. Hull*, 77 Iowa, 309; *Morris v. Council Bluffs*, 67 Iowa, 343; 56 Am. Rep. 343; *McCormick v. Kansas City etc. R. R. Co.*, 57 Mo. 433; *Abbott v. Kansas City R. R. Co.*, 83 ²¹⁹ Mo. 271; 53 Am. Rep. 581; *Jones v. St. Louis etc. Ry. Co.*, 84 Mo. 151; *Schneider v. Missouri Pac. Ry. Co.*, 29 Mo. App. 68; 24 Am. & Eng. Ency. of Law, 903.

As the recovery of the plaintiff below was largely based upon the failure of the railway company to provide openings for the flow of surplus water, it cannot be sustained.

The judgment of the district court will be reversed and the cause remanded for another trial.

Allen, J., concurring.

Horton, C. J., not sitting.

WATERS AND WATERCOURSES—SURFACE WATERS.—At common law, surface water, like the waters of the sea, is regarded as a common enemy, and any landowner has the right to expel it from his own land, without regard to the injury thereby occasioned to another proprietor: *Note to Kansas City etc. R. R. Co. v. Smith*, 48 Am. St. Rep. 588. The owner of a watercourse may divert or change the course of the stream on his own land, provided he returns it to its original or natural channel before it reaches the land of an adjoining owner without injury to the latter: *Kay v. Kirk*, 76 Md. 41; 35 Am. St. Rep. 408. A party has no right to collect surface water and discharge it on the

land of another, to his damage, and, if he does so, he will be liable for the damage sustained: *Note to Mayor v. Sikes*, 48 Am. St. Rep. 137. Surface waters are such as lie upon or spread over the surface, or percolate the soil, as in swamps, and do not flow in a particular direction: *Case v. Hoffman*, 84 Wis. 438; 36 Am. St. Rep. 937. A mere overflow is not surface water: *O'Connell v. East Tennessee etc. Ry. Co.*, 87 Ga. 246; 27 Am. St. Rep. 246; note to *Kansas City etc. R. R. Co. v. Smith*, 48 Am. St. Rep. 588.

WATERS AND WATERCOURSES—RAILROAD EMBANKMENTS—SURFACE WATERS.—The owner of an estate, for the purpose of securing or protecting his reasonable use and enjoyment, may obstruct and divert surface waters thereon which have come from higher levels, by embankments, ditches, drains, culverts, and other structures, and in so doing turn the same back upon, or off, onto, or over the lands of other proprietors, without liability for injury ensuing from such obstruction or diversion: *Note to Sharpe v. Schleib*, 42 Am. St. Rep. 839. A railroad company is not bound to construct waterways and culverts to carry off surface water in the absence of any channel or ravine crossing and closed by its embankment: *Missouri Pac. Ry. Co. v. Keys*, 52 Kan. 237; 39 Am. St. Rep. 344; note to *Kansas City etc. R. R. Co. v. Lackey*, 48 Am. St. Rep. 591.

WALKER v. COLEMAN.

[55 KANSAS, 381.]

REMOVAL OF CAUSE TO FEDERAL COURT—WHAT WILL NOT JUSTIFY.—The mere fact that the defendant in a state court is a United States marshal, justifying under a writ of attachment issued from a federal court having jurisdiction in the locality of the suit, does not confer upon him any right to have the cause removed to that court.

NEW TRIAL FOR MISCONDUCT OF JUDGE.—If the judge, on a trial before a jury, uses offensive language towards counsel for the defendant, such as to imply that he is an intruder in court, and the verdict goes against him, a new trial should be granted, on the ground of irregularity in the proceedings of the court, as the jury may have been influenced unfavorably to the defendant by the bearing of the judge and his prejudice against counsel.

Action by Coleman and others against Walker to recover the value of a stock of goods alleged to have been unlawfully taken. Coleman recovered judgment and Walker appealed. Walker filed an application to remove the cause to the circuit court of the United States for the district of Kansas, on the ground that in taking the stock of goods he was acting as a United States marshal for that district, under order of the federal court, by virtue of an attachment issued from said circuit court in the case of *Tootle v. Lynch*; that all his acts in relation to the taking of said property were in the strict and direct line of his duties as such officer; and that the suit arose under the laws of the United States by reason of such facts. Lawyers Stanley and Adams, of Wichita, and Solomon, of Atchison, actively participated in the trial.

Stanley represented Coleman, and Adams and Solomon represented Walker. The judge, during the trial, reprimanded Walker's attorneys on several occasions. After a question upon the admissibility of evidence as to the value of certain real estate had been argued, the following colloquy took place between court and counsel. The judge, having an open book in his hand, said:

"Here is some good law [reading]: 'A lawsuit is not a game to be won or lost by sharp practice and shuffling devices. The part of judicial investigation is to ascertain the facts, not to suppress them.'

"Adams: What has that got to do with this case?

"Court: I read that for the benefit of the attorneys for the defendant.

"Adams: We object to that, and desire the stenographer to take it down and note our exception to it.

"Stanley: I object to that going down in the record. It is not a proper thing to go into the record. It is not a part of the case.

"Court: The gentleman from Hogtown [referring to Mr. Solomon] may do very well up in his town, but it will learn him a few lessons when he comes down here. We can try our lawsuits.

"Solomon: I suppose I am privileged to come here, if I wish to.

"Court: Yes; but I think you belong in Missouri properly. You should have located in Missouri. There is where you made a mistake.

"Solomon: I have always lived in Kansas, and have practiced law here for a number of years.

"Court: You made a mistake.

"Adams: Mr. Stenographer, note our exceptions to the remarks of the court.

"Solomon: I have not had a word to say in court in any part of the case, and have tried to conduct myself courteously with the court.

"Court: If you kept still it would not be so bad; but you keep egging him on all the time. I can see. We could possibly get along with him, but you delay the case. Proceed with the case. You will have to show the market value of the property first."

H. C. Solomon and Adams & Adams for the appellant.

W. E. Stanley, for the appellees.

³³³ MARTIN, C. J. 1. The application to remove the cause to the United States circuit court for the district ³³⁴ of Kansas was properly overruled. The mere fact that the defendant was a United States marshal, justifying under a writ of attachment is-

sued from the federal court, did not confer upon him any right of removal under the several acts of congress relating to that subject. The order of attachment was issued under the laws of the state of Kansas, the federal courts having concurrent jurisdiction with the state courts in certain cases; but no federal question could arise upon the pleadings nor upon the petition for removal, and it was not claimed that the parties to this suit were citizens of different states.

2. The record discloses that the attorneys tried the case with reasonable fairness and courtesy as between themselves, and we see little or no cause for the apparent exasperation of the trial judge against the attorneys for the defendant, and particularly against Mr. Solomon. Mr. Adams took the leading part on that side of the case, and Mr. Solomon had little to say. He resided in a distant place, and the trial judge seems to have considered him in the light of an intruder. Presumably neither Mr. Solomon nor Mr. Adams had any interest in the result of the suit, except such as properly arises from the relation of attorney and client. The rights of the parties to the action were the proper subject of consideration by the court, and those rights ought not to be prejudiced by any ill-feelings of the trial judge against counsel. In the case of *Cronkhite v. Dickerson*, 51 Mich. 177, it is held that "judges must take great care to say nothing in the hearing of the jurors, while a case is progressing, which can possibly be construed to the prejudice of either party," and the judgment was reversed because of an unfavorable suggestion of the trial judge, the reviewing court saying: "It is impossible to tell to ³⁸⁵ what extent the defendant's rights may have been prejudiced by the remarks." And in *Wheeler v. Wallace*, 53 Mich. 355, 356, 361, it was decided that "error will lie on the demeanor of the trial judge, if it be such as to prevent a fair trial, or prejudice the case upon the facts before the jury," and that it is improper for him to reflect upon the capacity and memory of counsel to whom clients have intrusted their interests, and the judgment was reversed for this cause, among others. "Irregularity in the proceedings of the court, . . . or abuse of discretion by which the party was prevented from having a fair trial," is one of the grounds specified in section 306 of the code for a new trial, and this was assigned in the motion of the defendant for a new trial, and is renewed in the petition in error here. An examination of the record leads us to the conclusion that the defendant was probably prejudiced by the conduct and bearing of the trial judge toward counsel. We think that some of the answers of the jury to particular questions of fact

are against the evidence and too favorable to the plaintiffs, and this indicates that the jury may have been influenced unfavorably to the defendant by the bearing of the trial judge and his prejudice against counsel.

The judgment will be reversed, and the cause remanded to the district court of Sedgwick county for a new trial.

All the justices concurring.

REMOVAL OF CAUSES.—THE MERE FACT OF HOLDING A COMMISSION AS A DEPUTY-MARSHAL, at the time a party is indicted for an offense against the laws of a state, committed at a federal election, is not, of itself, sufficient ground for depriving the state court of jurisdiction of the case, and does not entitle the accused to have it removed: *Dillon's Removal of Causes*, 5th ed., sec. 64.

BEVERLY v. BARNITZ.

[55 KANSAS, 466.]

THE OBLIGATION OF A CONTRACT is that which binds a party to do or not to do a particular thing.

STATUTES—IMPAIRING OBLIGATION OF CONTRACT—CHANGE OF REMEDY.—The remedy provided by law for the enforcement of a contract is no part of its obligation, and whatever pertains merely to the remedy may be changed, modified, or abrogated by the legislature, in its discretion and to any extent, provided a substantive remedy be still left to the creditor, and such changes may constitutionally apply to existing contracts.

STATUTES—IMPAIRING OBLIGATION OF CONTRACT—CHANGE OF REMEDY.—The obligation of a contract cannot be impaired by the legislature, though it may alter the remedy to enforce it at will. If the effect of legislative action is to impair the obligation, it is void, as it is immaterial whether such result is accomplished by acting on the remedy, or directly on the contract itself.

**CONSTITUTIONAL LAW.—AN ACT WILL NOT BE PRO-
NOUNCED UNCONSTITUTIONAL**, unless it is clearly so. A doubt of the constitutionality of an act is not sufficient to warrant its judicial condemnation.

ESTATES.—THE EQUITY OF REDEMPTION is a creature of the courts of chancery, and is impliedly reserved by the mortgagor. This reserved estate belongs to the mortgagor, is regarded as an estate distinct from the right vested in the mortgagee, and is indefinite in its duration.

**STATUTES—CHANGE OF REMEDY.—EQUITY OF RE-
DEMPTION.**—As the reserved estate of an equity of redemption is indefinite in its duration, the legislature has power to regulate it, within reasonable bounds, so as to protect the interests and equities of both debtor and creditor.

CONSTITUTIONALITY OF "REDEMPTION LAW."—Chapter 109 of the Laws of Kansas, of 1893, concerning the sale and redemption of real estate, commonly known as the "redemption law," whether applied to existing or future contracts, is not in conflict with section 10, article 1, of the constitution of the United States, providing that no

state shall pass any law impairing the obligation of contracts, as such statute merely regulates the procedure upon the foreclosure of mortgages so as to define and make more certain the equity of redemption, that indefinite estate impliedly reserved by every mortgagor of real property, and called into active existence only by the foreclosure.

Action by Martha Barnitz against John L. Beverly to obtain judgment upon a note, and to foreclose a mortgage made in 1885. The case first came up in *Beverly v. Barnitz*, 55 Kan. 451, in which an appeal was taken from a judgment and an order directing the sheriff to execute a deed to the plaintiff. The judgment of the lower court holding that chapter 109 of the Laws of Kansas of 1893, commonly known as the "redemption law" did not apply to mortgages given prior to the passage of that act, that this statute relating to the sale and redemption of real estate was unconstitutional, so far as it was intended to apply to mortgages previously executed and delivered, and that the defendant was not entitled to any right of redemption under the statute, for the reason that the mortgage foreclosed was executed and delivered prior to the enactment of said law, was there affirmed. The present case was a motion for a rehearing, the question to be determined being whether the court below should have ordered the sheriff to execute to the purchaser a deed or a certificate of purchase.

E. A. McMath and William J. Scott, for the motion.

Ferry & Doran, against the motion.

⁴⁶⁶ MARTIN, C. J. On November 1, 1885, George A. Kirkland executed a negotiable promissory note to Martha Barnitz for fifteen hundred dollars, payable in five years, with interest at eight per cent per annum, and after maturity at the rate of twelve per cent per annum, which note was secured by a mortgage on a quarter section of land in Shawnee county, Kansas, appraisal being waived. ⁴⁶⁷ The land was afterward sold to John L. Beverly, subject to the mortgage. On January 21, 1893, an action was commenced in the district court of Shawnee county to obtain judgment upon said note and to foreclose said mortgage. On July 7, 1893, a personal judgment was rendered for two thousand one hundred and thirteen dollars and forty-six cents, bearing interest from that date at the rate of twelve per cent per annum, and forty-four dollars and ninety-five cents costs, and the land was ordered to be sold for the payment of said judgment. On January 9, 1894, an order of sale was issued, and the property was sold to Martha Barnitz by the sheriff on February 12, 1894, for two thousand dollars. On February 19, 1894, John L. Beverly filed a motion asking that, upon confirmation of the sale, the court

order, adjudge, and determine that said real estate is subject to redemption, as provided by chapter 109 of the laws of 1893 (which took effect March 17, 1893), and that the sheriff be ordered and directed to make to the purchaser the certificate of sale mentioned in said chapter, he being in actual possession of said real estate by his tenant, the same never having been abandoned, but being occupied in good faith. This relief was refused by the court, and it was ordered that the sale be confirmed and a deed executed by the sheriff to the purchaser for said premises, holding that said chapter 109 is unconstitutional, so far as intended to apply to mortgages previously executed and delivered. On a proceeding in error in this court, said judgment was affirmed. The companion case of *Watkins v. Glenn*, 55 Kan. 417, was decided at the same time. The plaintiff in error asks a rehearing.

Does this statute impair the obligation of this prior contract? If it does so in the slightest degree, it must be held unconstitutional as to such contract. If, on ^{the} other hand, the act affects only the remedy, or some provision of the contract which is inoperative and void under the laws of Kansas where the contract was made, then it must be held valid; and all legal presumptions, so far as this court is concerned, favor the validity of the act: *Cooley's Constitutional Limitations*, 216, 217. When Chief Justice Marshall delivered the opinion of the supreme court of the United States in *Sturges v. Crowninshield*, 4 Wheat. 122, the learning upon the inhibition, "No state shall . . . pass any . . . law impairing the obligation of contracts," was well nigh exhausted. Little was left for other or subsequent judges of that tribunal but to apply the law as there clearly laid down. The legislature of New York had in 1811 enacted an insolvent law, which not only purported to liberate the person of the debtor, but to discharge him from all liability for any debt contracted previous to his discharge, on surrendering his property in the manner prescribed by the act; and it was held that, in so far as it purported to discharge a debtor from his obligation without performance, it was invalid, but not so as to releasing the debtor from imprisonment, then a common and very persuasive remedy. The court says (page 197): "A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. In the case at bar, the defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that sum on that day; and this is its obligation. Any law

which releases a part of this obligation must, in the literal sense of the word, impair it. Much more must a law impair it which makes it totally invalid and entirely discharges it."

469 And again (pages 200, 201): "The distinction between the obligation of a contract and the remedy given by the legislature to enforce that obligation has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct. Confinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it; but the state may refuse to inflict this punishment, or may withhold this means, and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation": See, also, *Mason v. Haile*, 12 Wheat. 370; *Beers v. Haughton*, 9 Pet. 329, 359; *Penniman's case*, 103 U. S. 714, 717.

In *Bronson v. Kinzie*, 1 How. 311, 315, 316, the court, speaking through Chief Justice Taney, in respect to an Illinois mortgage, said: "If the laws of the state passed afterwards had done nothing more than change the remedy upon contracts of this description, they would be liable to no constitutional objection, for, undoubtedly, a state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations. It may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered in every civilized community as properly belonging to the remedy, to be exercised or not by every sovereignty according to its own views of policy and humanity. It must reside in every state to enable it to 470 secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community. And although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or

directly on the contract itself. In either case it is prohibited by the constitution."

In *Terry v. Anderson*, 95 U. S. 628, it was held that an enactment reducing the time prescribed by the statute of limitations in force when the right of action accrued is not unconstitutional, provided a reasonable time be given for the commencement of a suit before the bar takes effect. The court says (page 633): "The parties to a contract have no more a vested interest in a particular limitation which has been fixed than they have in an unrestricted right to sue."

In *Antoni v. Greenhow*, 107 U. S. 769, 774, 775, although the Virginia funding act of 1871 required the state to receive certain coupons for all taxes and demands due her, and authorized the writ of mandamus to compel the proper tax-collector to receive the same, yet the act of 1882, which required the coupon holder to first pay his taxes in cash and file his coupons in the court of appeals, and, after a circuitous proceeding, receive back his cash in lieu of the coupons, was held to affect only the remedy, and not to constitute an impairment of the contract.

In *Life Ins. Co. v. Cushman*, 108 U. S. 51, it was decided that the Illinois statute of 1879, entitling the purchaser, in case of redemption, to receive interest ⁴⁷¹ upon his bid at the rate of eight per cent per annum (the previous law prescribing ten per cent), was applicable to all decretal sales of mortgaged premises thereafter made, although the mortgage was given before the passage of that statute; that such reduction in the rate of interest did not impair the obligation of the contract between mortgagor and mortgagee, because the amendatory statute did not diminish the duty of the mortgagor to pay what he agreed to pay or shorten the period of payment, or affect any remedy which the mortgagee had by existing law for the enforcement of his contract; and that existing laws with reference to which the mortgagor and mortgagee must be assumed to have contracted are only those which, in their direct or necessary legal operation, controlled or affected the obligation of their contract. And in the opinion the court says (pages 64, 65): "The rights of the purchaser at the decretal sale, if one was had, were not of the essence of the mortgage contract, but depended wholly upon the law in force when the sale occurred. The company ceased to be a mortgagee when its debt was merged in the decree, or at least when the sale occurred. Thenceforward its interest in the property was as purchaser, not as mortgagee. And to require it, as purchaser, to conform to the terms for the redemption of the property as pre-

scribed by the statute at the time of purchase does not, in any legal sense, impair the obligation of its contract as mortgagee. It assumed the position of a purchaser, subject necessarily to the law then in force defining the rights of purchasers."

And again the court says (page 66): "That the reduction of interest to be paid to the purchaser would lessen the probable number of bidders at the decretal sale, and thereby diminish the chances of the property bringing the mortgage debt, are plainly contingencies that might never have ⁴⁷² arisen. They could not occur unless there was a decretal sale, nor unless the mortgagee became the purchaser, and are too remote to justify the conclusion, as matter of law, that such legislation affected the value of the mortgage contract."

In *Morley v. L. S. Ry. Co.*, 146 U. S. 162, it was held that a state was not forbidden, by the clause of the federal constitution under consideration, from legislating, within its discretion, to reduce the rate of interest upon judgments previously obtained in the courts, the judgment creditor having no contract whatever in that respect with the judgment debtor. The court held that the state law regulating the rate of interest on judgments formed no part of the contract, and quoted approvingly (page 171) from the opinion of Chief Justice Marshall in *Ogden v. Saunders*, 12 Wheat. 213, 343, as follows: "If the law becomes a part of the contract, change of place would not expunge the condition. A contract made in New York would be the same in any other state as in New York, and would still retain the stipulation originally introduced into it."

In *Curtis v. Whitney*, 13 Wall. 68, the court held that a statute which required the holder of a tax-sale certificate, made before its passage, to give three months' notice, with a copy of the certificate, the name of the holder, and the time the deed will be applied for, to an occupant of the land, if there be one, before he takes his tax deed, does not impair the obligation of the contract evidenced by the certificate, and accordingly a tax deed was adjudged void for want of the notice. Mr. Justice Miller, in delivering the unanimous opinion of the court, said (pages 70, 71): "That a statute is not void because it is retrospective has been repeatedly held by this court, and the ⁴⁷³ feature of the act of 1867 which makes it applicable to certificates already issued for tax sales does not of itself conflict with the constitution of the United States, nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts that

they may be affected in many ways by state and national legislation. For such legislation demanded by the public good, however it may retroact on contracts previously made, and enhance the cost and difficulty of performance, or diminish the value of such performance to the other party, there is no restraint in the federal constitution, so long as the obligation of performance remains in full force."

In each of the foregoing cases, except *Bronson v. Kinzie*, 1 How. 311, the supreme court of the United States held that the state statute enacted subsequently to the making of the contract affected the remedy only, and not the obligation of the promisor to perform his contract, and other cases of like character might be cited. In some cases expressions have been used in the opinions of the judges which, if taken alone, would obliterate the line of demarkation between the obligation of the contract and the remedy for its enforcement; but, as was well said by Chief Justice Marshall, in *Ogden v. Saunders*, 12 Wheat. 333: "The positive authority of a decision is coextensive only with the facts on which it is made"; and opinions of judges are to be understood in the light of the issues to be decided, and as limited by them. Thus, in *Louisiana v. New Orleans*, 102 U. S. 203, Mr. Justice Field, in delivering the unanimous opinion of the court, said (pages 206, 207): "The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy ⁴⁷⁴ of these means impairs the obligation. If it tends to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened."

But it was therein held that a state law requiring the registry in the office of the controller of judgments rendered against the city of New Orleans on former contracts, before any proceeding could be had for their enforcement, was a reasonable regulation and constitutional. The bonds in judgment were issued in 1854, and prior to the act of 1870 the judgment creditor was entitled to the writ of mandamus to enforce collection. That act, however, purported to divest the courts of the state of authority to allow any summary process or mandamus against said city to compel payment, and required that judgment creditors file transcripts of their judgments in the office of the controller, after which the judgments should be paid in the order of their registration. The supreme court of Louisiana held that this act was valid, and the plaintiff's case was dismissed and all relief denied,

and this decree was affirmed by the supreme court of the United States. This decision is in line with *Curtis v. Whitney*, 13 Wall. 68, where the holder of the tax deed was defeated because he did not comply with the subsequent state law requiring him to give to the occupant notice of the time when he would apply for a deed, together with a copy of the tax-sale certificate. The cases are in entire harmony, and yet it seems impossible to reconcile the propositions of the two great contemporary jurists who wrote the respective opinions, each concurring, however, in the opinion of the other. It is too much to expect perfect accuracy and clearness of doctrinal statement at all times, even from great judges.

⁴⁷⁵ *Edwards v. Kearzey*, 96 U. S. 595, involved the validity of the exemption clause in the North Carolina constitution of 1868. Under the prior statutes the exemptions to debtors in that state were quite limited, the provision of the new constitution being much more liberal, and it was held that this was unconstitutional as applied to prior contracts. Some expressions in the opinion of the court, delivered by Mr. Justice Swayne, might lead to the conclusion that no other or further exemptions were permissible than those existing at the date of the contract; but this would be a contradiction of the doctrines announced by the supreme court in prior and subsequent cases, and the concurring opinions of Justices Clifford and Hunt plainly show that the decision was placed upon the ground that the extension of the exemption was so large as to seriously impair the creditor's remedy for collection of his debt, Mr. Justice Clifford saying: "Beyond all doubt, a state legislature may regulate all such proceedings in its courts at pleasure, subject only to the condition that the new regulation shall not, in any material respect, impair the just rights of any party to the pre-existing contract." In the opinion, delivered by Mr. Justice Swayne, he says: "The remedy subsisting in a state when and where a contract is made and is to be performed is part of its obligation; and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution of the United States, and therefore void. And this clause of the opinion is made the syllabus in the report of the case. It would be difficult to justify the first clause of this sentence by any decision of the supreme court, or upon any principle of general jurisprudence. We know ⁴⁷⁶ that the general remedies provided by our state laws do not form part of a contract, for if so they would necessarily be effective in any state or country where suit was brought to enforce the contract. It is a fundamental

principle, not requiring in its support the citation of authorities, that the remedy is governed by the *lex fori*, and not by the *lex loci contractus*. A lawyer suing in the courts of this state upon a contract made in Louisiana, New York, or Illinois, would be thought reckless indeed if he should presume to ask remedies allowable under the laws of those states respectively, but not recognized here. The most that can be truthfully said is, that each civilized state is under a moral obligation to afford to foreign or domestic creditors adequate remedies for the enforcement of their rights, but these are subject to change at any time, whether as to existing or future contracts. If by the last clause of the proposition it is meant that any substantial impairment of the contract is forbidden, certainly there can be no objection to it; but the value of a contract may be incidentally lessened by state legislation without impairing its obligation at all, as decided in many cases by the supreme federal tribunal.

In *Seibert v. Lewis*, 122 U. S. 284, the syllabus in *Edwards v. Kearzey*, 96 U. S. 595, is quoted approvingly, but its principle was in nowise necessary to a decision of the case. By the act of March 23, 1868, the legislature of Missouri authorized the issue of bonds in payment of subscriptions to the stock of railroad companies, and therein stipulated that the county court should, from time to time, levy, and cause to be collected in the same manner as county taxes, a special tax, in order to pay the interest and principal of any such bond, and it was held by the supreme court that it was a material part of this statutory contract that ⁴⁷⁷ such creditor should always have the right to a special tax, to be levied and collected in the same manner as county taxes, and that a subsequent act of the legislature which took away this right, and gave in return no equivalent means of payment, was an impairment of the contract. There are other cases of like character, and certainly a creditor who takes the bond of a municipality upon the assurance of a statute which authorizes its issue and provides the means for its payment has a right to rely upon such statute as implicitly as upon the stipulation of the terms of payment in a private contract; but a bondholder would have no just cause to complain if the number of the terms of court should be reduced, or the obtaining of an order of attachment rendered more difficult, or the law as to the appointment of receivers modified. Such matters do not enter into the contemplation of the parties in making a contract so as to forbid a legislative change, nor follow the contract into other jurisdic-

tions. The correct doctrine is concisely stated in 3 *American and English Encyclopedia of Law*, 753, as follows:

"The remedy provided by law for the enforcement of a contract is no part of its obligation, and whatever pertains merely to the remedy may be changed, modified, or abrogated by the legislature, in its discretion and to any extent, provided a substantive remedy be still left to the creditor, and such changes may constitutionally apply to existing contracts. But if the parties to a contract include in it, in express terms, the remedy to be sought upon its breach, or the means to be used for securing its performance, subsequent legislation changing the remedial process they have agreed upon is, as to them, inoperative."

This brings us to a consideration of the change of our law as to the redemption of real estate. Prior to 1893 lands could not be sold for less than two-thirds ⁴⁷⁸ of their appraised value, unless appraisement was waived in the mortgage or the bond or promissory note which it was given to secure; but, in case of such waiver, the order could not issue for the sale of the lands until six months after the rendition of the judgment. Of course, the mortgagor might redeem at any time before actual sale by paying his debt, interest, and costs. By the act of 1893, the statutes requiring appraisement were repealed, so that an order of sale may be issued at any time after the entry of judgment, and the land, after due notice, sold for whatever price it will bring. Upon confirmation, which may be had at any time after the sale when the district court is in session in the county, the creditor is entitled to the proceeds of the sale up to the amount of his judgment, interest, and costs. Under our practice, a personal judgment is rendered in the first instance for the full amount due, and if the proceeds of the sale are insufficient to pay the whole judgment debt, interest, and costs, they are simply credited thereon, so that it is unnecessary to obtain a judgment over as in the federal courts of equity, and a general execution may issue for the balance due. The act of 1893 does not operate upon the rights of the mortgagee until his claim as such has been extinguished, either wholly or to the full extent of the proceeds of the sale of the mortgaged property. The mortgagor, it is true, may redeem the land within a certain time by payment of the sale price and interest thereon; but this is a matter wholly between him and the purchaser. If the mortgagee or judgment creditor has deemed it best to become the purchaser, and thus voluntarily change his relation, it is difficult to see how he has

any just cause of complaint. By the mortgage contract, the real estate was pledged for the ⁴⁷⁹ payment of the debt, subject to the equity of redemption. The state, by its proper officer, has at his instance sold the property for its payment, and after he gets the proceeds of the sale he has no further claim upon that property, although he may proceed by general execution to obtain any balance due by seizure and sale of other property.

"In this state the common-law attributes of mortgages have been by statute wholly set aside, and the ancient theories demolished. The mortgagee has a mere security creating a lien upon the property, but vesting no title, and giving no right of possession whatever, either before or after breach. The statute confines the remedy of the mortgagee to an ordinary action and sale of the mortgaged premises": *Waterson v. Devoe*, 18 Kan. 223, 233.

"In this state a real estate mortgage conveys no estate or title, in whatever form the mortgage may be drawn; it creates only a lien upon the mortgaged property, and such a lien can be enforced only by a judgment or order of the district court. A holder of a real estate mortgage cannot, even after condition broken, take possession of the mortgaged property, or of the rents or profits thereof, except by consent of all the parties, or by an action in the district court; and he cannot realize upon his mortgage except by judgment of such court. And this is true, whatever the form of the mortgage may be. . . . Where the mortgaged property is not a sufficient security for the mortgage debt, the district court may in some cases appoint a receiver to take charge of the mortgaged property, and to receive the rents and profits thereof, but in no case can the holder of the mortgage, without suit, and without the consent of the mortgagor or his assignee, take possession of either the real estate mortgaged or the rents or profits thereof": *Seckler v. Delfs*, 25 Kan. 159, 165.

The act of 1893 does not purport to repeal or modify section 254 of the Code of Civil Procedure (Gen. ²⁸⁰ Stats. 1889, par. 4349), which authorizes the appointment of a receiver in a foreclosure case, "where it appears that the mortgaged property is in danger of being lost, removed, or materially injured," or when "the condition of the mortgage has not been performed," and "the property is probably insufficient to discharge the mortgage debt." In such cases a receiver may be appointed at any time after the action is commenced, and the receivership may continue until the sale of the land by the sheriff, when the mortgagee's claim upon it is satisfied and extinguished, and as a creditor he has no

further concern with it. The act of 1893 does not become operative until after the sale, and it matters not to the former creditor how the land is occupied during the period of redemption. Where appraisement is waived, as in this case, the mortgage creditor may now have a sale on request six months sooner than formerly. In certain contingencies, the purchaser may obtain a deed as soon after judgment as under the old law; in others, he may be compelled to wait at most a year longer, but the redemptioner must pay interest in the mean time, which is generally accounted an equivalent for use and occupation.

It may be said, however, that the creditor is prejudicially affected by this change of the law, because purchasers may be unwilling to pay as high a price as before. But in this country land is not esteemed as in the old world. Here it is largely a subject of investment and speculation, and in many cases the purchaser would prefer a return of his money, with interest, to a deed for the land. A court could hardly say judicially that land would sell for less by reason of this change of the redemption law. Such considerations, like the lowering of the rate of interest to be paid by the redemptioner, are "too remote," as held ⁴⁸¹ in *Life Ins. Co. v. Cushman*, 108 U. S. 51, "to justify the conclusion, as matter of law, that such legislation affected the value of the mortgage contract."

A real estate mortgage is not what it purports to be on its face anywhere. In Kansas it has been shorn of all its common-law incidents, as we have seen, and this is true in most of the other states. It may be stipulated in the mortgage that, upon default of payment of principal or interest, the mortgagee shall be entitled to possession of the mortgaged premises. It is vain. It may be solemnly agreed that in such case the rents and profits shall be applied toward the satisfaction of the debt and interest. It is as nothing. It may be provided that for any particular delinquency a receiver may be appointed. It is a waste of words. The mortgagor may even be driven by his necessities to bargain away in the mortgage his equity of redemption. Equity will treat it as void. For any such purpose the Kansas short form of mortgage, authorized by statute (Gen. Stats. 1889, par. 3886), which contains not a word upon any of these subjects, is no less potent than the most tedious ironclad instrument ever devised by the wit, the cunning, and the avarice of man. All such clauses are treated by the courts as if they were not.

In *Clark v. Reyburn*, 8 Wall. 318, a decree of strict foreclosure was entered on a Kansas mortgage in the United States circuit

court. There was no act of Congress nor state statute nor rule of court forbidding this practice, nor purporting to give any time to redeem after foreclosure; yet the supreme court reversed the decree, holding that as the ninetieth equity rule directs that the practice of the circuit courts shall be regulated, where no rule is applicable, by that of the high court of chancery in England, so far as it can be ⁴⁸² applied consistently with the local circumstances and conveniences of the district where the court is held, and as, by the English practice, a period of at least six months was allowed for redemption, the decree, cutting off the mortgagor without time to redeem, was erroneous. Mr. Justice Swayne, delivering the opinion, said (pages 321, 322):

"The equity of redemption is a distinct estate from that which is vested in the mortgagee before or after condition broken. It is descendible, devisable, and alienable like other interests in real property. As between the parties to the mortgage, the law protects it with jealous vigilance. It not only applies the maxim, 'Once a mortgage always a mortgage,' but any limitation of the right to redeem, as to time or persons, by a stipulation entered into when the mortgage is executed, or afterwards, is held to be oppressive, contrary to public policy, and void. By the common-law, when the condition of the mortgage was broken, the estate of the mortgagee became indefeasible. At an early period equity interposed and permitted the mortgagor, within a reasonable time, to redeem upon the payment of the amount found to be due. The debt was regarded by the chancellor, as it has been ever since, as the principal, and the mortgage as only an accessory and a security. The doctrine seems to have been borrowed from the civil law. After the practice grew up of applying to the chancellor to foreclose the right to redeem upon default in the payment of the debt at maturity, it was always an incident of the remedy that the mortgagor should be allowed a specified time for the payment of the debt. This was fixed by the primary decree, and it might be extended once or oftener, at the discretion of the chancellor, according to the circumstances of the case. It was only in the event of final default that the foreclosure was made absolute."

And again he said (pages 323, 324): "The settled English practice is for the decree to ⁴⁸³ order the amount due to be ascertained, and the costs to be taxed, and that upon the payment of both within six months, the plaintiff shall reconvey to the defendant, but, in default of payment within the time limited, 'that the said defendant do stand absolutely debarred and fore-

closed of and from all equity of redemption of and in said mortgaged premises.' We have been able to find no English case where, in the absence of fraud, a time for redemption was not allowed by the decree. The subject was examined by Chancellor Kent, with his accustomed fullness of research. He came to the conclusion that the time was in the discretion of the chancellor, and to be regulated by the circumstances of the particular case; but he nowhere intimates that such an allowance could be entirely withheld."

The equity of redemption being a creature of the courts of chancery, and impliedly reserved by the mortgagor, notwithstanding any language incorporated into the mortgage, it results that the state legislatures may deal with and regulate it upon equitable principles, and may abate the rigors of the common-law foreclosure in any reasonable way, having due regard to the obligations of the mortgage contract as interpreted by courts of equity. The federal courts of equity first allow six months from the decree of foreclosure in which to redeem, as an incident of the remedy, and this may be extended once or oftener, "at the discretion of the chancellor, according to the circumstances of the case." In some cases—notably in foreclosures upon railways and other extensive properties—the time is extended for years, the subject matter of the litigation being held in the mean time by receivers appointed upon the same equitable principles as prescribed by our statute hereinbefore cited. Again, such courts refuse to confirm masters' sales where the purchase price is grossly inadequate, and in cases of peculiar hardship they deny judgment ⁴⁸⁴ over, according to the ninety-second equity rule, for any balance due after the application of the proceeds of the mortgaged property in satisfaction of the debt. It is one of the advantages of courts of equity that their remedies are more flexible than those afforded by the common law. In this state, however, the district courts have full equity powers, and yet foreclosures are governed by rules almost inflexible. Personal judgments are rendered for the full amount due, and the proceeds of the mortgaged property are applied only as a credit thereon, so that execution may issue at once for any balance remaining; and, so far as the reports of this court show, no sheriff's sale has ever been set aside on account of inadequacy of price alone, if, indeed, such a thing can be done: *Capital Bank v. Huntoon*, 35 Kan. 578, 591, and cases cited.

In *Clark v. Reyburn*, 8 Wall. 318, we have seen that the equity of redemption is regarded by the supreme court of the Union as

an estate distinct from the right vested in the mortgagee, and this estate is indefinite in its duration. In accordance with the English rule, the time given in the first instance is at least six months, and then it may be extended "once or oftener, at the discretion of the chancellor." And in granting these extensions, according to the circumstances of each case, the federal courts of equity have not the remotest idea of "impairing the obligation of contracts." They are endeavoring only to enforce them in a manner dictated by an enlightened system of jurisprudence that seeks not the financial ruin of the mortgagor in the application of his property to the satisfaction of his debt. From causes upon which all do not agree, and that we need not discuss, the burden of a private debt has been enormously increased of late years. Farms valued five years ago ⁴⁸⁵ both by borrower and lender at three thousand dollars or four thousand dollars, and mortgaged for one thousand dollars, are now knocked down under the sheriff's hammer for less than the mortgage debt, the accumulations of a lifetime being often swept away by the shrinkage, and this through no fault of the mortgagor. Now, may not a state legislature take cognizance of such a condition of affairs and prescribe a rule, for application in its courts, regulating the equity of redemption, and even extending it beyond the time formerly allowed? In other words, why may it not, in a time of general depression, reasonably extend the indefinite estate impliedly reserved by the mortgagor, as the federal courts of equity do in particular cases, beyond the six months allowed by the general practice? This reserved estate belongs to the mortgagor, and because of its indefinite duration the legislature ought to have power to regulate it, within reasonable bounds, so as to protect the interests and equities of both debtor and creditor.

Great reliance has been placed by counsel for defendant in error upon the authority of *Bronson v. Kinzie*, 1 How. 311, and it would be conclusive against our position if a Kansas mortgage of 1885 is to be governed by the rules applicable to the Illinois instrument, of date July 13, 1838, which was enforced in that case. There, in order to secure the payment of a certain bond of four thousand dollars, Kinzie conveyed to Bronson "in fee simple, by way of mortgage, one undivided half part of certain houses and lots in the town of Chicago, with the usual proviso that the deed should be null and void if the said principal and interest were duly paid; and Kinzie, among other things, covenanted that if default should be made in the payment of the principal or interest, or any part

thereof, it should be lawful for Bronson, or his representatives, ⁴⁸⁶ to enter upon and sell the mortgaged premises at public auction, and, as attorney of Kinzie and wife, to convey the same to the purchaser, and out of the moneys arising from such sale to retain the amount that might then be due him on the aforesaid bond, with the costs and charges of sale, rendering the overplus, if any, to Kinzie."

In the opinion the court says (page 315): "As concerns the obligations of the contract upon which this controversy has arisen, they depend upon the laws of Illinois as they stood at the time the mortgage deed was executed."

And (page 318): "According to the long-settled rules of law and equity in all of the states whose jurisprudence has been modeled upon the principles of the common law, the legal title to the premises in question vested in the complainant, upon the failure of the mortgagor to comply with the conditions contained in the proviso, and, at law, he had a right to sue for and recover the land. . . ."

And (page 319): "When this contract was made, no statute had been passed by the state changing the rules of law or equity in relation to a contract of this kind. None such, at least, has been brought to the notice of the court; and it must, therefore, be governed, and the rights of the parties under it measured, by the rules above stated. They were the laws of Illinois at the time, and therefore entered into the contract, and formed a part of it, without any express stipulation to that effect in the deed."

Thus it appears that, under the laws of Illinois then existing, the mortgage contract was in law what it purported to be on its face—it gave the legal title and the right of possession to the mortgagee on default of payment; and this no Kansas mortgage has ⁴⁸⁷ ever done, whatever may have been its stipulations. It therefore could not be otherwise than that the laws of Illinois formed part of the very obligation of the contract, and the rights vested by its terms with the sanction of the laws of Illinois could not be divested by any subsequent law of that state. Where a remedy is agreed upon in the contract itself, with the sanction of the state law, the obligation and the remedy are distinguishable, and in such case it is entirely proper to say that the subsisting remedy is a part of the obligation of the contract. On the other hand, it is safe to say that the general remedies afforded by the state jurisprudence and practice, entirely aside from anything contained in the contract, never constitute any part of its obligation, and may

be changed from time to time; and this is the doctrine of *Bronson v. Kinzie*, 1 How. 311, as quoted in the first reference to the case in this opinion.

The case of *Howard v. Bugbee*, 24 How. 461, although from Alabama, is in no way distinguishable from *Bronson v. Kinzie*, 1 How. 311, as will appear from the briefs and the opinion, and the authority of the earlier case was, of course, followed. In Alabama, as well as in Illinois, the real estate mortgage was clothed with its common-law attributes: *Paulling v. Barron*, 33 Ala. 9, 11; 1 *Jones on Mortgages*, sec. 18. *Bronson v. Kinzie*, 1 How. 311, was also decided in part upon a subsequent law requiring an appraisement and prohibiting a sale for less than two-thirds of the appraised value, and there are other cases of like nature, but as appraisement laws and those regulating the equity of redemption depend upon different principles, it is unnecessary to occupy time now with their consideration.

It can be no objection to the statute under review that redemption comes after and not before the sale, ⁴⁸⁸ for this is a feature favorable to the creditor. He may now have the sale advertised as soon as his decree of foreclosure is entered, and he is entitled to the proceeds whenever the sale is confirmed, and this may be at any time afterward that the district court is in session. The new law speeds the sale which is unfettered by any stay or appraisement law. Neither can it be a valid objection that the mortgagor or his assignee may redeem the property by paying its sale price with interest thereon, for the utmost relief that the courts can afford the creditor as to the mortgaged property is to sell it and apply the proceeds to the payment of the debt. If any balance remains, the creditor must always look to other property; and our state laws are as favorable to the creditor in this respect as those of any other state in the Union, and, as we have seen, more favorable than the remedies administered by the federal courts under their practice.

Section 24 of the redemption act in question has been the subject of much criticism. It relates to the appointment of a receiver, under certain circumstances, after the sale, and the application of the income up to the execution of the sheriff's deed; but no question arises under that section in this case, for the record does not show that any receiver was ever appointed or applied for under that section nor under paragraph 4849 of the General Statutes of 1889. It would seem that, even if said section should be held invalid, the other sections might yet stand firm.

There is a broad line between this case and *Greenwood v. But-*

ler, 52 Kan. 424, where the decree of foreclosure had been entered and the rights of the parties fixed thereby prior to the passage of said chapter 109 of the Acts of 1893.

If a state legislature may totally abolish imprisonment ⁴⁸⁹ of the debtor as a means of enforcing payment, if it may shorten the statutes of limitation, if it may reasonably extend and enlarge exemptions of property from sale for the payment of debts, if, where coupons are by law made receivable in payment of taxes, it may require such payment in the first instance in cash to be afterward refunded and the coupons taken up, if it may reduce the rate of interest on redemption from decretal sales, if it may lessen the interest on former judgments, if it may require the holder of a tax-sale certificate to give three months' notice of the time when a tax deed will be applied for, if it may require transcripts of judgments against a particular city to be filed in a certain office as a prerequisite to payment, and divest the courts of the power to grant remedies in force when the judgments were rendered, if it may reduce the terms of court in number and duration, if it may amend the laws as to attachments, garnishments, and receivers so as to take away causes therefor which were before sufficient—if, in short, "it may regulate at pleasure the modes of proceeding" in the courts, and all this as to existing obligations, it is difficult to frame a process of reasoning which would forbid it from so regulating the procedure upon the foreclosure of mortgages as to define and make more certain the indefinite estate impliedly reserved by every mortgagor of real property, and called into active existence only by the foreclosure, and which indefinite estate is extended by the federal courts of equity for six months in the first instance, and afterward "once or oftener," in the discretion of the chancellor, according to the circumstances of the case. Even if the statute in question should impair the remedy formerly grantable upon a foreclosure, yet it ⁴⁹⁰ should not for this reason be held invalid, for there is no constitutional inhibition against an impairment of the general remedies for the enforcement of broken contracts; and each and every of the special examples just cited is an instance of the impairment or abolition of a remedy allowable and in force when the obligation was incurred.

Upon the whole, it does not appear that any judgment or decision of the supreme court of the United States requires this court to hold said chapter 109 unconstitutional, whatever may have been remarked by judges in delivering their opinions; for it is quite impossible to harmonize all that they have said, although the judgments or decisions may not be in conflict.

Even doubt of the constitutionality of said chapter is not sufficient to warrant its judicial condemnation, especially by this court. In such case it seems better to leave such condemnation to the final arbiter, the supreme court of the Union.

This opinion is of unusual, perhaps unwarrantable, length; but the question involved is so important, and the respect of the writer for the deliberate judgment of his predecessor and the associate justice who concurred with him so profound, that it has been deemed best to state fully the reasons which lead to a different conclusion from that reached by the former majority of the court.

The motion for a rehearing will be granted, the judgment of the district court overruling the motion of plaintiff in error for the issue of a certificate of sale instead of a deed will be reversed, and the cause remanded for further proceedings in accordance with this opinion.

Allen, J., concurring.

CONSTITUTIONALITY OF "REDEMPTION LAW" AND ITS APPLICATION.—Sections 1, 2, and 26 of chapter 109 of the Laws of Kansas of 1893, read as follows:

"Section 1. After sale by the sheriff of any real estate on execution, special execution, or order of sale, he shall, if the real estate sold by him is not subject to redemption, at once execute a deed therefor to the purchaser; but if the same is subject to redemption, he shall execute to the purchaser a certificate containing a description of the property and the amount of money paid by such purchaser, together with the amount of the costs up to said date, stating that unless redemption is made within eighteen months thereafter, according to law, that the purchaser, or his heirs or assigns will be entitled to a deed to the same; provided, that any contract in any mortgage or deed of trust waiving the right of redemption shall be null and void."

"Sec. 2. The defendant owner may redeem any real property sold under execution, special execution, or order of sale at the amount sold for, together with interest, costs, and taxes, as provided for in this act, at any time within eighteen months from the day of sale as herein provided, and shall, in the mean time, be entitled to the possession of the property; but where the court or judge shall find that the lands and tenements have been abandoned, or are not occupied in good faith, the period of redemption for defendant owner shall be six months from the date of sale, and all junior lienholders shall be entitled to three months to redeem after the expiration of said six months."

"Sec. 26. The sheriff shall at once make a return of all sales made under this act to the court; and the court, if it finds the proceedings regular and in conformity with law and equity, shall confirm the same, and direct that the clerk make an entry upon the journal that the court finds that the sale has in all respects been made in conformity to law, and order that the sheriff make to the purchaser the certificate of sale or deed provided for in section 1 of this act."

In *Watkins v. Glenn*, 55 Kan. 417, mortgages given in 1886 by Glenn and his wife were foreclosed and a sale ordered under the new procedure of 1893, there being a judgment, decree, and order of the trial court directing the issuance of a certificate of purchase as follows:

"It is hereby further ordered, adjudged, and decreed that the sheriff

making said sale shall execute and deliver to the purchaser or purchasers of said mortgaged premises, or any part thereof, at said foreclosure sale, a good and sufficient certificate of purchase for the premises so sold, upon confirmation of said sale, as provided by the laws of the state of Kansas (Laws 1893, c. 109, secs. 1, 2, 26), containing a description of the property purchased, and the amount of money paid by each purchaser, together with the amount of costs up to said date, and stating that unless redemption is made within eighteen months thereafter, according to law, the purchaser, or his heirs or his assigns, will be entitled to a deed to the same; and that, upon the making and execution of such deed or deeds to such purchaser or purchasers, any of the defendants who may be in possession of said mortgaged premises, or any person or persons holding possession under, through, or by them, or either of them, since the commencement of this action, shall immediately surrender the possession of said premises to such purchaser or purchasers, upon production of such sheriff's deed; that upon production of such sheriff's deed to said mortgaged premises, if the parties in possession of the same neglect or refuse to surrender the possession of said premises to the purchaser at said sheriff's sale, a writ of assistance shall be issued by the clerk of the district court, upon the application of the purchaser at said sheriff's sale, directing the sheriff of said county to take possession of said mortgaged premises and deliver the same to said purchaser.

"It is hereby further ordered, adjudged, and decreed that from and after the execution of such deed or deeds, each and all of the defendants herein named shall be forever barred, both at law and in equity, from any right, title, lien, or interest in, to, or against the mortgaged premises hereinbefore described."

This decree was complained of, and an appeal taken. The question for determination was whether the law of 1893, commonly known as the "redemption law," was intended by the legislature to operate retrospectively, so as to apply to mortgage contracts existing at and before its passage. Involved in this inquiry was the further question whether, if the law was intended to apply to such contracts, it violated section 10, article 1, of the federal constitution, ordaining that no state shall pass any law impairing the obligation of contracts. The plaintiff contended that the law of 1893 was not intended by the legislature to apply to mortgage contracts entered into prior to its passage, and that, if such were the intention of the legislature, the act was unconstitutional as to such contracts. The defendants admitted that if, under the law of 1893, there was any material change or impairment of the contract rights secured under the mortgage, however slight, it was unconstitutional. But the claim was that the statute acted on the remedy only; that the plaintiff had, under that act, a substantial remedy to enforce the provisions of his mortgage, and, therefore, that it was constitutional and was intended by the legislature to apply to all contracts, whether made before or after its passage.

The court pointed out that the law of 1893 carved out for the mortgagor, or the owner of the mortgaged property, an estate of several months more than was obtainable by him under the former law, with full right of possession, and without paying rents, profits, or taxes. This was considered to be a carving out and taking away from the estate originally decreed to be sold another estate limited for that number of months, and the value of the lands to be sold was diminished by just exactly the value of the tenure, rent free, for that time. The court was, therefore, of opinion, after an elaborate review of the authorities, that the obligation of the mortgage contract involved was substantially impaired by the act of 1893, if that act operated upon contracts in existence at the date of its passage, as it injuriously affected the value of the mortgage security; and that the act, so far as it applied to past contracts, was unconstitutional and void, as being forbidden by section 10, article 1, of the constitution of the United States, providing that no state shall pass any law impairing the obligation of contracts.

With respect to the retroactive operation of the statute the court said: "No statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of action, or suits, and especially vested rights, unless the intention that it should so operate is expressly declared. And courts will apply new statutes only to future cases, unless there is something in the very nature of the case, or in the language of the new provision which shows that they were intended to have a retroactive operation." Further, that "the courts refuse to give statutes a retroactive construction, unless the intention is so clear and positive as by no possibility to admit of any other construction." No such intention appearing in the language of the law of 1893, the court held that it did not apply to mortgage contracts existing at and before its passage; and that, if the legislature did intend for it to apply to such contracts, it violated section 10, article 1, of the federal constitution.

It is worthy of mention, in view of the rehearing granted by the principal case, that Allen, J., rendered an extended dissenting opinion in that case, taking the ground "that a statute so eminently fair and reasonable in its main features and provisions, and which affords in most instances an even better remedy for creditors than was before afforded, ought to be upheld; that the legislature has not, by modifying the remedy, materially impaired the obligation of contracts; and that the law should be followed in all cases, whether the obligation was created before or after its passage."

The case of *Watkins v. Glenn*, 55 Kan. 417, was followed in *Beverly v. Barnitz*, 55 Kan. 451, ante, p. 257, the court holding that the law of 1893 did not apply to mortgages given prior to the passage of that act. A different conclusion from that reached by the majority of the court in these two cases was arrived at in the principal case, and the reasons which lead to it are there fully given.

STATUTES IMPAIRING THE OBLIGATION OF CONTRACTS—CHANGE OF REMEDY—REDEMPTION.—The obligation of a contract is that which obliges a party to perform his contract, or to repair the injury done by his failure to perform it: *Bruce v. Schuyler*, 4 Gilm. 221; 46 Am. Dec. 447. It means the right to performance which the law confers on one party, and the corresponding duty of performance to which it binds the other: *Larrabee v. Talbott*, 5 Gill, 426; 46 Am. Dec. 637. The legislature has no power to pass any law impairing the obligation of contracts: *People v. Common Council*, 140 N. Y. 300; 37 Am. St. Rep. 563, and note. It may, however, change the form of the remedy, or otherwise modify it, as seems fit, provided it does not deny a remedy, or so embarrass it with conditions and restrictions as seriously to impair the value of the right: *Note to Scobey v. Gibson*, 79 Am. Dec. 496. The law existing when a contract is made enters into and forms part of it; and this is applicable as well to the remedy as to the right, so that an impairment or taking away of the remedy is an impairment of the obligation of the contract: *Western etc. Soc. v. Philadelphia*, 31 Pa. St. 175; 72 Am. Dec. 730; *Scobey v. Gibson*, 17 Ind. 572; 79 Am. Dec. 490; *State v. Carew*, 13 Rich. 498; 91 Am. Dec. 245. Legislative authority over remedies may be exercised at pleasure over past or future contracts (*Baughner v. Nelson*, 9 Gill, 299; 52 Am. Dec. 694; *Coriell v. Ham*, 4 G. Greene, 455; 61 Am. Dec. 134; *Cook v. Gray*, 2 Houst. 455; 81 Am. Dec. 185), if the parties are left a substantial remedy, according to the course of justice as it existed at the time the contracts were made: *Von Baumbach v. Bade*, 9 Wis. 559; 76 Am. Dec. 283. The obligation of a contract is impaired if the means of enforcing it are withdrawn or materially diminished. It is immaterial whether this result is accomplished by acting upon the remedy or directly on the contract itself: *State v. Carew*, 13 Rich. 498; 91 Am. Dec. 245. When the remedy is an essential part of the contract, it cannot be changed. To take away all legal remedies, or so to change and obstruct them as materially to impair the value and benefit of the contract, is within the prohibition of the constitution: *Coffman v. Bank of Kentucky*, 40 Miss. 29; 90 Am. Dec. 311; *Sequestration cases*, 30 Tex. 689; 98 Am. Dec.

494; *Phinney v. Phinney*, 81 Me. 450; 10 Am. St. Rep. 266. If a statute so changes the nature and extent of existing remedies as to materially impair the rights and interests of a party to a contract, this is as much a violation of the compact as if it absolutely destroyed his rights and interest, and is unconstitutional and void: *Phinney v. Phinney*, 81 Me. 450; 10 Am. St. Rep. 266. An act providing for the redemption of real property sold upon execution, etc., so far as the same is intended to apply to sales on judgments rendered upon contracts existing at and before its passage, is unconstitutional: *Scobey v. Gibson*, 17 Ind. 572; 79 Am. Dec. 490. So an act which abrogates a right which a party had, as mortgagee, at the time the mortgage was given, of a fixed and definite period for the foreclosure of the mortgagor's equity, and renders that uncertain which was before certain, is unconstitutional. The right of redemption and the time for foreclosure cannot be prolonged so as to materially diminish the security of the mortgagee, notwithstanding he may be allowed possession of the premises: *Phinney v. Phinney*, 81 Me. 450; 10 Am. St. Rep. 266.

STATUTES ARE UPHELD UNLESS PLAINLY UNCONSTITUTIONAL.—Courts will uphold statutes, unless they are so plainly and palpably in conflict with the constitution as to leave no doubt or hesitation in the judicial mind as to their invalidity: *Burlington etc. Ry. Co. v. Dey*, 82 Iowa, 312; 31 Am. St. Rep. 477; *Mauldin v. City Council*, 42 S. C. 293; 46 Am. St. Rep. 723.

STATE v. MISSOURI PACIFIC RAILWAY COMPANY.

[55 KANSAS, 708.]

MANDAMUS TO ENFORCE ORDER OF RAILROAD COMMISSIONERS.—If a railroad company running an exclusive passenger train, as well as a freight train, each way every day over one of its branches, finds the revenues from the service insufficient to meet the expense of maintenance and operation, and withdraws the passenger train, thereafter running only a daily train each way carrying both passengers and freight, a court has no authority, by mandamus, to specifically enforce an order of the board of railroad commissioners directing the company to restore and operate the passenger train, as such order is not final or conclusive.

Mandamus by an original proceeding in the supreme court to compel the Missouri Pacific Railway Company to increase its train service on the Le Roy and Caney Air Line Road, a branch road about fifty-one miles long. It was admitted that, after the withdrawal of the passenger train, a mixed train, carrying both passengers and freight, was run over the railroad daily. On January 20, 1890, the board of railroad commissioners of the state ordered a train for passengers exclusively to be put in operation upon the road. It was further admitted that the earnings of a passenger train on the road would probably not be sufficient to meet the expense incurred in its operation.

F. B. Dawes, attorney general, for the plaintiff.

Waggener, Horton & Orr, for the defendant.

709 JOHNSTON, J. The Le Roy and Caney Valley Air Line Railroad Company constructed a short line of railroad, which was leased to the Missouri Pacific Railway Company, and which afterward formed a branch of the Missouri Pacific system. Prior to October 20, 1889, the Missouri Pacific Railway Company, operating the branch road under the lease, ran a daily passenger train each way over the branch, and in addition thereto a freight train each way per day. The receipts of revenue from the operation of the train being insufficient to meet the expense of maintenance and operation, the railway company, on October 20, 1889, withdrew the passenger train, and thereafter only a daily train, carrying both passengers and freight, was run over the road each way. On November 1, 1889, a petition was presented to the board of railroad commissioners, signed by citizens living along the line of the railroad, complaining of the withdrawal of the passenger train from the road and the discontinuance of the operation of the same, and praying for an order from that board for its restoration and operation as theretofore. After a hearing, and on January 20, 1890, the board of railroad commissioners rendered a decision in favor of the petitioners, and ordered the railroad company to restore the passenger train service within thirty days from that date. Afterward an extension of time for putting on the passenger train service was ordered and a rehearing ⁷¹⁰ had, which resulted in an affirmance of the first order and a direction that the passenger train should be restored to the road on or before May 1, 1890. The railway company declined to comply with this order, and the present proceeding was brought to compel compliance with and specifically enforce the order of the railroad commissioners.

The controlling question is whether the court has power to enforce such an order of the board of railroad commissioners. This question has, in effect, been answered in the negative by a decision which was made since the present action was begun: *State v. Kansas Cent. R. R. Co.*, 47 Kan. 497. In that case it was held that an order of the board requiring the railroad company to repair its track so as to promote the safety and convenience of the public, is advisory only, and is not final and conclusive upon the railroad company, or in the courts. The powers of the board in the matter of requiring a railroad company to operate its road properly and furnish sufficient passenger service are to be found in section 5 of the act creating the board and defining its powers and duties: Gen. Stats. 1889, par. 1328. This is the section which was construed in the cited case, and the powers of the board with

respect to the operation of the road are no greater or more extended than with respect to the making of repairs. As was there held, the board is not clothed with judicial power, and its order under the provisions mentioned is not final and conclusive; nor has any legislative provision ever been made for the specific enforcement of such orders by mandamus or other judicial proceeding. The statute, instead of providing for the enforcement of such an order when compliance is refused, merely directs the board to make a report of its proceedings and decision ⁷¹¹ to the governor. Following that decision, it must be held that the state is not entitled to the relief which is asked, and therefore the peremptory writ will be denied.

Allen, J., concurring.

Martin, C. J., having been of counsel, did not sit in the case.

In *State v. Kansas etc. R. R. Co.*, 47 Kan. 497, 505, the counsel representing the state on an original proceeding in mandamus made "a very able argument" to establish that, within the police power, the state had ample authority to compel the repair of any railroad, so that it might be operated safely for the public. But this argument, although considered "strong and ingenious," was held inapplicable, because the legislature had neither conferred nor attempted to confer, the power claimed, even if it had authority so to do. The result of the bitter legislative contention over the matter was that advisory action only, on the part of the railroad commissioners, was provided for. Hence, it was held, in the case cited, that an order or recommendation of the board of railroad commissioners of the state to a railroad company, requiring repairs to be made upon its road or track, to promote the security, convenience, and accommodation of the public, was merely advisory, and not final or conclusive upon the railroad company or in the courts.

IN RE PRYOR.

[55 KANSAS, 724.]

MUNICIPAL CORPORATIONS—EXERCISE OF POWERS.—SUPPLY OF GAS.—A city of the third class can exercise only such powers as are granted in express terms or by necessary implication. Hence, in the absence of legislative authority, it has no power to regulate the price at which natural gas shall be furnished to private consumers.

MUNICIPAL CORPORATIONS—THIRD CLASS—INVALIDITY OF ORDINANCE ATTEMPTING TO REGULATE PRICE OF GAS—HABEAS CORPUS.—If a company contracts with a city of the third class to supply it with gas, no rate being fixed, further than that it shall not charge the city more than one dollar per one thousand cubic feet of gas for lighting public buildings, and it afterwards, with the consent of the city, assigns its contract, upon condition that private families shall be furnished at not to exceed two dollars and fifty cents per stove per month, and forty cents per burner

for illuminating purposes, a subsequent ordinance, making it unlawful for any person, firm, or corporation to charge anything for natural gas in excess of the prices therein fixed, they being much lower than those named in the assignment, and lower than those collected from consumers, is inoperative and void as to such assignees, so far as it purports to establish prices for gas furnished by them to private consumers. Hence, if the assignees are imprisoned for violating such an ordinance, they are entitled to discharge on habeas corpus.

Habeas Corpus. In July, 1886, Iola, a city of the third class, granted to the Iola Gas and Coal Company, its successors and assigns, the right to lay gaspipes and mains in the streets and public grounds, for the purpose of supplying the city and its inhabitants with gas. This ordinance, by virtue of its own provisions, and acceptance thereof, became a contract between the city and the company for the supply of gas. No rates were prescribed, except that the company should not charge the city more than one dollar per one thousand cubic feet of gas for lighting the public buildings. In May, 1889, the company, with the assent of the city, assigned its rights and interests to W. S. Pryor and Joseph Paullin, upon condition that they should furnish private families with gas at a rate not exceeding two dollars and fifty cents per stove per month and forty cents per burner for illuminating purposes. Pryor & Paullin furnished natural gas to the city and its inhabitants for several years at contract rates. Finally, in May, 1895, the city by ordinance, enacted that it should be unlawful for any person, firm, or corporation furnishing gas in said city to charge anything in excess of the prices therein fixed, which were very much lower than those named in the assignment, and lower than those collected from consumers. It was also declared unlawful for any person to make collections for gas furnished without filing a written acceptance of the conditions of the ordinance. Pryor & Paullin did not file any such acceptance, and they had no competitor in the business. Pryor was convicted before a police judge and fined in the sum of thirty dollars and costs, and ordered committed to the city prison until the fine and costs should be paid, for a violation of such ordinance, in collecting from one person one dollar and fifty cents for each of the months of June and July, 1895, for supplying a No. 8 cook-stove, when the ordinance allowed only one dollar per month. He claimed that his imprisonment was unlawful, and sought discharge by an original proceeding on habeas corpus.

C. E. Benton and Campbell & Hawkins, for the petitioner.

H. A. Ewing, for the respondent.

⁷²⁶ MARTIN, C. J. The only question arising upon the record is whether the city of Iola had authority to fix the rates to be charged for natural gas furnished to private consumers by Pryor & Paullin under the circumstances above stated. In this country, municipal corporations (except the city of Washington) are the creatures of the states in which they are located. They derive their powers from the constitution and ⁷²⁷ the statutes. In *Anderson v. Wellington*, 40 Kan. 176, 10 Am. St. Rep. 175, this court has said: "The power to pass a city ordinance must be vested in the governing body of the city by the legislature in express terms, or be necessarily or fairly implied in and incident to the powers expressly granted, and must be essential to the declared purposes of the corporation—not simply convenient, but indispensable. . . . Any fair and reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied": See, also, 1 Dillon on Municipal Corporations, 4th ed., sec. 89.

The act providing for the organization and government of cities of the third class contains no express grant of power to fix or regulate the prices of gas, water, or any other article of necessity or luxury. General authority is given to enact ordinances for the good government and welfare of the city (Gen. Stats. 1889, pars. 958, 991), and such cities may provide for and regulate the lighting of streets, and they have power to make contracts with any person, company, or association to erect gasworks, with the privilege of furnishing gas to light the streets, lanes, and alleys of the city for any length of time, not exceeding twenty-one years: Gen. Stats. 1889, par. 984.

The respondent relies principally upon a section of the corporation law of 1868 relating to gas and water corporations, and published as paragraph 1401 of the General Statutes of 1889, which reads as follows: "Any gas or water corporation shall have full power to manufacture and sell and to furnish such quantities of gas or water as may be required by the city, town, or village where located, for public or private buildings, or for other purposes; and such corporation shall have power to lay pipes, mains, and conductors for conducting gas or water through the streets, lanes, alleys, and squares in such city, town, or village, ⁷²⁸ with the consent of the municipal authorities thereof, and under such regulations as they may prescribe."

Certainly there is no express power conferred upon the municipal authorities by this section to regulate the price of gas or water.

Whether they might, as a condition of their consent, provide that gas or water should be furnished to the city or to its inhabitants at not exceeding certain prescribed rates, we need not now inquire. Consent was granted by ordinance No. 268 to the Iola Gas and Coal Company, its successors and assigns, without annexing any condition as to rates, except that no more than one dollar per one thousand cubic feet of gas should be charged for lighting the public buildings.

In certain cases the state may fix and regulate the prices of commodities and the compensation for services, but this is a sovereign power, which may not be delegated to cities or subordinate subdivisions of the state, except in express terms or by necessary implication. No such power is expressly conferred upon cities of the third class, and we do not think the right can be implied from any express provision, unless possibly that in the grant of consent to any person or corporation so to use the streets and public grounds of the city a condition might be imposed as to the maximum rates to be charged.

In *Louisville etc. Gas. Co. v. State*, 135 Ind. 49, it was held that municipal corporations of Indiana have no power at common law to fix by ordinance the price at which natural gas shall be supplied to consumers, and that the act of March 7, 1887, providing "that the boards of trustees of towns and the common council of cities . . . shall have power to provide by ordinance reasonable regulations for the safe supply, distribution, and consumption of natural gas within ⁷²⁹ the respective limits of such towns and cities," does not confer the power to regulate the price at which natural gas shall be furnished: Overruling the case of *Rushville v. Rushville etc. Gas Co.*, 132 Ind. 575. In the opinion the court says: "To secure the safe supply and use of natural gas is one thing, and to fix the price at which gas shall be supplied is another and a different thing."

In *St. Louis v. Bell Telephone Co.*, 96 Mo. 623, 9 Am. St. Rep. 370, it was held that neither under its authority to regulate the use of streets, nor the power to license, tax, and regulate various professions and businesses nor the general welfare clause permitting the passage of all such ordinances not inconsistent with the provisions of the charter or the laws of the state as may be expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, and manufactures, can the city of St. Louis regulate by ordinance the tariff of charges of a telephone company. In the opinion the court says: "We are at a loss to see what this power to regulate the use of

the streets has to do with the power to fix telephone charges. The power to regulate the charges for telephone service is neither included in nor incident to the power to regulate the use of streets, and the ordinance cannot be upheld on any such grounds."

Under the section of our statute hereinbefore fully quoted, a gas or water company may lay its pipes and mains through the streets of a city only with the consent of the municipal authorities, and under such regulations as they may prescribe; but the regulations are only as to the laying of pipes and mains, and have nothing to do with the price of the gas or water passing through the pipes and supplied to consumers.

⁷³⁰ Counsel for the respondent cites the leading case of *Munn v. Illinois*, 94 U. S. 113, and others of like character, to the effect that where the owner of property devotes it to a use in which the public have an interest, he must, to the extent of the interest thus acquired by the public, submit to the control of such property by the public for the common good. But in these cases the control was exercised by the legislature either directly or through municipalities or agencies clothed by it with the power. In the present case, the legislative authority is wanting. We must therefore hold that said ordinance No. 368 is inoperative and void as to said Pryor & Paullin, their heirs and assigns, in so far as the same purports to establish the price for gas furnished by them to private consumers.

The petitioner will be discharged from custody.

All the justices concurring.

MUNICIPAL CORPORATIONS—POWERS OF—RIGHT TO REGULATE PRICE OF GAS.—Cities have such powers only as are conferred by the statute creating them, and such incidental powers as are implied by, and essential to, the accomplishment of the purposes of their creation, and for their continued existence: *Champer v. Greencastle*, 138 Ind. 339; 46 Am. St. Rep. 390; *Mauldin v. City Council*, 42 S. C. 293; 46 Am. St. Rep. 723; *Whiting v. Town of West Point*, 88 Va. 905; 29 Am. St. Rep. 750. A city, when acting in its private capacity as contradistinguished from its governmental capacity, is bound by its contracts, and may be estopped by the conduct of its proper officers when acting within the lawful scope of their powers: *Gregsten v. Chicago*, 145 Ill. 451; 36 Am. St. Rep. 496. If a city passes an ordinance granting to a gas company the privilege of manufacturing and supplying gas, and also fixing the maximum price thereof, upon the acceptance of the ordinance by the gas company, the city cannot subsequently reduce the price of gas below that fixed by the ordinance: *State v. Laclede Gaslight Co.*, 102 Mo. 472; 22 Am. St. Rep. 789.

HABEAS CORPUS is always available, where a judgment in a criminal case is involved, to inquire into the jurisdiction of the person and subject matter: *State v. Kinmore*, 54 Minn. 135; 40 Am. St. Rep. 305.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

COMMONWEALTH v. WILLIAMSON.

[96 KENTUCKY, 1.]

LARCENY—FELONIOUS CONVERSION.—If the owner of goods parts with their possession for a particular purpose, and he who receives such possession avowedly for that purpose has a fraudulent intention to make use of the possession as a means of converting the goods to his own use, and does so convert them, it is larceny. In such case the question of intent is for the jury.

LARCENY—FELONIOUS CONVERSION.—One who, under an agreement to renovate and return goose feathers, procures them from the owner with the felonious intention of converting them to his own use, and returns other feathers in their place worth comparatively nothing, is guilty of larceny.

LARCENY—EVIDENCE.—On a trial for larceny of goose feathers, by obtaining them under an agreement to renovate and return them, and returning worthless feathers in their place, evidence that defendants were guilty of other similar transactions is not admissible; but evidence that about the time of such transaction the defendants were shipping large lots of goose feathers, and receiving worthless feathers in return, is admissible.

W. J. Hendrick, attorney general, and S. T. Spalding, for the appellant.

* **HAZELRIGG, J.** The indictment charges the appellees with the crime of grand larceny, committed in manner and form as follows, to wit: "The said J. D. Williamson and J. S. Lawrence, in the said county of Marion, on the second day of February, A. D. 1894, and before the finding of the indictment herein, did, unlawfully and feloniously, confederate and conspire, and did feloniously take and steal and carry away from the possession of Taylor Abell and Josie M. Abell one hundred and fifty pounds of feathers, not their own, or the property of either of them, but the property of the said Taylor Abell and Josie M. Abell, and of the value of

sixty dollars, and all done with the felonious intent to convert them to their own use, contrary," etc. The appellees pleaded not guilty, and upon the trial of the case, at the conclusion of the testimony for the commonwealth, the court gave a peremptory instruction to the jury to find for the defendants, and the commonwealth has appealed.

³ The proof shows that the appellees came to the house of the Abells, and, representing themselves as feather renovators, procured a number of beds then filled with goose feathers, which they agreed to renovate, make into mattresses, and return to the Abella. The same feathers were to be returned. The feathers taken weighed one hundred and forty-two pounds, and were worth thirty cents per pound. The appellees shortly returned the mattresses, and after leaving the house the Abells found, upon examination, that the mattresses had been filled with chicken and turkey feathers, worth comparatively nothing. It is insisted for the state that the peremptory instruction should not have been given, and such is our opinion.

In *Elliott v. Commonwealth*, 12 Bush, 176, the law on the subject is thus stated: "If the owner of goods parts with the possession for a particular purpose, and the person who receives the possession avowedly for that purpose has a fraudulent intention to make use of the possession as the means of converting the goods to his own use, and does so convert them, it is larceny. But if the owner intends to part with the property, and delivers the possession absolutely, and the purchaser receives the goods for the purpose of doing with them what he pleases, it is not larceny, although fraudulent means may have been used to induce him to part with them."

It follows that if, when the appellees procured the goose feathers, they did so with the intention of feloniously converting them to their own use, they are guilty as charged, and their intention was a question of fact to be ascertained by the jury. These ⁴ principles seem to be well established: 2 Russell on Crimes, 21, 24; Wharton's American Criminal Law, 631-636.

We do not think that the testimony offered by the state showing transactions between appellees and others similar in character to the one under consideration was competent, but the proof of the agents of the express company that the appellees, about the time of the transaction in question, were shipping large lots of goose feathers to Louisville and receiving chicken feathers in return, seems clearly competent. The ownership and possession of the

articles thus shipped formed the very subject matter of dispute and investigation.

For the reasons indicated, the court should not have withdrawn from the jury the consideration of the case, but have submitted the proof with instructions in accord with the law as indicated herein.

LARCENY BY BAILEE—FELONIOUS CONVERSION—INTENT. One to whom personal property is delivered for a special purpose, but who intended, when he procured such delivery, to appropriate the property to his own use, is guilty of larceny: *Soltan v. Gerdau*, 119 N. Y. 380; 16 Am. St. Rep. 843, and note; *State v. McCord*, 2 Nott. & McC. 90; 10 Am. Dec. 576; *State v. Humphrey*, 32 Vt. 569; 78 Am. Dec. 605, and note. See, also, the extended note to *State v. Holmes*, 57 Am. Dec. 230, and *Smith v. Commonwealth*, 96 Ky. 85; post, p. 289, and note.

SMITH v. COMMONWEALTH.

[96 KENTUCKY, 85.]

LARCENY.—IF POSSESSION OF PROPERTY IS LAWFULLY obtained, a subsequent appropriation of it is not larceny unless the intent to appropriate it existed in the mind of the taker at the time it came into his hands.

LARCENY—HORSE STEALING.—One who obtains possession of a horse as bailee is not guilty of larceny in afterwards selling it and converting the proceeds to his own use, unless the intent to thus appropriate it existed at the time he obtained possession.

C. A. Board, for the appellants.

W. J. Hendrick, attorney general, for the appellee.

⁸⁵ **QUIGLEY, C. J.** Appellants, Elmer Smith and Morgan Goddard, were indicted in the Harrison circuit court for horse stealing. ⁸⁶ They were tried, found guilty, and sentenced to confinement in the penitentiary each for four years. The allegations of the indictment under which they were found guilty read as follows:

"The said Elmer Smith and Morgan Goddard, on the — day of November, 1893, in the county and state aforesaid, and before the finding of this indictment, did feloniously combine, confederate, and conspire to and did feloniously steal, take, and carry away a horse, to wit, a mare, the personal property of L. S. Burgess, with the felonious intent to convert the said mare to their own use, and to deprive the said owner thereof."

It appears from the evidence that appellants resided in the town of Sadieville, Harrison county, Kentucky, and that L. S.

Burgess, a farmer, resided near said town, and that during the summer and fall of 1893 both Goddard and Smith had been working for said Burgess; also, that in August or September, 1893, appellant Morgan Goddard contracted with said Burgess to raise a crop for him, on his, the said Burgess' farm, during the year 1894, and wanted the use of a horse. Burgess said to Goddard: "I have a horse that has the fistula; you take it and use it as you please, pay for its pasturage, keep it shod, treat it for the fistula, and return it to me in the spring."

In November, 1893, Goddard procured a buggy, hitched the horse to it, and drove to Cynthiana. It was county court day. Elmer Smith, a lad sixteen or seventeen years of age, also went to Cynthiana, where he met Goddard. They got drunk, concluded to go to Cincinnati, and put up the horse and buggy ⁸⁷ for sale on the public street, and sold them for twenty-one dollars. They went to Cincinnati and returned to Sadieville the latter part of the same week. Appellants' motions in arrest of judgment and for a new trial were overruled, to which they excepted, as well as to the instructions given and refused by the court.

Appellants asked the court to give to the jury the following instructions, which the court refused to do: "The court instructs the jury that to find the defendants guilty of larceny they must believe that, at the time the defendant Goddard obtained possession of Burgess' horse, he must then have had the purpose and intent to convert the property to his own use and benefit and to deprive the owner of his property feloniously; that unless the felonious intent was proven at the time of the taking of the horse, the law is for the defendant, and the jury will so find"; 2. "The court instructs the jury that the felonious intent must exist at the time of the taking, and that no felonious intent subsequent or wrongful conversion will amount to a felony."

The general and common-law rule is, that when property comes lawfully into the possession of a person, either as agent, bailee, part owner, or otherwise, a subsequent appropriation of it is not larceny, unless the intent to appropriate it existed in the mind of the taker at the time it came into his hands. Also, that if the possession of the property is obtained by lawful means, there can be no larceny at common law, even though it is afterwards appropriated to the use of the taker: 12 Am. & Eng. Ency. of Law, 770, 790; Snapp v. Commonwealth, ⁸⁸ 82 Ky. 173; Elliott v. Commonwealth, 12 Bush, 176.

Mr. Bishop, in his work on Criminal Law, in section 866, says: "If one hires a horse and sells it before the journey is performed,

or sells it after, but before it is returned, he commits no larceny in a case where the felonious intent came upon him subsequently to receiving it into his possession; and if one hiring a horse intends, when he receives it, to convert it to his own use, he thereby commits larceny. No subsequent act of sale or conversion is in such case necessary to complete the offense." And this court, in the case of *Elliott v. Commonwealth*, 12 Bush, 176, said: "The material ingredients to constitute the crime of larceny are that the goods must be taken *animo furandi*, and against the will of the owner of them; hence, in a class of cases where it appears that the goods were taken by the delivery or consent of the owner, or of someone having authority to deliver them, and they are converted by the party to whom they are delivered, it is often a very difficult question to determine the nature of the offense."

Goddard came into the possession of the horse lawfully, and by virtue of his contract with Burgess he acquired a special property in the horse, that of the right of user, and the exercise of control and ownership over it from the fall of 1893 to the spring of 1894. He had resorted to no trick, artifice, fraud, or deception to obtain its possession from the owner, and it should have been left to the jury to determine, as a question of fact, from all the circumstances of the case, under proper instructions of the court, whether ⁵⁹ or not the intent to appropriate the horse existed in the mind of Goddard at the time the horse came into his possession.

The court erred in refusing to instruct the jury on this point. The substantial rights of the defendants having been prejudiced by failure so to do, the judgment of the lower court is reversed.

LARCENY BY BAILEES.—A bailee who subsequently converts the bailment to his own use is not guilty of larceny, unless it is shown that the felonious intent existed at the time he acquired possession of the property: *Note to Soltau v. Gerdau*, 16 Am. St. Rep. 864; extended note to *State v. Homes*, 57 Am. Dec. 280, 281.

McDONALD v. McDONALD.

[96 KENTUCKY, 209.]

CONFLICT OF LAWS—NEGLIGENCE CAUSING DEATH—DISTRIBUTION OF SUM RECOVERED.—In case of recovery in one state for the negligent destruction of life in another, pursuant to a statute of the latter, the sum recovered must be distributed according to the law of the latter state, where the cause of action accrued.

J. D. White & Son, I. E. Conley, and W. G. Bullitt, for the appellants.

J. M. Nichols, for the appellee.

AM. ST. REP., VOL. XLIX.—19

210 HAZELRIGG, J. Oscar McDonald, a resident of Ballard county, Kentucky, was killed in Illinois while in the service of the Illinois Central Railroad Company. The appellee Shelton qualified as his administrator in the county named, and basing his suit upon an Illinois statute authorizing the personal representative of a person whose death has been caused by the willful negligence of another to recover damages therefor, he sued and recovered of the company in the Ballard circuit court (the road running into that county) the sum of two thousand five hundred dollars.

The sole question now before us is, to whom does this money belong? The deceased left a widow, but no issue, and the appellants, his mother, brother, and sisters, claim that the fund is to be disposed of under the Kentucky statute of distribution, and, therefore, that they are entitled to one-half of it and the widow the other. The appellees—the administrator and widow—say it is to go exclusively to the widow, as the Illinois statute directs.

The superior court affirmed the judgment below dismissing the appellants' petition. Under the Illinois **211** statute the amount recovered "shall be for the exclusive benefit of the widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate"; and looking to the law fixing this proportion, we find that where there is a widow and no issue, the whole of the personal estate goes to the widow.

The appellants contend that we cannot inquire as to how the fund came to the hands of the Kentucky administrator, but, finding it there, we must distribute it as our statute distributes other personal estate of persons dying intestate. We think differently. While the naked right of action under the Illinois statute is in the personal representative, the property right in the thing recovered is in the widow. The fund is not an asset of the decedent's estate. It never belonged to him. The company did not owe it to him, but to the widow.

The doctrine that the succession to personal property is governed by the law of the intestate's domicile has no application in this case. The personal representative succeeds to no property because the intestate died leaving none.

In the case of *Dennick v. Railroad Co.*, 103 U. S. 17, the supreme court, after announcing what is now the well-settled doctrine, that an action may be maintained in one state for the negligent destruction of life in another state, pursuant to a statute of the latter, held that in such event the sum recovered should be

distributed, and the courts had full power so to do, according to the law of the state where the cause of ²¹² action accrued. These views accord with the principles we have stated, and settle conclusively that the appellants are entitled to no part of the fund in controversy. But if distribution of the fund were made under the laws of this state the widow would get it. It has been determined, time and again, that when there is no widow or child, no suit can be maintained in cases like the one under consideration. There would be no beneficiary under the statute. The acts providing for a recovery in such cases are for the exclusive benefit of the widow and children of the deceased. As said in *Henderson v. Kentucky etc. R. R. Co.*, 86 Ky. 389, and in *Jordan v. Cincinnati etc. R. R. Co.*, 89 Ky. 42, and in a number of later cases, the widow and children of a person whose life is destroyed by willful neglect have the prior right to sue, and the exclusive right to receive, what may be recovered in such actions. Collaterals take nothing.

Wherefore, the judgment is affirmed.

DISTRIBUTION—CONFLICT OF LAWS.—The disposition, succession to, and distribution of, personal property wherever situate is governed by the law of the country of the owner's or intestate's domicile: *Smith v. Howard*, 86 Me. 203; 41 Am. St. Rep. 537, and note. This question is fully discussed in the extended notes to the following cases: *In re Ingram*, 12 Am. St. Rep. 95; *Montgomery v. Milliken*, 43 Am. Dec. 519; *Bryan v. Moore*, 13 Am. Dec. 349.

LOUISVILLE AND NASHVILLE R. R. Co. v. BRANTLEY.

[96 KENTUCKY, 297.]

ADMINISTRATORS—FOREIGN—RIGHT TO SUE.—An administrator appointed in one state can maintain no action in another unless authorized by a statute of that state.

ADMINISTRATORS—FOREIGN—RIGHT TO SUE.—A statute authorizing a foreign administrator to sue for debts due his decedent does not authorize him to maintain an action for a tort committed against such decedent.

ADMINISTRATORS—FOREIGN—RIGHT TO SUE—DEMURRER.—The right of a foreign administrator to maintain suit in favor of his decedent for a tort may be reached by general demurrer, and objection to the maintenance of such action is not waived by failure to file a special demurrer.

MASTER AND SERVANT—GROSS NEGLIGENCE OF CO-EMPLOYEE.—An employee may recover for an injury received through the gross negligence of another employee of a higher grade in the same service, but he cannot recover for his ordinary negligence.

NEGLIGENCE—VERDICT INSUFFICIENT TO SUPPORT JUDGMENT.—If, under the pleadings, the plaintiff is entitled to re-

cover only for gross negligence, a verdict based upon a finding of ordinary negligence against the defendant, and assessing damages, is insufficient to support a judgment therefor.

NEGLIGENCE—ERRONEOUS INSTRUCTIONS.—If, under the pleadings, the plaintiff is entitled to recover only for gross negligence, it is error to instruct the jury that he may recover upon proof of ordinary negligence, and a verdict based upon such negligence is not sufficient to support a judgment for damages.

J. McCarroll, for the appellant.

J. S. Bays, W. A. Cullop, J. Breathitt, and E. W. Hines, for the appellee.

300 PRYOR, J. Bluford B. Brantley, as the administrator of John L. Brantley, deceased, states, in substance, that the decedent departed this life in July of the year 1891; that he was appointed and qualified as the administrator of his estate by order of a court of competent jurisdiction in the state of Indiana, it being the state where the decedent resided at his death and where the plaintiff now resides. He then files what purports to be a copy of the letters of administration, etc. He further alleges that the decedent lost his life while in the service of the appellant, the Louisville and Nashville Railroad Company, and when in its employ as brakeman, running its trains between certain terminal points in this state; that he was seriously injured, his legs cut off, and he suffered for days great bodily and mental suffering, and for this suffering and loss of time he is seeking to recover. It is further alleged that the injury resulted from the gross and willful negligence of one of its employees, superior in authority to the decedent. There was a general demurrer to the petition and overruled.

An issue was then formed on the pleadings, and the case went to trial, with a verdict returned by the jury as follows: "We, the jury, find the defendant guilty ³⁰¹ of ordinary negligence, and assess the damages at five thousand dollars. Alex Garland, one of the jury."

There is no bill of evidence in the record, and we have before us only the instructions given by the court and the reasons of the court for refusing to grant a new trial.

Only so much of the petition is given as presents, in our opinion, the question raised by the demurrer, as the specific facts alleged constitute a cause of action, if the appellee can maintain it; and the only question is, Can a foreign administrator sue in this state for a personal injury to his intestate, committed in this state, as is alleged, by the negligence of the defendant, and if he cannot

sue, must the objection be taken advantage of by special demurrer, and if not, is the objection waived?

There was a general demurrer only, and it is urged that the provision of the code requiring, where the want of legal capacity to sue appears on the face of the petition, the objection to be raised by a special demurrer applies here. We think such a view is an entire misconception of the law. The doctrine is elementary that an action must be brought in the name of a party in interest, and at common law the legal right to sue must appear. Where one has neither a legal or beneficial interest in the controversy, either in his own right or as the representative of another, and this appears on the face of the petition, the objection can be and is properly raised by a general demurrer. His legal capacity to sue is not involved, but his right to maintain the action, either in his own right or as a personal representative.

³⁰² The provision of the code requiring a special demurrer to be filed, when the legal capacity to sue is wanting, has no application to a case like this. An infant has no legal capacity to sue, and must bring the action by his prochein amy or guardian, but having a legal or beneficial interest in the subject matter of the action and the right of recovery, the defense will not be allowed to plead or demur generally, and then after a verdict or judgment take advantage of the infancy of the plaintiff or the want of legal capacity on the part of the plaintiff to sue.

It is in cases where the petition on its face discloses an interest in the subject matter of the action, and also discloses a want of capacity to sue, that the question of a want of legal capacity arises; but where the petition shows that the party plaintiff is not interested in any way in the litigation, or, in other words, can maintain no such action, the objection can be made by a general demurrer.

The doctrine, I believe, is universal that an administrator, appointed in a foreign state, can maintain no action in another state unless authorized by statute, and if there is no authority given the foreign administrator to sue here in such a case as the one presented, the general demurrer should have been sustained.

The appellant admits by his demurrer that the appellee qualified as the administrator of the decedent in the state of Indiana, and that all the facts alleged in the petition are true, and then the question arises, Is the appellee, the foreign administrator, entitled to recover?

It is insisted that this court, in the case of Warfield ³⁰³ v. Gardner, 79 Ky. 583, and in previous cases, has decided this ques-

tion. That action was by the administrator of Gardner upon a note given by the appellant to his intestate. There was a general demurrer to the petition and overruled. It was averred in the petition that the appellees were appointed, by an order of the Hardin county court, administrators of the decedent, and had qualified as such. The court held that this was a substantial compliance with the code, and all that was necessary for the appellees to allege as to their appointment, and the objection that the petition failed to state facts showing the county court of Hardin had jurisdiction to appoint them administrators involved their legal capacity to sue, and must be taken advantage of by special demurrer, and, as no special demurrer was filed, the objection as to the want of the averment failed. This is sound law and correct practice. It is conceded that where one cannot sue by reason of some personal disability or want of capacity to sue, that, under the code, the question must be raised by special demurrer or by a special plea.

Suppose the plaintiff had alleged his qualification as administrator and his appointment by the properly constituted authorities without alleging where he had qualified, and the defendant, instead of demurring to the defective petition, had pleaded in bar of his recovery that he had been appointed and qualified in a foreign state, would not the plea have been good, unless the statute was so construed as permitted a recovery by the foreign administrator for a mere tort? We think so. Nor would it be a bar to the recovery by one authorized to sue, but it would be a bar to an ³⁰⁴ action by the plaintiff as the representative of the decedent under his appointment from the state of Indiana. If a bar to the recovery by the foreign administrator upon the facts being proved, when pleaded, why, when those same facts appear in the petition, may not the defense demur generally when, from the plaintiffs' own showing, he has no standing in court? The plaintiff must so connect himself with the subject matter of the action as to show a right of recovery, either in his own right or the legally qualified representative of another, and when he fails to do so the petition is bad on demurrer. In *Langdon v. Potter*, 11 Mass. 315, a case very similar to the one before us, there was nothing in the declaration showing that administration had not been granted in the state of Massachusetts, and the legal inference, the court said, was that it had been so granted. The right of the plaintiff to prosecute the action was not questioned, and, after several pleas to the merits, the objection was, for the first time, raised, and the court said it was too late, but also said it was "a

plea in disability of the plaintiffs, and did not touch the merits of the action"; and the court proceeded further to say: "We have no doubt the objection relied on in this case is pleadable in bar, and in the present stage of the action it must be so pleaded." In *Fenwick v. Sears*, 1 Cranch, 259, and in *Dixon v. Ramsay*, 3 Cranch, 319, a special plea in bar was sustained, and in *Noonan v. Bradley*, 9 Wall. 394, the Massachusetts case is referred to as settling the conflicting decisions, and yet it is held in that case a plea in bar is the proper ³⁰⁵ remedy. Why the necessity of a plea in bar, when the petition discloses what the plea must state?

The appellee sues as a foreign administrator and makes profert of his title, and as said in *Noonan v. Bradley*, 9 Wall. 394: "It is only in virtue of his representative character that the plaintiff is entitled to the matters in controversy, and a plea which denies to him that character is, in its nature, a plea in bar to the action." Where the petition discloses a defense that defeats the action, such as a want of title, legal or equitable, or any other defense that can be pleaded in bar, except such defenses as are privileged and do not affect the cause of action, as infancy or limitation, a general demurrer will be sustained. In the case of *Adams v. Terre-Tenants of Savage*, 6 Mod. 134, the plaintiff recited in the proceeding the manner and place he had obtained letters of administration, which showed a want of jurisdiction, and the defendants pleaded alone to the merits. After verdict the defendants moved in arrest of judgment, because the administration committed to the plaintiff was void. The plaintiff insisted the plea to the merits was a waiver of the objection, and the chief justice remarked: "If the plaintiff had not set forth what kind of administration he claimed by, but only generally alleged himself administrator of the goods and chattels of the intestate, and the defendant had not put you upon showing it by craving oyer of the letters of administration, as he might have done, but pleaded over, that had been an admission of the plaintiff's having a right of suing as administrator as he had alleged. . . . ³⁰⁶ And when you yourself affirm this to be your title, how can we intend you have another? For of your own showing this is your title, which is manifestly bad. And there is a vast difference where a title does not appear fully for the plaintiff, and the party will not controvert with him about that, . . . and where the plaintiff himself shows he has no title, for then the court has no room for intendment." The authority of the case cited, says the court, in *Noonan v. Bradley*, 9 Wall. 394, has never been doubted. If a nonsuit was proper when the proof

failed to show title, why is not a demurrer proper when the declaration shows the same state of fact?

The character of his title is set out in the petition, and the court will not assume that he has the authority to sue in this state. He is not known in our courts as an administrator, with an appointment and qualification only in the state of Indiana. There is no privity of representation appearing, and his right to sue in his individual name for a tort to the decedent is as great as his right to sue by reason of his foreign appointment. In the case of *Debolt v. Carter*, 31 Ind. 355, the court, in treating of the legal capacity to sue, says: "A demurrer for the want of legal capacity to sue has reference to some legal disability of the plaintiff, such as infancy, coverture, etc., and not to the fact that the complaint on its face fails to show a right of action in the plaintiff": *Devoss v. Gray*, 22 Ohio St. 159; *Winfield Town Co. v. Maria*, 11 Kan. 147.

A special demurrer is also required by the code where there is a defect of parties, plaintiff or defendants, ³⁰⁷ and yet it has been held that where plaintiffs unite in bringing a joint action, and the facts alleged show an absence of any joint liability, the defective pleading can be reached by a general demurrer, upon the ground that it fails to state a joint cause of action: *Berkshire v. Shultz*, 25 Ind. 523.

This court held, in *Gossom v. Badgett*, 6 Bush, 97, 99 Am. Dec. 658, that in an action against two upon an alleged joint undertaking, a judgment against one, upon proof that the contract was made alone with him, cannot be sustained. If the defect had appeared upon the face of the petition in *Gossom v. Badgett*, 6 Bush, 97, 99 Am. Dec. 658, it could have been reached by general demurrer, because it involved the right of recovery on an alleged joint undertaking, when the contract was with one only.

The argument that the facts alleged constitute the cause of action without reference to the party bringing it, although in a representative capacity, is both illogical and fallacious. Facts stated connecting the plaintiff with the cause of action are as essential as any other fact necessary to make the complaint good. The plaintiff's interest or right to sue must appear. It is a matter of substance, and a special demurrer is only in the nature of a plea in abatement that gives a better writ, and saying to the plaintiff he may recover on the merits if he sues in a particular way.

Can the Indiana administrator bring this action? The only authority is found in section 43 of article 2 of chapter 39 of the

General Statutes, which provides: "By giving bond with surety, resident of the county in which the action is brought, nonresident executors or administrators of persons who, at the ³⁰⁸ time of their death, were nonresidents of this commonwealth may prosecute actions for the recovery of debts due to such decedents."

It can scarcely be contended that the language would embrace actions for a tort caused by negligence or intentional wrong. While a liberal construction should be given this provision, and apply it to all contracts or obligations where the liability can be certainly fixed, it would be a strained construction to hold that the word "debts" embraced every character of action that a resident administrator could institute; for if such was the legislative intention, instead of confining the right to suits for debts, they would have said that when no resident administrator had qualified, a foreign administrator should have the same right, upon executing bond, to bring all actions he could have instituted if he had qualified as such in this state. The statute is, in effect, an inhibition of this right, and, in departing from the common-law doctrine, recognizes the right of the foreign administrator to sue for debts by complying with the provisions of the statute. The construction of this statute, or the right to sue given the foreign administrator, does not militate against the doctrine that the representative qualifying in the county or place of domicile of the deceased may receive or collect debts due the intestate in another state, for the reason that it is only his personal incapacity to sue that is involved, and not his title to the thing received, as held by the supreme court in *Wilkins v. Ellett*, 108 U. S. 256. The mere right to recover for a tort is not and cannot be regarded as assets to which the foreign administrator has title or the right to convert into a ³⁰⁹ debt by a judgment. This right is denied him by the statute. In the case of *Maysville Street R. R. Co. v. Marvin*, 8 Co. Ct. App. 21, 59 Fed. Rep. 91, appealed from this district (Kentucky) to the circuit court of appeals, it was held by Mr. Justice Lurton, in a well-considered opinion, that a general demurrer to a petition by a foreign administrator to recover for the death of his intestate, caused by the tort of the defendant, should have been sustained, and upon the ground there was no privity of representation—no cause of action in the plaintiff.

This court has also decided the identical question involved here. William Robb died at his domicile in the state of Massachusetts, leaving a will by which his executor was authorized to dispose of land in Jefferson county, Kentucky. The executor sold the land and brought an action to enforce the contract.

There was a general demurrer to the petition, based on two grounds: 1. The executor had no power to sell; 2. If such a power existed, he could not, as executor, maintain the action without complying with the provisions of the statute. It was held by this court, through Mr. Justice Holt, that the power to sell existed, but the executor could not maintain the action because he had not complied with the statute, and for that reason the general demurrer should have been sustained, the court saying, after citing the statute: "His qualification in a sister state does not authorize him to administer the assets here, or act otherwise in our courts as such representative": *Marrett v. Babb*, 91 Ky. 88.

There is still another question raised by counsel ³¹⁰ that requires a reversal of the judgment below. After a judgment had been entered on the verdict, a motion for a new trial was made by the defense, that for some reason was afterwards withdrawn.

The court instructed the jury as to the measure of damages in the event the injury was caused by the gross negligence of the defendant; and also instructed the jury what to find if the defendant was guilty of ordinary neglect. The jury, therefore, had two distinct issues presented by the instructions as to their finding: 1. If gross neglect exist, you may find punitive damages; 2. If ordinary neglect, you will find only the actual damage sustained; and the jury, under the instructions, returned a finding for ordinary neglect. If the instructions are to be considered, it is manifest the court below erred in instructing the jury they could find damages for the injury caused by ordinary neglect, as this court has decided that where one employee enters into a service, such as that pertaining to railroad corporations, and is crippled by the negligence of another employee in the same service of a higher grade, in order to recover gross negligence must be alleged and shown, as the ordinary risks belonging to such an employment he assumes when entering the service. But it is said there is no bill of evidence, and the instructions alone being here they cannot be considered, and the error committed being that of the court, it cannot be corrected without a motion for a new trial.

If the instructions are here for the purpose of enabling this court to know that the court below committed the error, they must also be here for the ³¹¹ purpose of enabling the court to correct the error. It was held in *Robards v. Wolfe*, 1 Dana, 156, that although the bill of evidence was not before the court, the instruction was erroneous under any state of case, and, therefore, the judgment was reversed. Here, however, there was no motion for a new trial, as there doubtless was in *Robards v. Wolfe*,

1 Dana, 156, and the sole question is, Were the verdict and judgment authorized by the pleadings? The appellant moved to set aside the judgment and render a judgment for the defendant.

If the plaintiff in this case, having alleged gross negligence, could recover for any less degree of neglect, then this verdict should stand, if otherwise proper, but, as has already been stated, gross neglect must be shown before a recovery in this class of cases can be had.

The plaintiff must recover upon proof of the cause of action alleged in his petition, and in this case it is manifest that a recovery has been permitted, not upon the cause of action alleged, but for that degree of negligence for which no action could be maintained. If the verdict had read: "We of the jury find for the plaintiff five thousand dollars," and nothing more, then this court could not tell whether it was for the gross or ordinary neglect of the defendant, and, in the absence of a bill of evidence, would answer that the verdict was based on the cause of action alleged. Here, however, is a true verdict returned saying: "We of the jury find the defendant guilty of ordinary negligence, and assess the damages at five thousand dollars." A motion then to set aside ³¹² the verdict or the judgment rendered upon it was proper, because it was not responsive to the cause of action alleged in the petition.

The pleadings no more authorized the verdict than a verdict for one species of property when the plaintiff in his petition claimed another and different kind of property. Suppose the jury had returned into court and said to the judge: "We find this defendant guilty of ordinary neglect; can we give to the plaintiff damages?" The response in writing would have been: You cannot award damages for ordinary neglect.

This is, in substance, what the jury said to the court by their verdict—a verdict not sustained by the pleadings or authorized by law even if ordinary neglect had been alleged.

Special findings were had at the common law, and, although none were asked in this case by either party, the jury, of its own volition, returned verdict for ordinary neglect. With the instructions therefore out of the case, and they have no place here, as there is no bill of exceptions, the finding of the jury is for that degree of neglect for which the law in this character of case will not permit a recovery. The degree of neglect causing the injury was for the jury and not the court to determine. As to special verdicts at common law, see Stephen on Pleading, 91, 92; 1 Robinson on Practice, 373, 406; Proffatt on Jury Trials, 434, 439, 440.

It is maintained the jury had no right to return a special verdict.

It was, nevertheless, returned, and no judgment should have been entered upon it. Whether ³¹³ or not, under the state of case presented, the defendant is entitled to a verdict, is now immaterial, as it would constitute no bar to a recovery by a rightful administrator, or one entitled to bring the action.

The judgment is reversed, with directions to set aside the verdict and judgment, and sustain the demurrer to the petition.

EXECUTORS AND ADMINISTRATORS—FOREIGN POWER TO SUE.—Ordinarily, no suit can be maintained by or against any executor or administrator in his official capacity in the courts of another state from that in which he was appointed: *Fugate v. Moore*, 86 Va. 1045; 19 Am. St. Rep. 928; extended note to *Shinn's Estate*, 45 Am. St. Rep. 672. See, also, the extended note to *Alley v. Caspari*, 6 Am. St. Rep. 185.

MASTER AND SERVANT—WHEN MASTER LIABLE FOR NEGLIGENCE OF FELLOW-SERVANTS.—The rule exempting a master from liability to a servant for injury caused by negligence of a fellow-servant does not apply in cases of willful neglect, where the two servants are not co-equals: *Louisville etc. R. R. Co. v. Brooks*, 83 Ky. 129; 4 Am. St. Rep. 135. To entitle a servant to recover of his master for the negligence of another servant associated with him in the same department of service, he must allege and prove that such other servant was his superior in point of authority and control, and that the negligence was gross: *Greer v. Louisville etc. R. R. Co.*, 94 Ky. 169; 42 Am. St. Rep. 345.

CINCINNATI COOPERAGE COMPANY v. BATE.

[96 KENTUCKY, 356.]

CORPORATIONS—CHANGE OF NAME—PARTNERSHIP.—Members of a corporation who voluntarily change or alter the corporate name selected, without recourse to such formal proceedings as are prescribed by law, thereby abandon the old corporation and become liable as partners in the new concern, as to parties who deal with it or give it credit.

Fairleigh & Straus, for the appellant.

J. S. Pirtle, for the appellee.

³⁵⁸ **HAZELRIGG, J.** The conclusions of fact certified by the court below in this case are that "the New Albany Brewing Company was a corporation duly created and organized under the laws of the state of Indiana for the purpose of manufacturing and vending beer. It was incorporated under the corporate name of the 'New Albany Brewing Company.' Afterwards, the defendants, E. R. Bate, J. Gebhart, and another, acquired the entire stock of the New Albany Brewing Company, and became its directors. Bate, Gebhart, and another, as directors and stockholders, without taking any steps required by the law of

Indiana in such cases provided, changed the name of the 'New Albany Brewing Company' to the 'Gebhardt & Bate Brewing Company,' and thereafter the business of the New Albany Brewing Company was conducted under the name of the Gebhardt & Bate Brewing Company, and the business under the latter name was conducted at the same place, and in its conduct was used the same property, appliances, and machinery. The draft sued on was drawn and accepted after the change of name of said corporation as aforesaid, and whilst the defendant E. R. Bate was a holder and owner of stock and a director of the corporation."

359 The court found, as a matter of law, that Bate was not liable individually on the draft, nor liable thereon as a partner. The contention of the appellant is that Bate and the other owners of the old concern, having abandoned the corporate name and adopted a new name, which gave special prominence to the names of the individuals composing the concern, are individually liable as partners in a venture, for the reason that no legal steps were taken to change the corporate name, as might have been done under the easy mode provided by the Indiana statute.

It is evident, at the outstart, that if there are any adjudications in point by the Indiana courts, they must be given a controlling influence, and we are referred to the case of *Coleman v. Coleman*, 78 Ind. 344. The court says: "Waiving all consideration of the doctrine of estoppel contended for, and conceding that there was no corporate body for which the appellees were authorized to act, . . . still, if the company was not a corporate body, then it was a partnership, composed not merely of the directors, but of all the subscribers to the articles of incorporation."

That the Gebhardt & Bate Brewing Company was a corporate body cannot be maintained in the face of the record to the contrary. The parties assuming to do business as such company did not take a single step required by the statute for the purpose of creating a corporation or of changing the name of the old corporation. The name of a corporation is "the very being of its constitution, the knot of its combination, without which it could not perform its corporate functions": *Smith's Mercantile Law*, 3d ed., 141.

360 "When a corporation is created, a name must be given to it, and by that name alone must it sue and be sued and do all legal acts": 1 *Blackstone's Commentaries*, 474. "The law knows a corporation only by its corporate name": *Walker's American Law*, 9th ed., 232.

"A corporation has no right or power of itself to change or

alter the name originally selected by it without recourse to such formal proceedings as are prescribed by law": Beach on Private Corporations, sec. 275. The effect of such change of name is an abandonment, not only of the corporate name, but of the corporation itself. The identity of the creature authorized by the statute to do business is destroyed. It is in no sense like the case where an individual changes his name. The very being of its constitution is destroyed by an abandonment of its name and an attempted substitution of a new name without authority of law. In the case of Fuller v. Rowe, 57 N. Y. 26, it was said: "Parties assuming to act in a corporate capacity without a legal organization as a corporate body are liable as partners to those with whom they contract." In Robinson v. Harris, 5 Ky. Law Rep. 928, it was held that the corporate existence of associations provided for in chapter 56 of the General Statutes depends upon and begins only after the terms of the law are substantially complied with; and, until the notice required by section 5 has been published, the association has no right to begin business as a corporation, and because such notice had not been published, the members were held liable as individuals. We concur in the conclusions reached ³⁶¹ by the superior court in this case, that "the Gebhart & Bate Brewing Company had no right to do business as a corporation until the members had complied with the law. Until they did so, no corporation existed. The stockholders were merely doing business as partners, and, as such, are individually liable for the debts."

Judgment reversed and cause remanded for proceedings conformable to this opinion.

CORPORATIONS—CHANGE OF CORPORATE NAME.—Where a name is given in the act of incorporation, it cannot be changed by the corporate body. The corporate name can be changed only by the same power by which the corporate body has been created: Sykes v. People, 132 Ill. 32; Boone on Corporations, sec. 31; Thompson on Corporations, sec. 238.

LOUISVILLE ETC. RAILWAY COMPANY v. STEPHENS.

[96 KENTUCKY, 401.]

MARRIED WOMEN—VOID CONVEYANCE—ESTOPPEL.—A deed executed by husband and wife, not acknowledged nor recorded, granting to a railway company a strip of the wife's land as a right of way, does not divest her title nor estop her from asserting title thereto, though without fraud she may have thus induced the company to build its road along the route taken.

MARRIED WOMEN—VOID CONVEYANCE BY—ESTOPPEL.—If, after a husband and wife have granted a railway company a right of way across her land by a conveyance void because not acknowledged or recorded, she stands by and allows the road to be built upon her land without objection, she cannot require the company to tear up its track and quit the occupancy of the premises, but she is entitled to recover damages.

MARRIED WOMEN ARE NOT ESTOPPED from asserting title to their lands, except for fraud, and can be divested of their interest therein only in the mode prescribed by statute.

DEDICATION OF REAL ESTATE to a public use may be made by parol, but there is no such thing as a parol dedication of real estate to a private use.

DEDICATION FOR RAILWAY PURPOSES.—A railroad corporation is a private institution, created and operated for private gain, and cannot acquire land for railway purposes by dedication.

Helm & Bruce, for the appellant.

Fairleigh & Straus and J. W. Lewis, for the appellees.

⁴⁰⁸ **HAZELRIGG, J.** By a writing of April, 1886, the appellees, W. E. and Amanda S. Minor, in consideration of the benefits to be derived from the building of the appellant's road, undertook to release, grant, and convey to the appellant a strip of ground sixty feet in width through the farm of the appellee, Amanda S., situated on the Ohio river, in Breckinridge county. The conditions of the grant were that the road should run between the dwelling-house and the river, and not be nearer than three hundred feet from it. This deed of conveyance was signed by the appellees, who are husband and wife, and attested by two witnesses, but was not acknowledged before any officer or attempted to be put of record. The title of this land was then held under the following provision of the will of Daniel J. Stephens, the father of Amanda: "I will and devise the same to my son, James G. Stephens, in trust for the use and benefit of my said daughter, Amanda, her heirs, etc., forever, to be held by the said trustee for the sole, separate, and exclusive use of my said daughter, free from the debts and other liabilities, control, or disposition of any husband she may hereafter have. The said trustee is to permit the said Amanda to occupy or lease said land as she may think

proper, and she is to direct and control the use and enjoyment of said land, the rents and profits of said land to be held as the land is held—for the separate use and benefit of said Amanda. The said James G. Stephens is to incur no responsibility, nor be in any wise liable on account of his trusteeship aforesaid, as it is my desire that my daughter ⁴⁰⁴ shall have the beneficial use of the land aforesaid devised in trust, and the control thereof for her own use as aforesaid.”

Shortly after the execution of the writing named, the appellant entered on the land and built the road, as required by it, between the dwelling-house and the river, but within about one hundred feet of the former.

This action was thereupon brought by Stephens, trustee, the minors uniting, for damages by reason of the construction of the road. Upon the trial, the sole question submitted to the jury was, How much, if any, was the market value of the farm reduced because of that construction? The appellees recovered the sum of tenthousand dollars. The appellant insists on this appeal, that the appellees were entitled to recover nothing: 1. Because the acts of the minors in executing the writing and consenting or acquiescing in having the road built nearer than three hundred feet to the house, as is alleged they did do, constituted an estoppel; and 2. Because their acts constituted a dedication to the railroad company of the right of way. That while the title did not pass, yet an easement was acquired.

As to the first question, we are aware of no case in which it has been held that a married woman is estopped from asserting title to her lands, except on the ground of fraud. She can be divested of her interest only in the mode pointed out by the statute. She is supposed to be under the dominion of the husband and incapable of contracting. When executing conveyances, she must acknowledge them separate ⁴⁰⁵ and apart from the husband. In any point of view the writing, or so-called deed of conveyance, in this case, must be regarded as ineffectual for any purpose. It not only does not divest her of title, but it is not binding on her for any purpose, and it would be singular if a void contract or writing could work an estoppel.

The case is to be determined as if she never signed the instrument. We may conclude that she stood by and, without objection, acquiesced in the subjection of the land to the uses of the road, and, for obvious reasons, she cannot require the company to tear up its track and quit the occupancy of the premises. This she is not asking. She is not charged with the perpetration of

any fraud or misrepresentation. If she has attempted to convey her lands, and failed to do so in the manner required by the statute, it is as if she had not made the attempt.

If, by reason of her signing this writing, the company was induced to build its road along the route taken, rather than along some other route, as is alleged and as is probable, still no fraud is chargeable to the wife, or concealment of any fact.

She has not legally parted with any right, and is not estopped in the assertion of any by her void contract, or by her conduct: *Kennedy v. Ten Broeck*, 11 Bush, 241; *Bigelow on Estoppel*, 3d ed., 484.

The second question is thus disposed of by the superior court in a well-considered opinion: "A dedication of real estate to a public use may be made by parol; but there is no such thing as parol dedication of real estate to a private use. A railroad ⁴⁰⁶ corporation is not a public institution. It is true that it serves a public purpose, and for that reason the law has conferred upon it the right to condemn land for its use, and makes it, in many particulars, subject to the control of the courts, but it is nevertheless a private institution created and operated for the purpose of private gain."

This position is supported by the case of *Todd v. Pittsburg etc. R. R. Co.*, 19 Ohio St., 514, where, in speaking of this subject, the court said: "Its road, its right of way, its depots, its offices, its rolling stock, etc., are all, not public, but private, property. They are owned by the defendant. But among the various methods by which private property may be acquired, dedication is not one. The statute provides that railroad companies may acquire sites for depots, etc., by donation, by purchase, or by appropriation. In the case of a donation or purchase, a formal conveyance is necessary to pass title. . . . But no provision is made for acquisition by dedication. It is but a fallacy to suppose that there is a dedication in the case merely because the defendant, for its own gain, has assumed toward the public the relation of a common carrier."

The fact that the legal title to the land in controversy was not in the minors makes still less probable the company's contention that the writing vested it with any title to or right of way over the disputed premises.

Judgment affirmed.

MARRIED WOMEN—VOID CONVEYANCE BY—ESTOPPEL.—

If a husband executes a deed which is also signed by his wife, but is void as to her because defectively executed, and the consideration is a transfer of other tracts of land to him, she is not, by her subsequent

joinder in a conveyance to a third person of the lands so acquired by her husband, estopped from denying the validity of the original deed: *Stone v. Sledge*, 87 Tex. 49; 47 Am. St. Rep. 65, and note. See, also, the extended note to *Kantrowitz v. Prather*, 99 Am. Dec. 605.

DEDICATION TO PUBLIC USE BY PAROL.—The dedication of and for public purposes may be made by parol and be established by parol evidence: *McKinney v. Griggs*, 5 Bush, 401; 96 Am. Dec. 360, and note. See, further, the notes to *Mason v. Sioux Falls*, 39 Am. St. Rep. 811, 812, and *Board of Supervisors v. Seal*, 14 Am. St. Rep. 549, and the extended note to *State v. Trask*, 27 Am. Dec. 559.

RAILROADS—POWER TO ACQUIRE LAND BY DEDICATION. A dedication of lands can be for public purposes only. Railway companies are private corporations, and therefore cannot acquire lands or an easement therein by common-law dedication: *Lake Erie etc. R. R. Co. v. Whitham*, 155 Ill. 514; 46 Am. St. Rep. 355, and note.

VALZ v. FIRST NATIONAL BANK.

[96 KENTUCKY, 542.]

PARTNERSHIP—JUDGMENT AS ESTOPPEL—LIABILITY OF PARTNER AFTER DISSOLUTION OF FIRM.—If one partner, after the dissolution of the partnership, gives a firm note for a partnership debt, and judgment is rendered against him in an action thereon, in which a plea of non est factum is sustained in favor of the other partner, such judgment does not bar an action against the latter to recover the debt for which the note was given.

PARTNERSHIP—ACTIONS—MERGER.—An action against all of the partners upon an account for a firm debt is not merged in an action on a note for a partnership debt executed by one of the partners in the firm name after the dissolution of the partnership.

LIMITATIONS OF ACTIONS—PLEA OF STATUTE OF LIMITATIONS OF ANOTHER STATE is not available, unless its terms and provisions are so pleaded as to show that by it the action is barred.

LIMITATION OF ACTIONS—STATUTE OF ANOTHER STATE. In the absence of a plea showing that the action is barred by the statute of limitations of another state where the cause of action accrued, the statute of limitations of the state where the action is brought must control.

LIMITATIONS OF ACTIONS.—STATUTE OF LIMITATIONS must be pleaded to be available on the trial.

I. Julian, for the appellant.

Bullitt & Shield and J. W. Rodman, for the appellee.

545 **PAYNTER, J.** The appellant, Valz, and one Commotto were partners under the firm name of Commotto & Valz, in a single venture, the erection of the masonry for a bridge at a point in Alabama near the city of Birmingham. To perform the work under the contract required the expenditure in materials and labor of several thousand dollars.

As managing partner, Commotto opened an account in the firm

name with the appellee. The work began in the fall of 1886. Commotto & Valz were paid monthly, but in order to meet the weekly pay rolls ⁵⁴⁶ and to carry on the enterprise, it was necessary to overdraw their account at the bank. Their account was overdrawn in January, 1887, six hundred and eighty-nine dollars and eighty-nine cents. On the first day of March, 1887, there was paid on the overdraft the sum of sixty-nine dollars and thirty-nine cents, leaving a balance due of six hundred and nineteen dollars and fifty cents, for which Commotto, after the completion of the work, executed to the appellee the firm's note.

Suit was brought on the note against Commotto and appellant. Appellant pleaded non est factum, and the judgment of the court sustained the plea. Judgment was taken against Commotto on the note. This action is brought against appellant on account for the overdraft. A number of pleas were interposed: 1. That the partner, Commotto, had no authority to make the overdraft; 2. Former adjudication; 3. Estoppel; 4. Limitation. We will consider these pleas in the order stated.

The proof conduced to show that Commotto had authority to do whatever was necessary to carry on the work, and that to carry it on it was necessary to overdraw the firm's bank account, and that the appellant had access to and did examine the bank account of the firm with appellee, and made no objection to nor raised any question as to the correctness thereof, or as to the right of his partner to overdraw. The proof shows that the money obtained was used for the benefit of the firm. The law and facts having been ⁵⁴⁷ submitted to the court, and the court having found that the partner, Commotto, had authority to make the overdraft, we could not disturb his judgment on that account.

It is insisted that the prosecution of the action on the note to a conclusion under appellant's plea of non est factum waived its right of action on the account for the overdraft, and, therefore, there has been a former adjudication, which is relied upon as an estoppel against appellee's right to recover on the account.

In arguing this question counsel insists that the doctrine of election of remedies is applicable. We do not agree with counsel on this question, or that the authorities which he cites on this point are applicable to the question in this case. We do not feel it necessary to notice in this opinion all the authorities thus cited.

Morris v. Rexford, 18 N. Y. 556, is cited. In that case there was a bargain and sale of goods for cash; the vendee took possession, but failed to pay; the vendor obtained a redelivery of his goods by writ of replevin. This was held to be a disaffirmance of

the sale and a bar to a subsequent action for the purchase money. Certainly the court did right in holding that an action by which a redelivery of the goods was obtained was a bar to an action for the purchase money. When the vendor disaffirmed the contract and obtained a judgment of the court sustaining his action, he could not be permitted to reaffirm it and recover the purchase money. To have held otherwise, the vendor would ⁵⁴⁸ have engaged in a very beneficial contract, the result of which would have been to give him the goods, and also the purchase money. In that case the vendor had two causes of action—the one to affirm the sale and sue for the purchase money, or to disaffirm it and sue for the goods. Of course, when he made the election and recovered on the one cause of action, the judgment thus obtained was a bar to the other cause of action.

In the case at bar the appellee had but one cause of action, which was upon account for the overdraft, and that cause was not merged by the execution of the note, as the partners could not bind appellant by a note which was executed without appellant's consent after the completion of the work undertaken by the firm.

The case of *First Nat. Bank v. Gaines*, 87 Ky. 598, does not sustain appellant's contention. That was an action to recover on a note which purported to have been executed by all the parties bound on the original notes, of which the notes in suit were intended to be in renewal, when some of the sureties on the original notes pleaded non est factum to the renewal notes. The court held in that case that as the plaintiff had gone to trial to recover on the notes purporting to be renewal notes, they could not recover on the original notes, because the action was not based on them, and there was no prayer to recover thereon.

This court has held in a number of cases where one partner, after the dissolution of the partnership, executed a note in the firm name for a partnership ⁵⁴⁹ debt, and the other partner interposed a plea of non est factum in an action to recover on the note, and the plea was sustained, that although a judgment had been taken against the partner executing the note, the partner who pleaded non est factum was still liable on the partnership debt for which the note was executed, and a recovery could be had against such partner thereon. The execution of the note by Commotto, and the recovery against him thereon, does not bar appellee's right to recover on the account for overdraft: *Brozee v. Poyntz*, 3 B. Mon. 178; *Calk v. Orear*, 2 B. Mon. 420; *Doniphan v. Gill*, 1 B. Mon. 199; *Daniel v. Toney*, 2 Met. (Ky.) 523.

The appellant attempts to plead the statute of limitation of the

state of Alabama, which is not sufficiently done. It is alleged that the overdraft, if made, was in Alabama, and more than three years had elapsed since plaintiff's alleged cause of action accrued, and he pleads and relies upon the statute of limitation of that state in such cases made and provided.

There is no allegation as to the terms and provisions of the statute of Alabama; there are no allegations which authorize the court to conclude that the plaintiff's right of action was barred because the action was not instituted within three years after the cause of action accrued.

In the absence of a plea which shows the action is barred by the laws of Alabama, we hold that it is governed by the laws of this state. As there is no plea that the statute of this state would bar the right ⁵⁵⁰ to recover, it could not be made available. Besides, the record shows the action was brought within five years after the cause of action accrued.

Judgment affirmed.

PARTNERSHIP—DISSOLUTION—POWER OF ONE PARTNER AFTER.—A new note or contract made by one partner in the name of the firm, and within the scope of the partnership business, and after dissolution, binds the firm until the payee of such note or contract has notice of the dissolution: *Clement v. Clement*, 89 Wis. 599; 2 Am. St. Rep. 760, and note; *Graves v. Merry*, 6 Cow. 701; 16 Am. Dec. 471, and note. See the extended notes to *Chardon v. Oliphant*, 6 Am. Dec. 574, and *Van Keuren v. Parmelee*, 51 Am. Dec. 330.

LIMITATIONS OF ACTION—NECESSITY FOR PLEADING THE STATUTE.—The statute of limitations, to be availed of, must be pleaded: *Gibson v. Green*, 89 Va. 524; 37 Am. St. Rep. 888, and note; but the statute of limitations is available as a defense without a formal plea thereof, if the nature of the proceeding is such that the statute cannot be interposed directly as a bar to the plaintiff's right of action, and is relied upon merely as precluding the plaintiff from assailing, on the ground of fraud, an instrument offered in evidence by the defendant: *Jackson v. Plyler*, 38 S. C. 496; 37 Am. St. Rep. 782, and note.

LAWRENCE v. LOUISVILLE.

[96 KENTUCKY, 595.]

STATUTE OF LIMITATIONS—POWER TO ALTER OR CHANGE.—The legislature has power to pass limitation laws, and to alter or change them by extending the time for their enforcement, or to shorten the time, by giving a reasonable time for asserting the right, provided such laws do not affect cases to which the bar of the existing statute of limitations has attached.

STATUTES—CONSTRUCTION.—Words of a statute ought not to be given a retrospective operation, unless they are so clear, strong, and impressive that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise satisfied.

STATUTE OF LIMITATIONS—VESTED RIGHTS.—The vested right to the defense of the statute of limitations after it has become a bar is protected against subsequent changes in the limitation law by a constitutional provision that all "rights" shall continue valid.

STATUTE OF LIMITATIONS—VESTED RIGHTS.—The right to plead the statute of limitations after it has run and become a bar to a demand arising either *ex contractu* or *ex delicto* is a vested right, and cannot be taken away by a subsequent repealing statute.

T. F. Hargis, for the appellant.

H. S. Barker, for the appellee.

⁵⁹⁶ **PAYNTER, J.** On the twentieth day of January, 1891, this action was brought by the appellant, Mary L. G. Lawrence, against the city of Louisville for damages for personal injury, alleged to have been caused by the neglect of the city in the erection and use of its bridge at the east terminus of Breckinridge street, and that the bridge was defective and perilous, which could be and was discovered by the city; that on the second day of June, 1890, she was run over on the bridge by reason of the defects in the construction and condition of the bridge, and her leg was so mangled and injured that it became necessary to amputate it.

Among other defenses made by the city was, that more than six months had elapsed from the time the ⁵⁹⁷ cause of action accrued before the action was instituted, and pleaded the statute of limitations as a bar to the action.

The statute relied upon is an amendment to the charter of the city of Louisville, approved March 29, 1882, and reads as follows: "No action for damages of any character whatever, to either person or property, shall be instituted or maintained against the city, unless such action be commenced within six months after the accrual of the cause of action."

A demurrer was filed to the paragraph of the answer pleading this statute as a bar to the action. The court overruled the demurrer, and plaintiff declining to plead further, the petition was dismissed. To review this action of the court the cause is before this court. The demurrer was overruled in January, 1892.

The statute of limitation *supra* was held by this court to be constitutional in the case of *Preston v. Louisville*, 84 Ky. 118. This court held a similar statute in relation to the city of Covington to be constitutional: *Covington v. Hoadley*, 83 Ky. 444.

It is insisted by counsel for appellant that the statute *supra*, which barred the action because it was not brought within six months, was not in force when the demurrer was overruled by the court, but that the general limitation law of the state was then

applicable, which did not bar an action for such injuries for one year after the cause of action accrued. The present constitution was adopted September 28, 1891. It is contended that by the schedule ⁵⁹⁸ of the constitution all laws not inconsistent therewith shall remain in force until altered or repealed by the general assembly; that all actions not inconsistent with it are continued as valid and all laws inconsistent with the constitution shall cease upon its adoption. And that, as by section 59 of the constitution, the general assembly is prohibited from passing any local or special acts "to regulate the limitation of civil or criminal causes," the special statute *supra* ceased, because it is inconsistent with that constitutional provision.

It is claimed, as the special statute ceased, the general law then in force became applicable, and, as the action was brought within one year from the time the cause accrued, the action was not barred. In other words, that the general law became retroactive, and restored her right to maintain her action, and destroyed the complete defense which the city had to it. The question as to whether or not the special act is inconsistent with the constitution, and ceased on its adoption, is not decided, although the court may consider the question involved apparently from that point of view. To reach the conclusion which the court announces in the case, it is not necessary to determine that the special statute has ceased. It is no longer an open question as to the power of the legislative branch of the government to pass limitation laws, and to alter or change them by extending the time for their enforcement, or to shorten the time by giving a reasonable time for asserting the right. The power to do this before the bar takes place is conceded.

In some cases retrospective legislation may be upheld. ⁵⁹⁹ However, words of a statute ought not to have a retrospective operation, unless they are so clear, strong, and impressive, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied: *Paterson, J., in United States v. Heth*, 3 Cranch, 399; *Harvey v. Tyler*, 2 Wall. 347; *Sohn v. Waterson*, 17 Wall. 596.

While the first subdivision of the schedule of the constitution continues as valid all actions not inconsistent therewith, the same subdivision continues as valid all rights not inconsistent therewith. It provides that "all rights, actions, . . . and contracts . . . not inconsistent therewith shall continue as valid as if this constitution had not been adopted."

At the time of the adoption of the constitution the right to

plead the statute of limitations had accrued. It was a complete bar to the action. The language of the constitution shows an intention to preserve that "right" as fully as the "action."

The second subdivision provides that "actions and causes of actions, except as herein provided, shall continue and remain unaffected by the adoption of this constitution." It follows that this action was unaffected by the adoption of the constitution. The right to recover, or the cause of action, having been extinguished by the lapse of time, the adoption of the constitution did not revive the right or cause of action. Evidently it was not intended that it should be done.

The lawmaking branch of the government has no more power to destroy a defense that has accrued than it has to take the citizen's property "without due ⁶⁰⁰ process of law." When one is released from a demand by the statute of limitations, his right of defense is as valuable as the right to institute the action. When the defense has accrued, the right to maintain the action is destroyed. When one has occupied land adversely for a given number of years, the statute of limitations destroys the remedy which the owner possessed to recover it. His right was extinguished by the destruction of his remedy. The defense is in the nature of a vested right. In the application of the statute of limitations it is the same, whether the suits arise *ex contractu* or *ex delicto*: *Moore v. State*, 43 N. J. L. 203; 39 Am. Rep. 558.

Though a debt has never been paid, the statute of limitations bars it after a certain lapse of time, and no legislative authority can reimpose the obligation. The obligation can only be reimposed by his will and consent. When one is guilty of a tort, and immunity from suit has arisen by operation of the statute of limitations, the legislature cannot deprive him of it any more than it can the debtor who has been exempted from a demand by operation of the statute of limitations.

Naught v. Oneal, 1 Ill. 36, was an action for slander, and the court said: "If the cause of action accrued one year or more before the repeal of the statute of limitations, still the old statute of limitations is a good bar to the action. It is a complete bar before the repeal, and the repeal of a statute does not affect the rights acquired under the repealed statute."

In *Moore v. Luce*, 29 Pa. St. 262, 72 Am. Dec. 629, the court said: "It is a mistake to suppose that the person barred by ⁶⁰¹ the statute loses nothing but his remedy. The law never deliberately takes away all remedy without an intention to destroy the right. Remedies are frequently changed. One is withdrawn

and others remain, or one is substituted for another. But when all remedies are taken away after a specified period of neglect in asserting rights, and, when this is done for the purpose of promoting the best interests of society, the right itself is destroyed."

In *Von Hoffman v. Quincy*, 4 Wall. 554, the court said: "A right without a remedy is as if it were not. For every beneficial purpose, it may be said not to exist." In *Sprecker v. Wakeley*, 11 Wis. 440, the court said: "And although it is generally true that the statute only bars the remedy, and does not destroy the right, yet when the defense has been vested, no subsequent revival of the right to sue, as by repeal of the statute, or other act, without the consent of the party entitled to the defense, could take away or destroy such defense."

Kent, C. J., in *Dash v. Van Kleeck*, 7 Johns. 477, 5 Am. Dec. 291, quotes with approval the declaration as follows: "A law can be repealed by the lawgivers, but the rights which have been acquired under it while it was in force do not thereby cease. It would be an act of absolute injustice to abolish with the law all the effects which it produced."

In *Kinsman v. Cambridge*, 121 Mass. 558, it was decided that the statute of 1874, extending the time for filing a petition for damages for land taken to widen a street, did not revive an action already barred by the statute existing before the new act was passed.

⁶⁰² Sutherland on Statutory Construction, section 480, holds that there is a vested right in a defense to an action, even in the statute of limitations, when thereby the bar has attached.

Mr. Cooley, in his work on Constitutional Limitations, page 455, says: "Regarding the circumstances under which a man may be said to have a vested right to a defense against a demand made by another, it is somewhat difficult to lay down a comprehensive rule which the authorities will justify. It is certain that he who has satisfied a demand cannot have it revived against him, and he who has become released from a demand by the operation of the statute of limitations is equally protected. In both cases the demand is gone, and to restore it would be to create a new contract for the parties—a thing quite beyond the power of legislation."

In *Davis v. Minor*, 1 How. (Miss.) 183, 28 Am. Dec. 325, the high court of errors and appeals of Mississippi decided that a law reviving the right of action barred by the statute of limitations is void. The chief justice, in delivering the opinion of the court, said: "To my mind it is clear that the moment the remedy

was gone by the running of the statute, the right was gone also, and a right to set this lapse of time up as a defense vested in the opposite party, and he could not be deprived of the privilege, without his consent, by subsequent legislation. This must be the rule if a defense may form the subject of a right, and that it may seems to me to be clear."

It was decided in *Thompson v. Read*, 41 Iowa, 48, that the repeal of the statute of limitations cannot act retrospectively, so as to disturb rights acquired thereunder ⁶⁰³ and deprive parties of protection to which they were fully entitled under the prior enactment.

The current of decisions in other states treats as a vested right the privilege to plead the statute of limitations when it has run and become a bar to a demand arising either *ex contractu* or *ex delicto*. We believe the right of defense is just as important as the right to bring an action.

When the right to recover property has been extinguished because of the statute of limitations, we say that the one who thus holds has a vested right. He acquired it not by a moral but a legal remedy. He is then beyond the power of the legislature to divest him of his rights therein, except by his consent or due process of law.

From a wise public policy the legislature has declared that a cause of action is destroyed by certain neglect, and thus secures a party a right to withhold his property from subjection to a demand.

The legislature has no more right in the one than in the other case by retrospective legislation to destroy the right to property, each being held by virtue of the statute of limitations. The right to a defense should be held as inviolate as the right of action. When the remedy is destroyed, the right to maintain the action is extinguished.

From the foregoing views it will be seen that the court is of the opinion that the demurrer was properly sustained, although when the constitution was adopted, the six months' statute of limitation may have ceased, and the one year statute become operative as to the city of Louisville. However, this point is not decided.

Judgment affirmed.

~ LIMITATIONS OF ACTIONS—POWER TO ALTER OR CHANGE. Where there is an existing statute of limitations, the legislature may pass an amendatory act which either shortens or extends the time within which an existing cause of action may be barred. Such statute is not unconstitutional, as being in conflict with the provisions of the

United States constitution, which forbids the states to pass laws impairing the obligation of contracts, if a reasonable time is given for the commencement of an action before the bar takes effect: *Extended note to Griffin v. McKeasie*, 50 Am. Dec. 391.

LIMITATIONS OF ACTIONS—VESTED RIGHTS.—The complete bar of the statute of limitations is a vested right, and therefore the legislature cannot authorize the assertion of a claim if such bar has become final: *Board of Education v. Blodgett*, 155 Ill. 441; 46 Am. St. Rep. 348, and note.

STATUTES — RETROSPECTIVE — CONSTRUCTION. — A statute must not be given a retroactive effect, unless its language expressly requires it: *People v. O'Brien*, 111 N. Y. 1; 7 Am. St. Rep. 684, and note; *Lane's Appeal*, 57 Conn. 182; 14 Am. St. Rep. 94, and note with the cases collected.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

STATE v. HILL.

[46 LOUISIANA ANNUAL, 27.]

HOMICIDE—INTOXICATION AS DEFENSE—BURDEN OF PROOF.—A plea of drunkenness of such degree as to render the accused incapable of entertaining malice toward the deceased at the time of killing him is a special defense, and must be proved by the party urging it to the satisfaction of the jury beyond a reasonable doubt.

HOMICIDE—INTOXICATION—EVIDENCE.—The prosecution must establish the malicious homicide of the deceased by the accused beyond a reasonable doubt, and if, in making this proof, the drunkenness of the accused at the time of the killing is developed, it is to be considered by the jury, in determining the felonious intent of the homicide; but it is not the duty of the state to prove a negative by showing, beyond a reasonable doubt, that the accused was not so intoxicated as to render him incapable of entertaining malice against the accused. On the contrary, the defense must prove that he was so intoxicated.

Young & Young, for the appellant.

M. J. Cunningham, attorney general, J. E. Randell, district attorney, and R. B. Snyder, for the state, appellee.

27 WATKINS, J. The defendant was convicted on a charge of murder and sentenced to death, and prosecutes an appeal from the judgment rendered, placing his sole reliance on the alleged error of the trial judge in refusing to give to the jury one requested special charge.

The special charge requested and refused was of the following tenor, to wit: "If the jury has a reasonable doubt whether the defendant was intoxicated to such a degree as to create a state of mental confusion, excluding the possibility of a specific intent

to take life, or positive premeditation, then the verdict should be guilty of manslaughter."

The argument of defendant's counsel upon this proposition is that inasmuch as evidence had gone to the jury as to the defendant's ²⁸ state of intoxication at the time of the homicide, it was the province of the jury to determine the degree of intoxication, and whether it was sufficient to reduce the grade of the crime committed from murder to manslaughter; and from that premise his contention is that, as the state must prove, beyond a reasonable doubt, every essential element of the crime charged, and as malicious intent or motive is an essential element of the crime of murder, the state was bound to prove that the accused was not so intoxicated as to render him incapable of entertaining malice toward the deceased, and hence the defendant was entitled to the charge requested. Or, in other words, that the defendant does not rely upon a special defense, but on the want of sufficient evidence to establish the existence of malice on the part of the defendant, on account of his drunkenness at the time of the homicide. Hence, if the evidence raised a reasonable doubt of such a degree of intoxication as to create an impossibility of the existence of malicious intent on part of the accused, the grade of the crime is reduced to manslaughter.

On the part of the state, the argument is that the intoxication of the accused is resorted to a special defense, like a plea of insanity, and that the rules of law provided to test the latter should be applied in this case to test the degree of the defendant's intoxication. He cites *State v. De Rance*, 34 La. Ann. 190, 44. Am. Rep. 426, wherein the court had under consideration the special defense of insanity, and in their opinion said, viz: "The prosecution must prove all the essential, affirmative allegations [of the indictment] beyond a reasonable doubt, [but] the burden of proof on the plea [of insanity] rests upon the party urging it, and its truth must also be established beyond a reasonable doubt." He also cites *State v. Coleman*, 27 La. Ann. 699. We are of the opinion that the plea of drunkenness is a special defense, and, like any other, must be proved by the party urging it to the satisfaction of the jury.

It was the duty of the state to establish the malicious homicide of the deceased, at the hands of the accused, beyond a reasonable doubt; and if, in making that proof, the drunkenness of the defendant was developed, it was a circumstance for the consideration of the jury, along with other proven facts of the case, in determining the felonious intent of the homicide. But it does

not follow that it was the duty of the state to make proof of a negative, by showing, beyond ²⁰ a reasonable doubt, that the defendant's state of intoxication was of a degree not to interfere with his judgment and intelligence, or preclude the possibility of his entertaining malice toward the deceased. The trial judge properly declined to give the requested special charge, and the accused is without grounds of complaint.

Judgment affirmed.

Mr. Justice McEnery absent, sick.

HOMICIDE—INTOXICATION AS A DEFENSE—BURDEN OF PROOF.—In *People v. Ferris*, 55 Cal. 588, the trial court instructed the jury that when drunkenness was relied upon as a defense as an excuse for crime, the burden of proof is upon the defendant to establish the fact of drunkenness to such an extent as that he was not conscious he was doing wrong, and this must be established on his part by satisfactory proof. The court held that the instruction was erroneous. This case is cited in the extended note to *Flanigan v. People*, 40 Am. Rep. 566, where the subject is further discussed.

STATE v. BOARD OF ASSESSORS.

[46 LOUISIANA ANNUAL, 145.]

TAXATION OF IMPORTED GOODS IN ORIGINAL PACKAGES.—Imported goods in the hands of the importer in original packages stored by him and kept for sale cannot be subjected to taxation by the state until the packages are broken or the goods sold.

ORIGINAL PACKAGES ARE BUNDLES put up for transportation or commercial handling, and usually consist of a number of things bound together convenient for handling and conveyance.

G. W. Flynn, assistant district attorney, and E. A. O'Sullivan, city attorney, for the appellants.

H. H. Hall, for the appellee.

¹⁴⁵ **BREAUX, J.** The admitted facts are, that the relators conduct a commercial partnership as importers of foreign goods in New Orleans; that they (the goods) are foreign imports; that at the date of the assessment they had in stock fifteen thousand dollars' worth of imported goods, of which one thousand dollars were in broken packages and fourteen thousand dollars in original packages; that at no time during the year the quantity or value of imported goods in broken packages exceed one thousand dollars; that during the course of the year they sell the entire fourteen thousand dollars in the original packages imported, and they

are in their store subject to such sales as can be made during the year. It is also admitted that the import or impost taxes have been paid.

Application was made to the board of assessors for the cancellation ¹⁴⁶ of the fourteen thousand dollars assessed upon goods in original packages, also to the committee on revision for the taxes for the year 1893.

The relators claim that the assessment is illegal; that the duty on the goods imposed by the act of Congress had been paid to the United States; that the tax assessed was, in effect, an additional import duty which could not be constitutionally imposed by state law.

The respondent, the city of New Orleans, defends on the ground that the relators had, by their disposition of the property, incorporated it in the mass of the property of the state; that by their act the importers have mixed the property with the other values in the state subject to assessment.

That a state law including original packages as property to be taxed would be repugnant to the prohibition of the constitution upon the states not to lay any imposts or duties on imports is conceded by respondent.

1. The respondent argues that it is not essential to break every package in the stock of merchandise in order to commingle them with the other property of the importer; 2. That by the admission that the goods are in relators' store, subject to sale, they have become taxable property.

Commencing with the case of *Brown v. Maryland*, 12 Wheat. 447, the supreme court of the United States, in a number of decisions, has invariably held that imported goods from foreign countries are not subject to taxation under state laws until the packages are broken, or they have been sold by the importer.

Relative to broken packages: When the imported goods are broken up they become subject to taxation as part of the bulk of the property in the state: 1 *Desty on Taxation*, 234.

Relative to sales: At all times between the arrival of the goods imported and the sale by the importer, if the packages are not broken from the original cases, they are not subject to state taxation: *Low v. Austin*, 13 Wall. 34.

With reference to imports the United States supreme court in another case holds: "We have held property in one stage of its ownership," prior to its sale, "not to be taxable," and in a succeeding stage "to be taxable" after the sale by the importer in original packages: *Murray v. Charleston*, 96 U. S. 446.

Breaking packages as applied to imported goods has a defined meaning. ¹⁴⁷ The package consists of a number of things bound together convenient for handling and conveyance. A package means a bundle put up for transportation or commercial handling. It is a thing in form to become as such an article of merchandise, or transportation or delivery from hand to hand: *United States v. Goldback*, 1 Hughes C. C. 529. The breaking or destroying the entirety of the package is a clear definition which does not admit of comment.

Applying these principles to the case at bar, it is obvious that the packages were not broken and that the importers had not sold the goods. The evidence shows that at no time during the year the quantity or value of the imported goods in broken packages exceeded one thousand dollars, and that during the year the relators sell the entire fourteen thousand dollars remaining in the original packages in which they are imported, and that they are in their store subject to such sales as can be made during the year.

Any argument that there was a breaking of the packages or a mixing of part of the goods claimed as exempt from taxation is not sustained by the evidence. The sale during the year of the goods valued at fourteen thousand dollars is made in the original.

The facts that these goods are for sale in the store does not change their ownership nor necessarily have the effect of mingling them with other goods that are not in packages. The immunity from payment of the taxes follows the goods without reference to the place in which they are stored. That they are offered for sale in unbroken packages in the importers' store is not, in effect, the breaking of the packages, or such a disposition of the goods as causes the immunity from the tax to end.

The writs were made peremptory by the judgment of the district court.

We affirm the judgment.

Mr. Justice Parlange takes no part.

TAXATION OF IMPORTED GOODS BY STATE.—A state cannot impose taxes upon property imported into the state from abroad, or from another state which has not yet become a part of the common mass of property therein: *Extended note to People v. Wemple*, 27 Am. St. Rep. 551. A tax on the sale of articles in the original package, brought from another state, is unlawful: *State v. French*, 109 N. O. 722; 28 Am. St. Rep. 590. See, also, *State v. Gorham*, 115 N. O. 721; 44 Am. St. Rep. 494.

"ORIGINAL PACKAGE" DEFINED.—The "original package" is the package of the importer as it existed at the time of its transport-

tation from one state into another: *Extended note to People v. Wempe*, 27 Am. St. Rep. 553. The case or box or bale in which separate articles are placed together for transportation constitutes the "original package" in the commercial sense. No single article therein, though separately wrapped, is an original package: *State v. Parsons*, 124 Mo. 436; 46 Am. St. Rep. 457, and note.

SCHEXNADRYE v. TEXAS AND PACIFIC RAILWAY CO.

[46 LOUISIANA ANNUAL, 243.]

RAILROADS—NUMBER OF TRAINS.—In the absence of statutory regulations, a railroad company may run as many trains, regular and special, as its interests demand.

RAILROADS—RATE OF SPEED OF TRAINS.—In the absence of statutory regulations as to the rate of speed of trains, greater caution is required of a railroad company in running its trains in the country while passing places where it is known that persons are in the habit of crossing the track in necessarily going from one place to another, than is required while running in unfrequented and scantily populated sections.

RAILROADS—DUTY OF PERSONS CROSSING TRACK—NEGLIGENCE.—Persons whose business or pleasure takes them across a railroad track must, before attempting to cross, exercise prudence and care, and look and listen for approaching trains. If they do this, it is not negligence on their part to go upon the track when no approaching train is in sight.

RAILROADS—PARTY USING TRACK AS HIGHWAY—NEGLIGENCE.—A person who goes upon a railroad track for the purpose of using it as a highway to a certain extent assumes all risks, and it requires gross negligence, amounting to malice, to make the railroad company liable for an injury to him, especially when he has a safer mode of travel by a public highway.

RAILROADS—DEAF MUTE ON TRACK—NEGLIGENCE.—Greater care, caution, and prudence are required of a deaf mute who goes upon or uses a railway track as a highway than is required from one in the full possession of all his senses. It is negligence on the part of such mute to so use the track and fail to use his sense of sight to detect the approach of a train, and the railroad company, if exercising due diligence, is not liable for an injury to him.

M. Marks, H. N. Gautier, and J. L. Gaudet, for the appellant.

Howe & Prentiss and L. De Poorter, for the appellee.

250 McENERY, J. The plaintiff sued the defendant company for twenty-eight thousand three hundred dollars' damages for the death of his son, who was killed on the track of said company by one of its trains on the 15th of December, 1890. The case was put at issue by a general denial. There was judgment for plaintiff for twenty thousand dollars, and the defendant appealed.

In this case the facts are few, and the law well settled applicable to the same. The plaintiff's son was a deaf mute, and was walking on the railroad track, his back toward an approaching

train, which was a special train, running at a high rate of speed. The engineer of the train gave the usual signal for the crossing, about one-half mile above Duke station, near which the plaintiff's son was killed.

When about a quarter of a mile from Duke station another signal of four whistles was sounded. These signals could be heard two miles on a still day. The day was clear and bright. When the last crossing signal was sounded, the engineer saw a man walking on the track. This man was the deceased son of plaintiff. The engineer did not know of his infirmity. The man paid no attention to the signal, and when within one hundred yards the engineer blew the danger signal rapidly, "very vicious and quick for a number of times." When within thirty or forty feet of the man, the engineer reversed the engine and applied the air brakes. But this last effort to avert the accident was too late, and the deceased was run over.

The plaintiff's contention from these facts is that the company was guilty of negligence in running a special train at a furious speed; that proper signals had not been given before reaching Duke station, and that he failed to give notice to the deceased son of plaintiff of the proximity of the train.

The defendant company has the exclusive use and control of its tracks and roadbed, and it is within its discretion to run on said ²⁵¹ tracks as many trains, regular or special, as its interests demand. There is no law regulating the speed of trains, except in cities whose crowded thoroughfares render this necessary. In the country, passing places where it is known that persons are in the habit of crossing the track in necessarily going from one place to another, greater caution is required of a railroad company in running its trains than in unfrequented and scantily populated sections. In the absence of statutory regulations, common prudence requires this. It is a necessity in many places, in fact, along the entire road, for it to be crossed at certain points by persons whose business or pleasure takes them across it. In these instances the party attempting to cross the road, before going on the tracks, has to exercise prudence and care, and to look and listen for an approaching train. If he does this, it is not negligence on his part to go on the track when no train is seen approaching. But where the party goes on the track for the purpose of using it as a highway, he, to a certain extent, assumes all risks, and it would require very gross negligence, amounting to malice, to make the railroad company liable for an injury to him. And this rule is particularly applicable when the deceased or party

injured has a safer mode of travel by a public highway, as in the instant case.

The deceased was a deaf mute. Greater care, caution, and prudence were required from him than from one in full possession of all his senses. Knowing his infirmity, his use of the road as a highway, upon which trains at any time must pass, was in itself negligence.

The defendant company exercised all due diligence in running the train which killed the deceased. The usual and customary signals were given at the crossing, within the hearing of one not afflicted with deafness, and, on the approach of the train to deceased, he was given ample time, by signals, to get off the track. It was his unfortunate infirmity which caused the accident, and he was to blame for placing himself in a situation where hearing was one of the essentials of his safety.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and it is now ordered that there be judgment for the defendant and plaintiff's suit dismissed, with all costs.

RAILROADS—RIGHT TO REGULATE NUMBER OF TRAINS. If a railroad company running an exclusive passenger train, as well as a freight train, each way every day over one of its branches, finds the revenues from the service insufficient to meet the expense of maintenance and operation, and withdraws the passenger train, thereafter running only a daily train each way, carrying both freight and passengers, a court has no authority by mandamus to enforce an order of the board of railroad commissioners directing the company to restore and operate the passenger train: *State v. Missouri Pac. Ry. Co.*, 55 Kan. 708, ante, p. 278, and note. See, also, the note to *Potwin Place v. Topeka Ry. Co.*, 37 Am. St. Rep. 322.

RAILROADS—SPEED OF TRAINS—NEGLIGENCE.—The law does not impose any rule as to the rate of speed of passenger trains. Hence the fact that in passing a small station such train was run at a high rate of speed cannot be regarded as negligence per se: *McDonald v. International etc. Ry. Co.*, 86 Tex. 1; 40 Am. St. Rep. 803, and note. This question will be found discussed in the notes to the following cases: *Dyson v. New York etc. R. R. Co.*, 14 Am. St. Rep. 87; *McMarshall v. Chicago etc. Ry. Co.*, 20 Am. St. Rep. 453; *Peyton v. Texas etc. Ry. Co.*, 17 Am. St. Rep. 435.

RAILROADS—DUTY OF PERSONS AT CROSSINGS TO LOOK AND LISTEN.—A person walking on a railroad track must look and listen for approaching trains, and his failure to do so is gross negligence and defeats his right to recover for injuries sustained, unless there is a want of reasonable care on the part of the employees of the company after becoming aware of the perilous situation of the party injured: *State v. Baltimore etc. R. R. Co.*, 69 Md. 494; 9 Am. St. Rep. 436, and note. A person on a highway approaching a railway track is bound to exercise ordinary care and due diligence to ascertain whether a train is approaching, and if, before attempting to cross, and being in possession of his senses, he fails to look and listen, he is guilty of such negligence as will preclude his recovery for an injury sustained from a

collision with the train: *Brown v. Texas etc. Ry. Co.*, 42 La. Ann. 350; 21 Am. St. Rep. 374, and note; to the same effect, see *Liermann v. Chicago etc. Ry. Co.*, 82 Wis. 286; 83 Am. St. Rep. 87, and note. See, also, the note to *Atchison etc. R. R. Co. v. Hogue*, 45 Am. St. Rep. 285.

RAILROADS—DUTY TO PERSONS USING TRACK AS HIGHWAY.—Persons traveling upon railroad tracks as highways are guilty of gross negligence, and the railroad company is responsible only for willful or wanton injuries to them, or for injuries resulting from a degree of negligence equivalent thereto: *Roden v. Chicago etc. Ry. Co.*, 133 Ill. 72; 23 Am. St. Rep. 585, and note; *Blanchard v. Lake Shore etc. Ry. Co.*, 126 Ill. 416; 9 Am. St. Rep. 630, and note; *Lake Shore etc. Ry. Co. v. Bademer*, 139 Ill. 596; 32 Am. St. Rep. 218, and note. A person walking on a railroad track is a trespasser, and the company's servants are under no obligation to keep a lookout for his protection: *State v. Baltimore etc. R. R. Co.*, 69 Md. 494; 9 Am. St. Rep. 436, and note. See, also, the note to *McMarshall v. Chicago etc. Ry. Co.*, 20 Am. St. Rep. 452.

SUCCESSION OF GAINES.

[46 LOUISIANA ANNUAL, '82.]

EXECUTORS AND ADMINISTRATORS—FOREIGN SUCCESSION—REMISSION OF FUNDS.—The courts of one state have jurisdiction, whenever the rights of her citizens are not affected, to order the remission of funds belonging to a foreign succession to the representatives of such succession, authorized to receive them by the courts of the domicile of the deceased. The exercise of such jurisdiction is a matter of discretion, depending on the circumstances, and is a consequence of comity prevailing between states in amity with each other.

EXECUTORS AND ADMINISTRATORS—FOREIGN SUCCESSION—REMISSION OF FUNDS.—The courts of one state have jurisdiction, provided her citizens are not affected, to order surplus funds in the hands of an administrator there to be remitted to the administrator at the foreign decedent's domicile, but if the legatees, creditors, and all other interested parties are before the domestic court requesting it to distribute such funds, the court may order them distributed there.

R. DeGray and Brown & Choate, for the appellants and legatees.

T. J. Semmes and Rouse & Grant, for the appellees and heirs.

Farrar, Jonas & Kruttschnitt, for the New York administrator.

²⁵⁴ **WATKINS, J.** The object of this suit is the recovery, by the New York administrator of the primary succession of the deceased in that state, of the residuum of assets of the ancillary succession in the state of Louisiana, from the administrator appointed under the laws thereof, and for their removal to the probate court of Kings county, New York, for the purposes of administration and distribution under and in pursuance of the laws of that state, and of the provisions of the will of the deceased therein admitted to probate.

The demand of the New York administrator, as well as that of certain legatees under the probated will, is resisted mainly on two grounds, viz: 1. That the allowance of such an application is within the discretion of the courts of this state, and this is not a proper case for its exercise; 2. That our Civil Code requires a complete administration, within this state, of the successions of nonresidents, and that the courts of this state should deal with them as if they were domestic estates.

The facts necessary to be stated as pertinent to the issues involved, and in order to a clear understanding of same, are as follows, viz: ²⁵⁵ On the 5th of January, 1885, Mrs. Gaines made her will in the city of New Orleans, and died in this city on the 9th of that month, though she was at that time a citizen and resident of the state of New York, and temporarily absent therefrom. Soon afterward the persons named in said will as joint testamentary executors thereof presented same to the civil district court for the parish of Orleans (in Louisiana) for probate, but its probate was refused, on the ground that it was informal and not entitled to probate under the laws of Louisiana, though reserving proponents' right to present said will in Washington, D. C., the supposed residence of the deceased at the time of her demise.

On appeal to this court of another branch of the case, the judgment of the lower court was affirmed (38 La. Ann. 123), the proponents of this particular will having acquiesced in the judgment rendered in the court below. There subsequently arose a controversy in the courts of this state, in 1889, between one of the Christmas grandchildren and one of the Whitney grandchildren, over the administration of the Louisiana succession of deceased, and it was decided in favor of the latter, who was duly qualified (42 La. Ann. 699)—the sole asset thereof being a judgment against the city of New Orleans for the sum of nine hundred and twenty-three thousand seven hundred and eighty-eight dollars.

Contemporaneously with these proceedings in Louisiana, others were inaugurated in the surrogate's court of Kings county, New York, for the purpose of obtaining therein the probate of the aforesaid will of Mrs. Gaines, and which resulted in a judgment of the latter court, on the 24th of June, 1891, probating it; and thereunder William B. Davenport, of New York, was appointed temporary administrator of decedent's estate, in pursuance of the laws of that state.

Subsequently the administrator of the Louisiana succession of deceased filed an account, wherein are exhibited sundry large amounts as having been paid and disbursed, and certain others as

of doubtful validity, the payment whereof ought to be refused, showing a large cash surplus to his credit unexpended.

The recognized legal heirs of the deceased appeared therein and preferred claim to this surplus, and their demands are resisted by five different alleged legatees of the deceased under the will that was probated by the New York court—the aggregate of whose claims are about fifty-five thousand dollars—and also by the New York administrator.

²⁵⁶ These various parties appeared, by way of oppositions to the account of the demands of the heirs to be placed in possession, and substantially claimed “that the balance of the funds or assets here remaining, after the payment of all debts here approved, should be paid over to said Davenport, temporary administrator, for distribution by the surrogate’s court aforesaid,” coupling with their demand the prayer that, in the alternative said relief should be refused, the court should order the Louisiana administrator to pay same out of the funds in his hands.

The special averments of Davenport’s opposition are to the effect that there are large legacies that were created by said will, and debts due, and others contested, which must necessarily be adjusted, paid, or rejected by the New York administrator, after same have been passed upon by said probate court, and for that purpose he prayed “that the said residue of the estate here remaining, after the payment of all the debts here established, be paid over to him for administration in Kings county, New York.”

Its further averment is that, under the laws of New York, he, as temporary administrator, has all the powers of an administrator with a will annexed, or dative testamentary executor under the law of Louisiana, and that there are large legacies created by said will, and debts due by persons domiciled in the state of New York, and, also, amounts claimed to be due to persons there domiciled, which claims and debts must necessarily be adjusted and paid or rejected by the administrator under the will of the deceased, in said county of Kings, in the state of New York.

Its further averment is that large amounts are also due for attorney’s fees, costs, and disbursements in the matter of the probate of said will, and in the matter of the defeat of another so-called will, commonly known as the Evans will; and that all of said claims should be passed upon by the said court of probates of the domicile of said deceased.

It is further alleged therein that the administration of the deceased’s estate in Louisiana has been purely auxiliary, and for the purpose of paying debts due creditors of the deceased residing in

this state, or those who had obtained judgments in the courts sitting in Louisiana.

After these recitals comes the opponent's prayer for the surrender and delivery to him of the surplus of funds remaining in the administrator's ²⁵⁷ hands after all demands against the Louisiana estate have been paid and fully satisfied.

The foregoing summary of established facts, and the truth of opponents' averments of fact, are conceded, leaving for discussion and decision only the two questions of law heretofore propounded.

On the trial all of said oppositions were dismissed, and the administrator's demand was rejected, the judgment reserving the rights of the legatees to make claim for their legacies from the Louisiana administrator, or heirs, in case the court should order the registry and execution of the decedent's will.

In a different proceeding in the same succession in Louisiana, reported in 45 La. Ann. 1237, the lower court rejected and disallowed the will which had been probated in New York, and from that judgment an appeal was prosecuted to this court, and same has this day been decided, and the judgment appealed from reversed.

In so deciding, the purport of our opinion is, that the probate of said will in New York is recognized, "to the extent necessary to make it the basis of claims predicated upon it as such," the will of deceased.

It is further to the effect that the administrator of the estate of Mrs. Gaines in Louisiana is ancillary, merely, and that the administration thereof in Kings county, New York, is the primary administration of her estate, same having been inaugurated at the place of the decedent's domicile, and predicated upon her will. It further held that these recognized and established facts must be given effect in the courts of Louisiana as established facts.

It necessarily follows from that judgment that the opponents cannot make claim for their legacies, either from the Louisiana administrator or heirs, inasmuch as the will of deceased has not been ordered to be registered and executed here. And just here it must be observed and borne in mind that this controversy contemplates no further act of administration in Louisiana, but, on the contrary, it proceeds upon the opposite hypothesis, that the ancillary succession here has been closed and terminated by the payment of all the claims proved or provable here, only contemplating the removal of the residue of assets afterward.

Hence, the question arises whether opponents have made out,

under the law, a proper case for a transfer of the residuum of the ancillary succession in Louisiana to the probate court in Kings ~~ess~~ county, New York, for administration there, according to law and the provisions of the will.

This question arose and was decided in the case of *Gravillon v. Richards*, 13 La. 293, 33 Am. Dec. 563, in which Judge Eustis, as the organ of the court, expressed the following opinion:

"The power of courts to order the remission of the funds belonging to a foreign succession to the representatives of the succession authorized to receive them by the courts of the domicile of the deceased, we consider undoubted. Its exercise is necessarily a matter of discretion, depending on the circumstances of each case, and is a consequence of that comity which prevails between nations in amity with each other. The interests of commerce and civilization require that this comity should be carried into effect by our tribunals. It is done in England and in other states of the Union, in analogous and similar cases; and, whenever the rights of our citizens are not affected by the act to be done, we shall feel ourselves bound to act on a principle which is impressed upon us equally by an enlightened policy and a certainty that it will tend to the great purposes of justice. . . .

"We therefore determine, as the interests of no one will be injured thereby, that the court of probates ought to have placed the funds of the estate at the disposal of the syndics and curator of the vacant estate, for the purpose of their being transmitted to the place of domicile of the deceased for distribution."

The same principle was recognized and reannounced in *Mourain v. Poydras*, 6 La. Ann. 151, and again in *Succession of Taylor*, 28 La. Ann. 367, and we are aware of no decision of this court to the contrary. The cases cited by counsel for the Louisiana administrator and heirs (*Heirs of Henderson v. Rost*, 15 La. Ann. 405, and *Succession of Butler*, 30 La. Ann. 890), are dissimilar to this case, in that the demands of foreign administrators were rejected, on the ground that they exhibited no legal title to interfere with existing administrations under the local law before same had been concluded by the payment of debts and charges against the ancillary successions.

Nor are the provisions of article 1220 of the Civil Code opposed to the principle we have quoted from the cases cited, the evident intention of that article being to require the administration of the successions of persons domiciled out of the state only to the extent of paying debts by them. The legislative act of 1842 simply

requires a ²⁵⁹ foreign executor to furnish bond and security before he can undertake the administration of an estate in Louisiana. On this question the New York jurisprudence conforms to our own: See *Despard v. Churchill*, 53 N. Y. 192; *Parsons v. Lyman*, 20 N. Y. 103. The supreme court has likewise held in *Wilkins v. Ellett*, 9 Wall. 740.

In the brief of opponent's counsel the following pertinent questions are propounded, viz: "If the power of the foreign executor to receive the assets belonging to an estate, and which are beyond the territory of the state in which he is appointed, is denied, and he has no right to ask the administrator of the ancillary estate to turn the residuum over to him, how, we ask, is the residuum ever to get to the parent or primary administration for distribution? If the foreign executor must apply and qualify here, and become an officer of this court, how is he to get the fund in this court to the court under which the parent succession is being administered? Must he, as an officer of this court, settle with himself as an officer of the other court? And if yes, does he then do anything more than he is asking to have done now, to wit, to have an officer of this court turn over the remaining residuum to the officer of that other court? If his right to receive is only (in a case like the present, where, under the law of New York, he is vested with title) coextensive with the territorial limits of the state of his appointment, how is he, when made an officer of this court, with a grant of power which can only be, on the same theory, coextensive with the limits of this state, to get the personal property here beyond the limits of this state? "If such was the law, the personal property here could never be gotten beyond the limits of the state where the same may be found to pay the debts and legacies that might be due at the testator's domicile."

In our opinion these questions find a correct answer and solution in the decisions above quoted; and, on the authority of the sound principles of jurisprudence therein formulated, we hold that the New York administrator is legally and rightfully entitled to have the residuum of the assets of the succession of the deceased remaining in the hands of the Louisiana administrator after all debts and charges therein have been fully paid and discharged removed into ²⁶⁰ surrogate's court of Kings county, state of New York, there to be administered and distributed according to law and in conformity to the will of the deceased.

We further hold and decide that the oppositions were incorrectly overruled and dismissed, and that same should be reinstated and sustained, to the extent of authorizing the transfer of the

residuum of assets to the surrogate's court in Kings county, New York, the rights of the opposing legatees to there assert their claims being fully reserved.

We further hold and decide that the demand of the legal heirs to be put into possession of said residuum of assets as an inheritance was improperly sustained and must be rejected and disallowed.

It is therefore ordered and decreed that the judgment appealed from be annulled and reversed in the following particulars, viz: 1. By rejecting and disallowing the demands of the legal heirs of Mrs. Gaines to be placed in possession of the residuum of the assets of her ancillary successor after debts and charges have been paid; 2. So as to reinstate the oppositions of the legatees and of the New York administrator, and to recognize and specially reserve the rights of said legatees to present their demands in the New York court, conformably to law, and to have same therein judicially determined contradictorily with said New York administrator; 3. So as to sustain the demands of the opponents, requiring the residuum of assets in the hands of the administrator of the ancillary succession in Louisiana to be transferred to the surrogate's court of Kings county, state of New York.

And it is further ordered and decreed that the demands of the legal heirs to be placed in possession of the residuum of the succession be rejected and disallowed; that the rights of the opposing legatees be reserved to present and have their claims determined in the New York court without prejudice; and that the administrator of the ancillary succession in Louisiana be ordered and required to transmit, in proper form of law, to the surrogate's court, Kings county, New York, the residuum of assets remaining in his hands after all debts and charges against said ancillary succession have been paid and discharged.

It is further and finally ordered and decreed that in the foregoing particulars the account of the administrator be amended, and in all other respects approved, and that, as amended, the judgment appealed ²⁶¹ from be affirmed, costs of oppositions and appeal to be taxed against administrator and appellees.

Mr. Justice Parlange takes no part.

ON THE MATTER OF REHEARING.

BREAUX, J. The appellees applied for a rehearing and for a modification of the decree, so as to allow payment here to the legatees under the will. In their application the legatees represent that all the legatees are before the court. They allege that

the records do not disclose that Mrs. Gaines was indebted in New York, and that there is no legal necessity to send the legatees to that city to get their money, that no creditor from New York has asked a transfer of the funds to that state, and that the transfer of the funds is a matter of discretion, depending upon the circumstances of each case.

This court having decreed that the domicile of Mrs. Gaines was in New York, attention is directed to the fact that though the decedent was domiciled in New York and the administration was auxiliary only in this state, the legatees, distributees, and creditors may recover amounts due them out of the assets here.

In support of the application the following cases are cited: In *re Hughes*, 95 N. Y. 55; *Harvey v. Richards*, 1 Mason, 381. In speaking for the court Judge Story, regarding the *lex rei sitae* in the last case, says: "Why should not legatees and distributees be entitled to recover out of the assets here as well as creditors? It is true that legatees claim by the bounty of the testator, but it is a legal right, as fixed and vested as the right of a creditor. And as to distributees the case is still stronger, for that rests not on the bounty of the intestate, but on the law of the land, which at the same time enables the creditor to receive his debt out of the assets and the next of kin to claim the residue." Upon the authority of the decision from which we have just quoted appellees principally relied in their application for a rehearing.

The appellants also filed a brief on the application for a rehearing, from which we quote: "The validity of the will of Mrs. Gaines being fully established: 1. By the decision of the surrogate's court of Kings county, New ²⁶² York, declaring it to be the last will of the testatrix and a valid will of real and personal estate; 2. By the recognition thereof as such last will by decree of this court in No. 11193; and 3. By the admission of all parties in interest, now before the court, in their application for the modification of the decree herein, the titles of the legatees to the respective amounts therein named is beyond dispute, for they are settled by both the judgment of the court and the admission of all parties in interest. This being the case, it can make no difference where the legacies provided for in the will are paid, whether in the home or the ancillary succession."

The court ordered that the parties in interest be heard regarding the modification of our decree, so as to avoid as much as possible the incurring of further costs and expenses at the home succession, where there are no assets.

At this hearing all the parties in interest were present and

consented to a modification of our former decree, in order that the respective claims represented be paid here, except the counsel for the administrator of the home succession in New York, who, though not a party to the agreement, interposed no special objection, but asked, if modification of the decree as applied for be granted, that the rights of his client, the temporary administrator, and of all creditors who might recover through his administration of the home succession in New York, be reserved; that the validity of these claims and charges may be established before the court contradictorily with the other parties in interest in the settlement, in so far as relates to the succession funds here.

Under the circumstances payment can be ordered by the court of all funds in this state. A final settlement may be made of the succession, so far as relates to these funds. The consent of the legatees and of the creditors of the succession support the application to pay the funds on hand to the legatees, distributees, and creditors. It would serve no useful purpose to compel the interested parties and all claimants to abandon their pleas here in a court of competent jurisdiction to renew them in another tribunal. The funds being within the court's jurisdiction may be paid here, ²⁶³ and included in the settlement of the ancillary succession in this state. The question of the judicial agency through which the settlement shall now be made arises. Shall the present administrator continue in the discharge of his trust, or shall an executor qualify under the will? It devolves upon us to determine. The last will and testament of Myra Clark Gaines appoints two executors. One of the two survives and is a resident of the city of New Orleans.

This will has been probated, and recognition has been given by this court to the authority of a judgment pronounced in a sister state probating the will and ordering the execution of its terms. The judgment having been rendered by the court having jurisdiction of the domicile of the testatrix, a validity now exists not previously recognized. It follows that the payments should be made by the executor named by the testatrix, and that these funds should be under his administration. The present administrator will have to account to the executor appointed under the will.

It was stated in argument for a rehearing that certain payments had been made by the administrator here in certain legacies, and it was said, on behalf of the appellants, that these payments should be ignored, and that the assets should be accounted for by the administrator to the executor without reference to these payments. That issue not being before the court, it is not decided, but left

to be first passed upon by the court of the first instance. All rights are reserved to the administrator, contradictorily with the executor who may be appointed, to prove the legality and correctness of these payments on legacies and advances to the heirs, if any have been made.

It is therefore ordered, adjudged, and decreed that this case be remanded to the court a qua, to be proceeded with in accordance with law and the views herein expressed; that the legacies, debts, and charges be paid here and complete settlement made with legatees, distributees, and creditors to the extent of the funds on hand; that a final accounting be given and final ²⁶⁴ account filed by the executor of his administration of these funds and of the ancillary succession in this state.

After all legal claims and charges on the part of legatees, distributees, and creditors shall have been paid, and all entitled to any part of these funds settled with, if there be a residuum as per final account of the executor, that the residuum be transferred to the legal representative of the estate authorized to receive it in the surrogate's court of Kings county, New York; that upon proper application, an executor be appointed to execute the will of Myra Clark Gaines, of January 5, 1885, probated in the surrogate's court of Kings county, New York, on the 24th of June, 1891; that he execute the will after having qualified, and that he account as herein ordered; that the administrator of the succession in this state shall account to the executor thus appointed for all amounts received by him and for all disbursements, and render full account of his gestion; that all questions of the validity and the effect of payments made by the administrator are left to be, in the first instance, passed upon by the court of original jurisdiction, with all needful rights to protect their respective interests reserved; that all the rights of the temporary administrator, appointed by the surrogate's court of King's county, New York, be reserved, in order that he may recover all amounts due him, and that all creditors with valid claims be paid in the rank due and to the extent the funds will pay them; (this includes all valid claims and charges, whether presented through the temporary administrator or independently of his trust, all to be proved up and recovered contradictorily with all parties in interest.

Our former decree is set aside, in so far as it may be necessary to make it conform to our decree at this time. That portion which reads: "1. By rejecting and disallowing the demands of the legal heirs of Mrs. Gaines to be placed in possession of the residuum of the assets of her ancillary succession after debts and charges have

been paid; 2. So as to reinstate the opposition of the legatees and of the New York administrator, and to recognize and specially reserve the rights of said legatees to present their demands in the New York court, conformably to the law, and to have the same judicially determined contradictorily with said New York administrator." That this copied portion and all of the original decree is only ²⁶⁵ changed, amended, and annulled to the extent and in those respects necessary to make it conform with the decree now rendered. This amending and annulling as made has become necessary in order to carry out the agreement of the interested parties. In all other respects than that before provided our original decision remains.

The case having been argued and the agreement made by counsel considered, our decree is changed as above without further hearing. Without the necessity of a rehearing, the modification is made and rehearing is, therefore, refused.

EXECUTORS AND ADMINISTRATORS—FOREIGN SUCCESSION—REMISSION OF PROPERTY.—Property remitted here by a foreign administrator cannot be claimed by an administrator appointed here, either as against the person in whose hands it might happen to be, or against the foreign administrator: *Williamson v. Branch Bank*, 7 Ala. 906; 42 Am. Dec. 617. According to the law of Vermont, no one but an administrator appointed in the state in which the intestate's debtors resided at the time of his death can collect such debts, or release them, or properly administer them: *Abbott v. Coburn*, 28 Vt. 663; 67 Am. Dec. 735.

STATE v. DUPAQUIER.

[46 LOUISIANA ANNUAL, 577.]

CONSTITUTIONAL LAW—POLICE POWER—ADULTERATION OF FOOD.—The legislature, or a city under delegated power, has authority to forbid the sale of impure or adulterated food or milk, and to fix a standard by which it shall be judged.

CONSTITUTIONAL LAW—ORDINANCES TO PREVENT SALE OF ADULTERATED MILK.—A city ordinance requiring public milk vendors to furnish gratuitously, on the application of sanitary inspectors, samples of milk for inspection and analysis, is not unconstitutional, as forcing such vendors to furnish evidence against themselves, as taking private property for public use without compensation or due process of law, as denying them the equal protection of law and the enjoyment of their property, as denying them protection in person and property against unreasonable seizure or search, and authorizing invasion thereof without warrant founded on oath or affirmation, or as subjecting them to odious, oppressive, and unreasonable exactions in a lawful vocation. On the contrary, such ordinance is but a reasonable regulation for the public health.

ADULTERATION—MUNICIPAL ORDINANCE—POLICE POWER.—A city ordinance requiring public milk vendors to furnish gratu-

itously, on the application of sanitary inspectors, samples of their milk for inspection and analysis, or suffer a penalty for refusal, is not unreasonable, vexatious, or oppressive, but is a legitimate exercise of the police power for the benefit of the public health.

J. C Walker, for the appellant.

F. McGloin, for the appellee.

⁵⁸¹ NICHOLLS, C. J. The defendant, having been sentenced to pay a fine of twenty-five dollars, and in default of twenty-five dollars to suffer imprisonment for thirty days, on the charge of refusing, in violation of ordinance No. 6576 of the city of New Orleans, approved August 2, 1892, to furnish the officers of the board of health with samples of the milk he was supplying to his customers, has appealed.

The constitutionality of the ordinance was attacked on several grounds by special plea in the magistrate's court, and a bill of exceptions reserved to the overruling of the same.

The ordinance violated is as follows:

"Section 1. Be it ordained by the common council of the city of New Orleans that the standard by which the adulteration of milk shall be considered to be such milk as shall be determined under ordinance No. 6022, as adopted June, 1879, shall be as follows: Normal or pure milk shall be considered to be such milk as will, upon the test thereof, be found to possess a minimum specific gravity, actual density, of one thousand and twenty-nine (1,029) at sixty (60° F.) degrees Fahrenheit, and shall contain not less than thirteen (13) parts of total solids in one hundred parts of milk, as follows: Butter fat, three and one-half (3½) per centum; solids not fat, nine and one-half (9½) per centum; and water, not more than eighty-seven (87) per centum.

"Sec. 2. Be it ordained, etc., that any milk falling below the test above described, or any milk from which the cream has been removed, or to which water, foreign fats, coloring matter, or any other foreign or extraneous substance has been added, shall be considered as adulterated under said ordinance.

"Sec. 3. Be it ordained, etc., that every vendor or establishment or person who sell milk shall be obliged to furnish to any sanitary officer or inspector of the board of health of the state for inspection and analysis, on application therefor, a sample of the milk ⁵⁸² sold by said vendor or establishment or person, from the can or other vessel from which it is sold to the public; said sample shall not exceed one-half pint, and there shall be no charge therefor.

"Sec. 4. Be it ordained, etc., that any person who shall be

found guilty of selling milk below the standard hereinbefore fixed, or otherwise adulterated or modified, as provided under section 2 of this ordinance, or refusing to furnish samples as hereinbefore provided, shall be subject to a fine of not more than twenty-five dollars for each and every offense, and, in default of payment thereof, to imprisonment in the parish prison for a period of not over thirty days; said fine or imprisonment to be enforced by any court of competent jurisdiction within the corporate limits of the city of New Orleans."

Appellant contends: 1. That the ordinance deprives dairymen of their milk without compensation and without uniform rule or regulation; 2. It compels dairymen to be witnesses against themselves, and to furnish samples of milk to be used as evidence against themselves, under penalty of fine or imprisonment; 3. It denies them the equal protection of the law; 4. It denies them protection in the enjoyment of their property; 5. It denies them protection in person and property against unreasonable searches and seizures, and authorizes the invasion of the same without warrant founded on oath or affirmation; 6. It subjects them to an odious, oppressive, and unreasonable exaction, which interferes with their vocation, which is lawful and industrial and not injurious to the community; 7. It deprives dairymen of their property without due process of law; 8. It establishes a rule of evidence and mode of proof legislative in its character, and makes the same conclusive evidence against parties accused thereunder.

His counsel additionally maintains that the ordinance is not within the scope of the police power of the city; that, considered as a health law, it bears no substantial relation thereto; that it delegates arbitrary power to health officers without restraint or uniform rule or regulation.

We think that the objection raised to the ordinance in question as establishing a rule of evidence is not an issue in this case. Defendant was not on trial for having sold adulterated milk, and therefore ⁵⁸³ no question arose in the lower court upon the admissibility or effect of evidence against him based upon an analysis made from a sample of milk taken from him, under protest or by compulsion, under the provisions of the ordinance.

We find in Tiedeman's Limitations of Police Power a note, on page 292. to the effect that the legislature has the power, in an act forbidding the sale of impure or adulterated milk, to fix a standard by which it shall be judged, and as supporting this proposition the following citation of authorities: *People v. Cipperly*, N. Y. Ct. App. February 5, 1886; *State v. Smyth*, 14 R. I. 100; 51

Am. Rep. 344; Commonwealth v. Waite, 11 Allen, 264; 87 Am. Dec. 711; Commonwealth v. Farren, 9 Allen, 489; Polinsky v. People, 73 N. Y. 65.

In *State v. Fourcade*, 45 La. Ann. 717, 40 Am. St. Rep. 249, we held that, under the powers delegated to the city of New Orleans on the subject of the regulation of the milk traffic, the city council had the legal right to adopt a standard.

Referring to the adoption of a standard, Parker and Worthington, in their work on Public Health and Safety, say, in section 301: "In some of the states the statutes on this subject provide that in all prosecutions under the act, if it be shown upon analysis that the milk sold or offered for sale contained more than a certain percentage of watery fluids, it shall be deemed, for the purposes of the act, to be adulterated. These provisions are valid, as they merely regulate and control the quality of an article of food in the interest of the public health, and fix a standard of quality. The clause does not establish a rule of evidence to the prejudice of the accused, but creates and defines a new offense. It is the purpose of the statutes to prohibit, not merely the dealing in milk which has been adulterated, but also the dealing in milk of such inferior quality as to fall below the standard required": Citing numerous authorities.

We will postpone a discussion of the correctness of these statements until a case comes before us in which the rights of the appellant are claimed to have been illegally affected through the ordinance as "a rule of evidence."

Most of the questions raised in this litigation were directly passed upon in the case of *Commonwealth v. Carter*, 132 Mass. 12, from which we shall quote freely later on, and the whole subject of the regulation of the milk traffic is discussed in Parker and Worthington's *Public Health and Safety*, on pages 345 to 349, under the sections from ⁵⁸⁴ 299 to 304. The last section (section 304) is as follows: "It is said milk dealers may be required to supply, from time to time, samples of milk to milk inspectors for analysis, and the inspectors may be authorized to take samples for that purpose and to condemn and pour upon the ground, or return to the person who supplied to the dealer, any milk which, upon inspection, he finds to be adulterated or below the prescribed standard: *Shivers v. Newton*, 45 N. J. L. 469; *Blazier v. Miller*, 10 Hun, 435."

The question of the general powers of the city of New Orleans over the subject of the regulation of the sale of milk within its limits has been several times presented to and passed upon by this

court. The present suit does not involve an issue upon the general power, but upon the special application of the power as attempted to be made through the ordinance whose constitutionality, upon the specific grounds urged, is herein attacked. We do not think the attack upon the ordinance on the ground that it forces a man to furnish evidence against himself is well taken.

On this point plaintiff's counsel in his brief contends as follows: "The object of the ordinance was not to secure evidence against violation of the law, but simply to secure means for proper examination of the milk which is being sold upon the public streets and places to inhabitants of New Orleans. The milk cannot possibly be produced before the courts, being necessarily destroyed by the very chemical process for which the ordinance provides. No law can prevent the chemist of the board of health from chemically analyzing the milk which vendors are selling, and from testifying to the result of the analysis. Whether the sample analyzed was acquired by purchase or seizure would render the effect of the chemists' testimony neither more favorable or unfavorable to the one accused. The object of the ordinance is rather, if it can be considered as contemplating the furnishing of evidence, the obtainance of satisfactory evidence of the vendor's innocence than of his guilt: *State v. Davis*, 108 Mo. 666; 32 Am. St. Rep. 640. In this instance the municipal authorities have licensed the vendors to sell and waived inspection previous to the taking out of the wares, and, as a precaution to the end of ascertaining that the privilege given is not being abused, requires the vendors, when occasionally called upon, to furnish a trifling sample from their stock. This is emphatically to gather assurance of their good faith and right to continue in the ⁵⁸⁵ calling they are pursuing, and not for the purpose of extorting evidence against wrongdoers. It was not presumed the vendors were intending to violate the law; it is not to be presumed that the present appellant has declined to give a sample in this case because of the fear that his milk would be found to be adulterated had the samples been furnished. If the original seizure or taking had been justifiable, the fact that it is possible that the thing may serve to subsequently fasten criminal guilt upon the possessor cannot render the taking unlawful: *Langdon v. People*, 133 Ill. 382. Indeed, the courts have held that even though the original taking were a trespass, the results of the taking were admissible in evidence: *Gindrat v. People*, 138 Ill. 103."

"That the city having a right to license the selling of milk, and the parties having availed themselves of that privilege, under

the conditions stated the wares they sell become property in which the public has an interest. It is that public interest alone in the foods generally sold which justifies the public examination of private property. If the public have such interest in the wares of this character to be disposed of to them, that same public have a corresponding right of access to such wares, to the extent necessary for the preservation of their rights or interests. The milk sold by the milkmen in the city of New Orleans, therefore, is public property, as well as private, to the extent that the public have the right to effectively provide for its purity, and, to that end, to view and analyze it."

In *Commonwealth v. Carter*, 132 Mass. 12, the supreme court held that a statute of that state authorizing inspectors of milk to enter all carriages used in the conveyance of milk, and, whenever they have reason to believe any milk found therein is adulterated, to take specimens thereof for the purpose of analyzing or otherwise satisfactorily testing the same, was constitutional.

Taking up the particular objection we are now considering, it said: "Neither is the power granted in violation of the provisions of article 12 of the declaration of rights, that no man shall be compelled to give evidence against himself. If the seizure is such as is authorized by the constitution, and a law passed in pursuance thereof, the fact that the thing seized may be used in evidence against the person from whose possession it is taken does not render the seizure itself a violation of the declaration of rights": *Commonwealth v. Dana*, 2 Met. 329, 337.

⁵⁸⁶ In *State v. Davis*, 108 Mo. 666, 32 Am. St. Rep. 640, the supreme court of Missouri held that statutes of that state prohibiting a druggist from selling liquor, except on the prescription of a physician, and declaring that such prescriptions shall be carefully preserved and produced in court or before any grand jury whenever required, and that on the failure of the druggist to produce the same he shall be deemed guilty of a misdemeanor, were not in conflict with the article of the constitution providing that no person shall be required to furnish evidence in a criminal case against himself.

Referring to the claim that they were, the court said: "We think not. The right to sell intoxicating lipuor is not a right or privilege accorded to every citizen. The state has the right to control, regulate, or altogether prohibit its sale. It has, therefore, the undoubted right to impose such conditions upon those whom it may authorize to sell such liquors as it may deem necessary to properly regulate and control its use: *Austin v. State*, 10 Mo. 591.

Druggists are not given an unlimited right to sell intoxicating liquors. . . . There can be no doubt that the legislature had the right to impose its own conditions in authorizing such sales. It undertook to do so by the provisions of section 4621, which limits sales to those made under the written prescription of a regularly registered and practicing physician."

"To prevent abuse of their authority to sell as a covering under which to make unlawful sales, section 4622 requires the druggist to preserve all such prescriptions, and produce them in court or before the grand jury when lawfully required. This duty was imposed as a condition upon which a sale was authorized. The prescriptions thus become the license or justification to the druggist for making sales which would otherwise be unlawful. As evidence of authority to make particular sales, they would constitute private papers of the druggist, but could not be regarded as evidences of crime, but rather of innocence. The chief purpose of their preservation, however, was evidently that they might be used in giving aid to courts and grand juries in their proper and lawful endeavors to control and regulate the sale of intoxicating liquors within the limits prescribed by the legislature, and in the investigation of matters of public concern. In these respects all the prescriptions become public and not private papers, and the druggist merely their custodian. It could not be insisted that the production of the official books of a collector, treasurer, ⁵⁸⁷ or other public officer could not be required in the investigation of his accounts, or used in evidence against him in a prosecution for official misconduct. The obvious reason is that the books are not the private property of the citizen, but the public records required to be kept by the officer. The law imposing the duty upon druggists of preserving the prescriptions of physicians left with them, and of producing them before the grand jury, is as clearly required as the duty imposed by law upon any public officer to keep an account of the public money which passes through his hands. Our conclusion is that section 4622 is constitutional, and all its requirements may be lawfully enforced."

This decision was referred to in *State v. Davis*, 117 Mo. 614, and the principle enunciated therein was reaffirmed.

We do not think that the objections urged by appellant to the ordinance, that it deprives him of the equal protection of the law; that it denies him protection in the enjoyment of his property; that it denies him protection in person and property against unreasonable searches and seizures, and authorizes the invasion of the same without warrant, founded on oath or affirmation, and

that it deprives him of property and liberty without **due process of law**, are well founded.

Defendant has selected as a business one which, improperly conducted in the hands of unscrupulous men, would seriously affect the health of the public. It is no longer a debatable question whether callings of that character can be legally brought under reasonable restraints and regulations through the exercise of the police power. The object of the ordinance in question is to protect the general public against dishonest vendors of milk; its effect will be, not only not to injure appellant, but to protect him as a member of the public from that class of persons, and incidentally to save him as an honest vendor in that business from injurious competition through fraudulent devices and ill practices. Honest vendors could certainly see nothing to flow from the ordinance but proper and beneficial results; they certainly should raise no complaint at having their own actions brought to a test, when in so doing they purge the business of disreputable characters. We do not think the ordinance was beyond the scope of the police power of the city, nor that, considered as a health ordinance, it bears no substantial relation thereto.

588 We are of the opinion that in delegating to the common council the powers it did, the legislature contemplated that it would adopt a reasonable system to render the power effective. We agree with plaintiff's counsel that a reasonable method of inspection of the milk offered for sale to the public falls legitimately under the grant of power. There are two methods of inspection. The first is to compel the vendor to exhibit the articles he proposes to dispose of to a public officer, as a condition precedent to their sale, but inasmuch as there are certain cases where the prior inspection would fail of accomplishing the purpose, by reason of the facility offered for subsequently tampering with the goods inspected, a second system is often had recourse to. Under this system the vendor is permitted to proceed with his sales without prior inspection, but with the obligation to submit his commodity to inspectors when the latter think it necessary to demand an examination. The penalty is laid upon the sale, not of uninspected wares, but of improper ones. We are of the opinion that the liability at any moment to a call for inspection, together with the dread of the penalty following detection, operates strongly by way of prevention against the perpetration of frauds, and, as counsel well says, "are the most effective of checks against the sale of adulterated food, and the object of the law otherwise unattainable is accomplished."

We have already referred to the case of *Commonwealth v. Carter*, 132 Mass. 12, as presenting issues almost identical with those presented here in respect to statute closely resembling the ordinance we are now considering. In that case the court said: "It is said that the provision is unconstitutional, because it authorizes the taking of property without consent or compensation, warrants unreasonable searches and seizures, compels one to furnish evidence against himself, and is not within the police power of the commonwealth. An analysis of a specimen of milk offered for sale is an appropriate means of carrying into effect the various provisions of the statutes regulating the sale of milk in this commonwealth. In the case at bar, the can of milk was taken from a carriage used in the conveyance of milk, and it is unnecessary to consider whether the words of the section, 'place where milk is stored or kept for sale,' may or may not include a dwelling-house, and whether, if construed to include a dwelling-house, they do not purport to give a power which the legislature could not give, because the clause authorizing an ⁵⁸⁹ entry is separable from that which authorizes an entry into all carriages used in the conveyance of milk.

"If the statute had required that all milk offered for sale should first be inspected, it would be hardly contended that the trifling injury to property occasioned by taking samples for inspection would be such a taking of private property for public use as to require that compensation be made therefor. Such an injury to property is a necessary incident to the enforcement of reasonable regulations affecting trade in food. Private property is held subject to the exercise of such public rights for the common benefit, and in the case of licensed dealers in merchandise, the injury suffered by inspection is accompanied by advantages which must be regarded as a sufficient compensation: *Bancroft v. Cambridge*, 126 Mass. 438, 441. Instead of requiring all milk offered for sale to be first inspected, the legislature, for obvious reasons, has permitted licensed dealers to sell milk without inspection, has imposed penalties for selling adulterated milk, and has provided that, when the inspector of milk has reason to believe that any milk may be adulterated, he may take specimens thereof, in order that, by analysis, he may determine whether the milk has been adulterated. Such a seizure of milk, for the purpose of examination, is a reasonable method of inspection, and does not require a warrant. It is a supervision, under the laws of the state, by a public officer of a trade which concerns the public health,

and it is within the police power of the commonwealth: *Commonwealth v. Ducey*, 126 Mass. 269; *Jones v. Root*, 6 Gray, 435.

"There is nothing in this case which requires us to determine the rights of the defendant if the inspector had attempted to take a larger quantity of milk for analysis than was reasonably necessary for the performance of his duties. We have not found it necessary to consider whether the defendant, by voluntarily accepting a license to sell milk, has not assented to the conditions and regulations which the legislature has seen fit to impose upon the exercise of the trade licensed: See *Pitkin v. Springfield*, 112 Mass. 509; *Bertholf v. O'Reilly*, 74 N. Y. 509, 517; 30 Am. Rep. 323."

Appellant complains that the ordinance is vexatious and oppressive, in that the inspectors are subjected to no special and uniform rules to control and govern their action. He claims that it opens the door to favoritism and to the gratification of personal spite and ⁵⁰⁰ prejudice; that the inspectors may harass the vendors of milk by unnecessary and repeated demands for samples. The mere fact that powers under an ordinance may be abused does not make the ordinance itself illegal, unreasonable, or oppressive; it is very difficult to so hedge in power conferred as to withdraw from it opportunities for wrongdoing. If such wrongdoing as appellant anticipates were to occur, we think that there are ample remedies at hand to correct and punish it. In the case at bar the efficacy of the inspection rests to a great extent upon the very uncertainty as to the times and places of inspection of which counsel complains. It would be an easy matter to prepare for inspections when parties knew in advance precisely when and where they were to be made.

For the reasons herein assigned it is hereby ordered, adjudged, and decreed that the judgment appealed from be and it is now affirmed.

Rehearing refused.

ADULTERATION OF FOOD—FORBIDDING—POLICE POWER. Laws prohibiting the adulteration of articles of food, or preventing imposition or fraud in the sale of such articles are valid exercises of the police power of the state: *State v. Campbell*, 64 N. H. 402; 10 Am. St. Rep. 419, and note. Under a charter authorizing a city to prohibit the adulteration of drinks, it may, by ordinance, adopt a legal standard of adulteration, so long as such standard is not unreasonable or arbitrary: *State v. Fourcade*, 45 La. Ann. 717; 40 Am. St. Rep. 249. See, also, the extended note to *Butler v. Chambers*, 1 Am. St. Rep. 644.

ADULTERATIONS OF MILK—ORDINANCES PROHIBITING.—Under a statute authorizing a city to provide by ordinance for the inspection and regulation of the sale of milk within its limits, an ordinance forbidding the sale of milk not coming up to a standard or test

of purity prescribed, and authorizing the destruction of milk found impure according to such standard, is a valid exercise of the police power of the city and state: *Deems v. Mayor*, 80 Md. 164; 45 Am. St. Rep. 339, and note. See, also, the extended note to *Butler v. Chambers*, 1 Am. St. Rep. 649, and the notes to *State v. Fourcade*, 40 Am. St. Rep. 259, and *Littlefield v. State*, 47 Am. St. Rep. 702.

BETZ v. LIMINGL

[46 LOUISIANA ANNUAL, 1112.]

MUNICIPAL CORPORATIONS—DEFECTS IN STREETS—LIABILITY OF ABUTTING OWNER.—If statutes impose a mere public duty upon a lotowner in a city to keep the banquettes in front of his premises in repair, or to raise or lower them to an established grade, a failure or neglect to perform such duty does not render him liable in a private action to an individual injured by reason of such failure or neglect.

ACTIONS—BREACH OF PUBLIC DUTY.—Private actions do not lie for a breach of public duty.

MUNICIPAL CORPORATIONS—DEFECTS IN STREETS—TRANSFER OF LIABILITY.—In the absence of an express grant of power, a city has no authority to change the general law, and transfer the liabilities for injury resulting from defects in its streets from the public to an individual who is not directly responsible for their existence.

MUNICIPAL CORPORATIONS—DEFECTS IN STREETS—LIABILITY.—Although a city may have imposed upon lotowners the public duty to keep the sidewalks in front of their premises in repair, or to raise or lower them to an established grade, yet the city, and not the owner, remains answerable in a private action for injuries resulting from his negligence, or his own omission to act.

ACTIONS.—BREACH OF PUBLIC DUTY by a private individual can be punished only by some form of public prosecution, and not by suit for damages by an individual.

B. R. Forman, for the appellant.

Chretien & Suthon, for the appellee.

1115 *McENERY, J.* The plaintiff's wife was injured on the banquette in front of defendant's house, in the city of New Orleans, while passing in front of the same. It is alleged that the injury was in consequence of the defendant having neglected to repair the banquette. It is not alleged that the injury resulted from any obstacles placed on the banquette by defendant. There was judgment for defendant, rejecting plaintiff's demand. The plaintiff appealed.

1116 Section 36 of the charter of the city of New Orleans provides "that all paved banquettes in the city of New Orleans shall be kept in repair by the owners of the real property fronting thereon," and section 8 of the same says the "city council shall

have power to compel the owners of property or tenants to keep their sidewalks in front of such property clean and in repair."

Act 114 of 1886 authorized the city council to establish a uniform grade for the banquettes in the city. When the city council in its discretion deems it necessary to alter the grade on any street, it is made the duty of the city surveyor "to give the grade and make it known," upon which the proper notices shall be issued by the commissioner of public works to owners of property, or their agents, to conform to the newly established grade within ten days after the service of the notice. In default of the owner doing the required grading after the proper notice, it is made the duty of the comptroller of the city to have the work done at the request of the commissioner, at the expense of the owner. A certificate for the cost of the work is recorded, which becomes a lien on the property, with six per cent interest per annum.

We are asked by plaintiff's counsel, in default of judgment in his favor, to remand the case to correct certain alleged errors of the district judge in his ruling in reference to the scope and meaning of act 114 of 1886.

It will be unnecessary to remand the case, for the reason that, conceding all that the plaintiff asks in reference to said rulings, we do not think he is entitled to a judgment. Conceding that the defendant had failed to make repairs to the banquette, and that the council had ordered the banquette raised or lowered on the street on which defendant owned the property, and that he had been served with proper notice and had failed to comply with the same, still only a public duty would have been imposed upon him, the neglect to perform which could not render him liable to an individual who had been injured on the sidewalk or banquette in consequence of the failure to repair it, or to raise or lower it in conformity to the established grade: Dillon on Municipal Corporations, sec. 1028.

In the case of *Taylor v. Lake Shore etc. R. R. Co.*, 45 Mich. 74, 40 Am. Rep. 457, the council of the city of Monroe had full and complete power over the streets, and the legislature had granted to said city in its charter the power to compel owners and ¹¹¹⁷ occupants of property to repair the banquettes in front of same, and to keep them free from obstructions and snow and ice.

The plaintiff in that case sued the defendant for an injury suffered by her in consequence of slipping and falling upon the ice which had formed on the sidewalk in front of premises occupied

by defendant, who had failed to remove it in accordance with the city ordinance.

Judge Cooley, the organ of the court, held: "An ordinance requiring all persons to keep their sidewalks free from ice imposes a purely public duty, and persons injured by slipping on the ice cannot bring private action against the owner of the premises." The syllabus of the case is brief, and is as follows: "Private actions do not lie for breach of public duty."

In the case of *Hartford v. Talcott*, 48 Conn. 525, 40 Am. Rep. 189, the action was by the city against the defendant to recover the amount of a judgment against plaintiff for damages for an injury caused by ice upon a sidewalk in front of his premises.

The city had been held liable because of the duty imposed upon it to keep the sidewalks in repair and free from obstructions. The city council of Hartford had passed an ordinance requiring every owner or occupant of a building or lot bordering upon a street with paved or graded sidewalk to remove from the walks all snow and ice within a certain time, and imposed a penalty for the non-performance of the public duty. The ordinance was passed in conformity to a general law of the state, which placed upon municipal corporations the burden of keeping the highways in their respective limits in a reasonably safe condition.

The court held that there was no grant of power to the city council to change the general law and transfer the responsibility for injuries resulting from defects in the way from the public to an individual who is not directly responsible for their existence.

And we can find no such power to transfer responsibility in the charter of the city of New Orleans or in act 114 of 1886. The charter and act 114 only authorized the enactment of an ordinance requiring each proprietor fronting on a street to assist the city in keeping the banquette in repair and to keep it to a certain grade.

And such seems to be the intent of the legislature in relation to the city of New Orleans. No penalty is imposed by fine for the nonperformance of the public duty imposed. The work is to be done at the expense of the owner, if he fails to do it, with an additional burden ¹¹¹⁸ of six per cent interest. By this legislation the city is not relieved from responsibility. It is still its duty to do the work, and, as it has no authority to shift the responsibility for failure to do it, it remains answerable for injuries resulting from negligence of the owner or its own omission to act.

It is claimed by plaintiff that under section 36 of the city charter, quoted above, that the obligation to keep the banquettes in repair imposed a duty upon the owner of the lot in favor of all persons who use them, and that the neglect to keep them in repair, in consequence of which anyone lawfully using the banquettes is injured, renders the owner liable to him in damages. But the duty imposed was not for the benefit of individuals or a particular class of individuals. The duty was to the whole public of the city, to all its inhabitants, who own the banquettes and streets in common. The neglect to repair the banquettes was such a breach of public duty that its punishment must be in some form of public prosecution, and not by a suit for damages by an individual: *Taylor v. Lake Shore etc. R. R. Co.*, 45 Mich. 74; 40 Am. Rep. 457. There are certain burdens imposed upon the individual members of a community for the benefit of a particular individual or class of individuals which, for a violation of the duty imposed, may give rise to an individual right of action as well as a public prosecution: *Taylor v. Lake Shore etc. R. R. Co.*, 45 Mich. 74; 40 Am. Rep. 457. Such actions generally spring from franchises granted by the state or some subordinate political corporation, to be used for the benefit of the individual members of the community, or from the performance of a public duty by an official for the benefit of a particular individual.

The distinction between the duty imposed as due to the whole community collectively, and that due to individuals, is readily distinguished by the nature of the obligation.

Judgment affirmed.

Rehearing refused.

MUNICIPAL CORPORATIONS—DEFECTIVE STREET—LIABILITY OF ABUTTING OWNER.—No obligation to repair streets or sidewalks adjoining lots in a city rests upon the owners of such lots at common law, but the duty to do so, if any, arises out of statutory obligations imposed upon them by the state or municipality. Such owners do not therefore incur any liability to individuals or municipalities for damages arising from streets rendered defective through want of repairs, where the charters of such municipalities do not assume to make the lotowners liable to the party injured: *Rochester v. Campbell*, 123 N. Y. 405; 20 Am. St. Rep. 760, and note. See, especially, the extended note to *Browning v. Springfield*, 63 Am. Dec. 355-357, discussing this question.

ACTIONS—PRIVATE—FOR BREACH OF PUBLIC DUTY.—A municipality having powers to be exercised for the public good is liable for its failure to exercise them to any person who has received substantial damages therefrom, and who is not himself in fault: *Cochrane v. Mayor*, 81 Md. 54; 48 Am. St. Rep. 479, and note. An action at common law will not lie for private injury caused by the execution of legal powers exercised judiciously and carefully: *Cleveland etc. R. R. Co. v.*

Speer, 56 Pa. St. 325; 94 Am. Dec. 84. Actions cannot be maintained for injuries resulting to individuals from acts done by persons in the execution of a public trust: Tinsman v. Belvidere etc. R. R. Co., 26 N. J. L. 148; 69 Am. Dec. 565. See, also, the extended notes to Robinson v. Chamberlain, 90 Am. Dec. 726; Van Pelt v. Davenport, 20 Am. Rep. 626; Nickerson v. Bridgeport Hydraulic Co., 33 Am. Rep. 5, and Blanc v. Murray, 51 Am. Dec. 10.

LEMAN v. MANHATTAN LIFE INSURANCE COMPANY.

[46 LOUISIANA ANNUAL, 1189.]

LIFE INSURANCE—SUICIDE.—PROOFS OF LOSS under a policy of life insurance showing that the death was caused by suicide, are admissible, but not conclusive, against the insured.

LIFE INSURANCE—SUICIDE—BURDEN OF PROOF.—If suicide is relied upon as a defense to an action to recover on a life insurance policy, the burden of proof is upon the insurer to establish the suicide, and, if circumstantial evidence alone is relied upon, it must be of such character as to exclude, with reasonable certainty, any other cause of death.

A. H. Leonard and M. Marks, for the appellant.

Dinkelspiel & Hart, for the appellee.

1191 MILLER, J. The plaintiff sues on a policy of insurance issued by the defendant on the life of her husband. The defense is, the husband committed suicide, and the policy excludes liability in cases of self-destruction, sane or insane. The jury found for the defendant, and plaintiff appeals from the judgment on the verdict.

The proofs of loss furnished the company, i. e., statements of the undertaker, physician, agent, and friend, as well as the coroner's inquest, stated suicide as the cause of death. The defendant offering these proofs insisted plaintiff was bound by them; that is, defendant objected to any testimony contradicting these proofs. The court admitted the testimony. It is to be observed at the outset, the cause of death in this case is purely a matter of opinion. There is no testimony whatever on the subject, except the fact the insured was found dead from a mortal gunshot wound, with a pistol wedged in the bend of his thumb, and the body so disposed, as will be discussed in another place, as to suggest inferences entirely consistent with accidental death, or at least not of a character to exclude every supposition but suicide. If opinions of witnesses as to the cause of death are to be accepted as conclusive, contained in statements which the company exacts under their policy, it is a harsh application of the supposed rule as to the effect of such statements. In our opinion, neither reason nor

authority support the contention of the company in this respect. We think the proofs of death were admissible to be weighed by the jury with other testimony administered. Such was the ruling of the lower court, and we sustain it: See *Home Ben. Assn. v. Sargent*, 142 U. S. 699; *Insurance Co. v. Newton*, 22 Wall. 36; *Phillips v. Louisiana etc. Ins. Co.*, 26 La. Ann. 404; 21 Am. Rep. 549. The authorities, perhaps, do not go to the full length here affirmed, but they tend to give the proofs of death admissibility, but certainly do not assert their conclusiveness. The better opinion is the insurer is not estopped by the proof: *Bliss on Life Insurance*, sec. 265.

The discussion on the point that suicide should be regarded as ¹¹⁹²proceeding from insanity, and not bar recovery, even though the policy stipulated no recovery in cases of self-destruction, has been ended, as life policies now usually, we believe, contain what is known as the "sane or insane" clause, i. e., no recovery in cases of suicide, sane or insane. That clause is in this policy.

But still, notwithstanding the sane or insane clause, to defeat a recovery on this policy it must appear the deceased took his life. In this case the testimony, mainly the mute witness of the dead body, is all on which the company relies, besides the statement in the proof of loss from those who were possessed of no knowledge save that afforded by the body of the deceased. There is in the record a mass of what is termed expert testimony. It, of course, consists of theories as to the cause of the death. The testimony is of those who testify from their experience in the use of firearms and from physicians who draw their inferences from the gunshot wound, the position of the body, and other circumstances. The admissibility of such testimony is at best doubtful: *Bliss on Life Insurance*, secs. 378, 379. The court at last must determine the basis and potency of all such theories arising from all the facts. These facts are: The body found with the wound from a gunshot causing death, the discharged pistol wedged, or as if it had been forced, on the thumb of the right hand, the body reclining on the sofa as of one sleeping, the left arm rested on the breast, the right leg crossed on the left, the head in the usual position of one in repose, and there being no evidence of any convulsive movement, if we correctly translate the technical word "jactitation," used by the physicians who testify. The pistol was "tightly wedged" to the thumb, so as to require force to remove it. The question is whether these appearances point to suicide, to the exclusion of any other cause? Why not, with equal potency, to accidental death or death by the hand of another?

Dr. Gray, who was one of those who gave a statement at first attributing the death to suicide, seems to have changed his opinion. He testifies: "I was first led to believe it was suicide from the fact that the body was dead and the pistol was on his hand, but the fact as stated in a previous answer (viz., that thumb was thrust through guard of pistol and tightly wedged as if it had been thrust in forcibly), the force necessary to draw the thumb from the guard, the absence of any evidence of jactitation, or of having been any, as shown by the ¹¹⁹³ precise manner in which the body laid, with arms folded, the legs crossed at ankles as in a person sleeping, have raised doubts in my mind as to how his death did occur, whether by his own hand, or by that of another." The testimony of others professing to be experts as to the handling of firearms and the causes of this death reaches a conclusion different from that of Dr. Gray. We think, giving all due effect to the expert testimony, it is at least fair to say it does not establish the suicide.

In any consideration of the cause of the death, weight is due to the condition of the deceased in life, i. e., his domestic relations, his means, his health, and the state of his mind. It is human experience that the motive prompting self-destruction is to be sought, and usually found, in domestic unhappiness, ill-health, financial troubles, or insanity. In this case no such causes are exhibited by the record. The deceased was fortunate in business, had a wife and children to whom he was attached, and with whom he was happy. He parted with them on the day of his death in the best of spirits, and the shock of his death came a few hours later. No physical malady or mental disturbance or financial trouble existed to furnish any cause for taking his life.

In this condition of the record there is no adequate basis to refer the death to the intentional act of the deceased. If there are indications that point to suicide, there are other features not consistent with that theory. When, as in this case, circumstantial evidence alone is relied on to establish suicide, it is at least within bounds to say the evidence must be of a character to exclude, with reasonable certainty, any other cause of death. If the evidence falls short of this exaction, the suicide is not proved. The fact of death remains, and that casts the liability on the company insuring against death, with the excepted case of self-destruction, which the company fails to establish. This appreciation of the evidence and of the burden of proof constrains us to set aside the verdict and judgment of the lower court in favor of the defendant: *Bliss on Life Insurance*, secs. 366, 367; *Mallory v. Travellers' Ins.*

Co., 47 N. Y. 52; 7 Am. Rep. 410; Phillips v. Louisiana etc. Ins. Co., 26 La. Ann. 404; 21 Am. Rep. 549.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be avoided and reversed, and that plaintiff do have and recover from defendant five thousand dollars, with legal interest, and that appellees pay costs.

Rehearing refused.

LIFE INSURANCE—SUICIDE—BURDEN OF PROOF.—Self-destruction is never presumed, and if recovery upon a policy of life insurance is resisted on the ground that the assured committed suicide, the defendant must satisfy the jury, by a preponderance of competent evidence, that the injuries which caused death were intentional on the part of the assured: *Walcott v. Metropolitan etc. Ins. Co.*, 64 Vt. 231; 33 Am. St. Rep. 923, and note with the cases collected.

STATE v. TAYLOR.

[46 LOUISIANA ANNUAL, 1832.]

FORGERY CONSISTS OF MAKING OR ALTERING a writing so as to make the alteration purport to be the act of another person.

FORGERY—AGENCY.—One who falsely assumes to act as agent for the maker in the execution of a note or other writing is not guilty of the forgery thereof.

FORGERY—AGENCY.—An instrument showing on its face that the person who executed it signed as agent for the maker cannot be the subject of forgery, although such agent acted without authority.

P. Breazeale, district attorney, for the appellant.

Pierson & Porter, for the appellee.

¹⁸³² **BREAUX, J.** The defendant was indicted for forgery. The note he is charged with having forged reads:

"\$69.38. On or by the 16th day of November next, we, or either ¹⁸³³ of us, promise to pay J. P. Readhiner, or bearer, the sum of sixty-nine dollars and thirty-eight cents for value received of him, bearing eight per cent from date till paid.

"This, February 3, 1890. Henry Weber, Boston Thomas, Adolphus Taylor, Mason Ray, Mat Beavers, Jr., Mat Beavers, Sr., Anderson Forley, Joe Forley, Jr., E. R. Taylor, J. R. Weaver.

"I was authorized to sign the above names. I secured the order.

"E. R. TAYLOR."

He moved to quash the indictment, on the ground that the facts charged do not constitute the crime of forgery. This motion was sustained by the district court. From the order quashing the indictment the state appealed. Without brief or oral

argument the appeal was submitted for decision. The defendant is charged with having made an instrument purporting to be a note signed by a number of persons. The facts, as charged, are that he executed an instrument purporting on its face to be executed by him as agent.

Assuming that the facts are correctly charged, forgery is not the crime the defendant has committed. Forgery is defined as the making or altering of a writing so as to make the alteration purport to be the act of another person. This definition does not embrace the making of a note per procuration of the party whom he intends to represent. The false assumption of authority is not the forgery denounced by the statute, and, by falsely assuming to act as agent, the maker of the instrument does not make the alteration purport to be the act of another. It is his own unauthorized and wrongful act, and not the fraudulent falsifying of another's name, as in forgery.

It was not a false making of another's signature. It did not purport to be the signatures of the drawers personally, but their signatures as written by the defendant acting as an agent. He did not personate others and fraudulently write their names, but stated on the face of the instrument that he was an authorized agent. This did not constitute forgery, though he may have had no authority in fact. The agency expressed takes the instrument out of the category of false making in the sense of forgery.

1334 Mr. Wharton, in his work on Criminal Law, eighth edition, volume 1, page 668, says: "That to sign the name of another, without authority, is forgery, when similitude is attempted." There was no attempt made to imitate the signatures of the drawers, or to impose by attempting to create the impression that they had signed. To constitute the offense there must be some attempt made to imitate a genuine instrument, and the writing falsely made must purport to be the writing of another. These elements of forgery are not proved by the instrument copied in the indictment.

From Archbold's Criminal Pleading and Practice, Volume 11, page 819, we quote as pertinent: "If a man draw, accept, or indorse a bill of exchange in the name of another, without his authority, it is forgery. But if he sign it with his own name per procuration of the party whom he intends to represent, it is no forgery; it is no false making of the instrument, but merely a false assumption of authority."

Mr. Bishop, in his Criminal Law, volume 2, page 582, is equally clear and positive that "indorsing a bill of exchange,

under a false assumption of authority to indorse it *per procura-tion*, is not forgery, there being no false making."

The crime charged was false making and forgery. The facts upon which the charge is based do not support the indictment. In fine, we are persuaded, after an examination of a number of authorities, that an instrument which shows on its face that the person signed as agent of the drawer of a note cannot be the subject of forgery. The act has not one of the essentials of the crime of forgery—a false writing of an instrument apparently genuine. The falsehood, if there is falsehood, is in the agency, in omissions to act as agent, and not in forging an instrument.

It is therefore ordered, adjudged, and decreed that the judgment appealed from quashing the indictment be affirmed.

FORGERY—AGENCY.—In order to constitute forgery, the act done must be performed with the intent that it shall appear to be the act of another, or other than it really is. Hence, it is not forgery to sign one's own name, though with a false pretense of authority to bind another: *Extended note to Arnold v. Cost*, 22 Am. Dec. 307. But in *Commonwealth v. Wilson*, 89 Ky. 157, 25 Am. St. Rep. 528, and note, it was held that forgery need not be the doing of an act in the name of another. The offender may be guilty of the false making of an instrument, although he signed his own name, if it is false in a material part and calculated to induce another to give credit to it as genuine and authentic, when it is false and deceptive.

TARLETON v. LAGARDE.

[46 LOUISIANA ANNUAL, 1368.]

APOTHECARIES—REFUSAL TO FILL PRESCRIPTION.—The mere refusal of a druggist to fill prescriptions does not render him liable in damages to the physician who gives the prescriptions.

APOTHECARIES—SLANDER—REFUSAL TO FILL PRESCRIPTION.—A druggist, while exercising his privilege of declining to fill a physician's prescriptions, must abstain from any comments, not based on good cause, calculated to convey impressions damaging to the physician's character and standing as a professional man, and if he impugns the physician's professional capacity without cause, he must respond in damages.

SLANDER—MALICE, WHEN IMPLIED.—Under the Louisiana law malice may be implied from any kind or form of words slanderous in their nature, and damages may be allowed therefor without express proof of malice.

W. J. Burke, for the appellant.

Weeks & Weeks, for the appellee.

1871 MILLER, J. The plaintiff, a physician, claims of the defendant, a druggist, damages for his refusal to fill plaintiff's

prescriptions and for slander. The defense is that defendant was unable to fill the prescriptions, and a denial of the slander imputed to defendant. From the judgment of fifty dollars against him, defendant appeals, and, answering the appeal, plaintiff asks that the damages awarded be increased.

It appears from the record the defendant did decline to prepare two prescriptions of the plaintiff. In one a patent medicine formed a component. The defendant seems to have been averse to putting up prescriptions of which the patent medicine formed a part. In his own language as a witness, he was unwilling to take the responsibility of such a prescription, as he was not sure of the composition of the patent medicine. There is some testimony that it is not usual to include a patent medicine as a component of prescriptions, and there is testimony it is not infrequent. At least, this difference in the testimony of the physicians who testified deserves some consideration, in connection with defendant's unwillingness to prepare the prescriptions. With reference to the other prescription, ¹³⁷² the plaintiff's brief claims defendant should be made liable because of his refusal to fill it, avowed in his answer. But the answer is, that the prescription was not filled for the want of the necessary ingredients and other causes. On this branch of the case the propositions affirmed by the plaintiff's case is, that a druggist is to be made liable in damages because he declines to fill prescriptions. We cannot assent to this view. In many cases the druggist may have the best reasons for declining to fill prescriptions. As a chemist he may perceive or have cause to suspect the physician erred in his prescription; or the druggist may not have at hand the ingredients; or he may distrust his ability to prepare the prescription, or other causes may disincline the druggist to undertake filling the prescription presented to him. Recognizing the room for all such causes, we cannot hold that the mere refusal of a druggist to fill prescriptions furnishes any occasion to hold him for damages to the physician who gives the prescription. It does not appear from the testimony that in refusing to fill the prescriptions the defendant used any language derogatory to the plaintiff. True, the father of the child for whom one of the prescriptions was given states the impression as to plaintiff's professional capacity made on his mind by defendant declining to fill the prescriptions was unfavorable. But it is quite certain no such impressions could be derived from anything the plaintiff said, and an impression arising solely from the defendant's right to decline filling the prescriptions obviously furnishes no cause for plaintiff's action against defendant.

The slander attributed in the petition to defendant was in the course of a discussion between him and one of his fellow-citizens, begun on the street and continued in a barber shop. It commenced with a request of defendant for information of the gentleman addressed, formerly a representative in the legislature from defendant's parish, whether the law compelled a druggist to fill prescriptions presented to him. The information given on that subject did not suit defendant, seems to have excited him, and led him to make observations offensive and unjust to plaintiff, at least in their tendency to affect those who were gathered by the animated and angry discussion, or to whom the observations might be repeated. The defendant, exercising his privilege of declining to fill plaintiff's prescriptions, should for that very reason have abstained from any comments calculated to convey impressions damaging to plaintiff's ¹⁸⁷³ character as a professional man. On the contrary, defendant engages in a public discussion on the subject of plaintiff's prescriptions, in which he derided plaintiff's diploma, i. e., he, defendant, would not give a straw for such a diploma, and he further commented on one of plaintiff's prescriptions as containing ingredients that might kill the child. It is in proof that the plaintiff is a graduate of Tulane University Medical Department and that he is a practicing physician. There is no testimony to justify defendant's comments on plaintiff's prescription, and there is, if possible, still less extenuation for defendant's disparaging allusion to plaintiff's diploma. Our jurisprudence rejects the common-law distinction, in actions of slander, of words actionable per se, requiring no proof of damage, and other words slanderous in tendency, but in respect to which the law exacts proof of damage. Under our law malice, the essence of slander, may be inferred from the words, and damages allowed without express proof: *Civ. Code*, arts. 2315, 2316; *Miller v. Holstein*, 16 La. 389; *Feray v. Foote*, 12 La. Ann. 894; *Cachoux v. Dupuy*, 3 La. 207; *Allain v. Truxillo*, 14 La. 298. The application of defendant's remarks was well understood. They were uttered publicly. Their natural tendency to affect plaintiff injuriously as a professional man is obvious, and the mischief apt to be done by such language is increased when it is considered that defendant is a druggist in the community in which plaintiff is a practicing physician. We have read with care the elaborate opinion of the judge of the lower court. We think that, under the circumstances, the judgment should be more than nominal. It is a grave matter to assail without a semblance of cause professional

reputation. In our opinion the judgment should be increased to one hundred dollars.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court should be avoided and annulled, and it is now adjudged and decreed that plaintiff recover from defendant one hundred dollars, with costs in both courts.

SLANDER—IMPLIED MALICE.—Malice is implied from the willful utterance of falsehoods concerning another, whereby injury is done to his character: *Callahan v. Ingram*, 122 Mo. 355; 43 Am. St. Rep. 583, and note. From language per se slanderous malice is inferred, but this inference may always be rebutted by proof of the occasion or other circumstances of justification: *Jones v. Forehand*, 89 Ga. 520; 32 Am. St. Rep. 81, and note with the cases collected.

MATTISE v. CONSUMERS' ICE MANUFACTURING CO.

[46 LOUISIANA ANNUAL, 1885.]

MASTER AND SERVANT—LIABILITY FOR NEGLIGENCE OF VICE-PRINCIPAL.—A master is liable to an inferior servant for injuries received from an explosion of a boiler in his factory caused by the failure of his chief engineer to immediately extinguish the fire and disconnect such boiler after notice of a defect therein, when such failure is the immediate and proximate cause of the accident.

MASTER AND SERVANT—FELLOW-SERVANTS, WHO ARE NOT.—A coal passer at the boilers in a factory is not a fellow-servant with the chief engineer in charge thereof.

MASTER AND SERVANT—VICE-PRINCIPAL—LIABILITY FOR NEGLIGENCE OF.—A chief engineer who is in charge and has the management of his employer's factory with full control of the firemen and coal passers employed therein, and full authority to provide for their safety, is a vice-principal, who, in the absence of his employer, must supply safe machinery and keep it in repair. His failure to perform this duty renders his employer liable to an inferior employee injured thereby.

MASTER AND SERVANT.—KNOWLEDGE OF VICE-PRINCIPAL that machinery under his control is dangerously defective is the knowledge of the principal.

DAMAGES—DEATH CAUSED BY NEGLIGENCE.—One suing to recover for the death of another caused by negligence, is entitled to such damages only as the deceased himself could have recovered at the moment when he died; that is, compensation for the suffering endured.

H. H. Hall, for the appellant.

J. Q. Flynn and W. B. Lancaster, for the appellee.

1885 **BREAUX, J.** The plaintiff sues for the recovery of damages sustained by the death of his son, caused by the explosion of a boiler. The defendant admits that Frederick Mattise, the son of plaintiff, was killed by an explosion of a boiler owned by the

company. The defense is a denial of all liability, and that it, or its employees, were guilty of negligence; and it further alleges that if there was negligence, its employees were the fellow-servants of the defendant.

In a supplemental answer, the defendant sets up and avers that plaintiff proposed, if the defendant would pay the funeral charges, he would accept the payment in full settlement of all claims that he might have for damages. The court *a qua* decided that the plaintiff is not entitled to recover on his own account for loss of support, as the relations between himself and his son had not been of a character to justify the belief that he would have looked to or received from him any relief or support had he lived. Upon the other ground, as exercising the action of his son, which survived in his favor, he was allowed the sum of two thousand five hundred dollars.

¹⁵³⁷ The following are the facts as we summarize them: The boilers were iron boilers. In the afternoon of the 25th of June, 1892, the fireman informed the engineer in charge that a "bag" had formed on the boiler. The chief engineer testifies that he ordered this fireman to put out the fires and put the boiler out of service. He also states that the boiler had "bagged" previously; upon notification, he gave it a critical examination and put it into service for inspection; that it is customary, whenever a boiler "bags," to put out the fire; to have it examined and the "bag" driven up or cut out and a new sheet put in. A bag in the boiler is formed by sediment settling on the inside, which prevents the water from touching the shell; the result is the boiler expands wherever the sediment settles, and the entire thickness of the sheet is forced out by the inward pressure. The weight of the evidence is that a "bag" in a boiler should never be neglected, as neglect may be attended with serious accident; that the fire should be immediately taken out and the boiler disconnected. About three hours after the fireman had reported to the engineer and superintendent in charge that there was a "bag" in the boiler, the explosion occurred and killed the son of plaintiff, who was a coal-passer at the boilers. The evidence does not disclose that the fireman complied with the order, and that the boiler was "cut off" or separated from the battery of boilers of which it formed part by closing the connecting valves and putting out the fire.

The chief engineer, Smith, superintended and directed the ammonia department of the plant, and had charge of the whole factory. He had the authority to employ and discharge the fireman and other employees. The deceased was his subordinate,

under his immediate direction, by whom he had been employed and might be discharged. The president of the company testifies that a superintendent of the defendant's ammonia engine and boiler was succeeded by this engineer, who was promoted from the position of second to that of chief engineer.

As to the defendant's payment of the funeral expenses, the president, as a witness, says that an aunt of the decedent called on him and said the plaintiff was in Covington, and asked him if he would pay the funeral expenses, and that if he did they would require nothing ¹⁵³⁸ more. The company did defray the expenses of the funeral. The testimony does not establish that any agreement was entered into of compromise regarding damages. We will discuss the issue raised in the order in which we have stated the facts of the case.

It is evident that had the steam been "cut off" by closing the valves and thereby separating the boiler that exploded from the other five of the battery, the explosion would not have taken place. After those hours a boiler out of service will not explode. There is evidence tracing the explosion to the "bag." A witness, a boilermaker, whose testimony is not contradicted on that point, was satisfied that the "bag" was the cause. The negligence in not extinguishing the fire and disconnecting the steam is not less because an unexecuted order is said to have been given to the fireman. Empty orders will not suffice.

It was the duty of the engineer, as he had done on previous occasions, to examine the boilers and exert due precaution against an accident. It was not shown that the engineer's authority, which was really that of a superintendent, was at all felt. He controlled the labor, or at any rate it devolved upon him to control the labor, in the departments under his charge (in fact of the whole plant).

The judge of the district court, who heard the witnesses, says: "A 'bag,' that is to say a local distention, took place in one of the boilers, and about three hours later the boiler exploded. That Smith, the engineer in charge, was informed of the 'bag' at the time that it appeared and had ample opportunity to have had the boiler cut out, that is to say disconnected from the other boilers and relieved of steam, and to have had the fires drawn from under it, and that it was his duty, after having been informed of the 'bag,' to have immediately taken those measures of precaution. That whilst said Smith claims to have given orders to Fricke, the fireman, to extinguish the fire and put the boilers in question out of service, it does not appear that he saw that his orders were exe-

cuted, or as a matter of fact, that said orders were executed, but it appears, on the contrary, that the boiler which exploded three hours after the ¹⁵³⁹ 'bag' was the boiler in which the 'bagging' had taken place, and my conclusions, not only from direct testimony to that effect, but from evidence as to the nature of a 'bag' and as to the surrounding circumstances, is that the 'bag' in question was the point from which the break in the boiler began when the explosion took place, and that said 'bag' was the immediate cause of the explosion."

The defendant's second ground is urged in the alternative; that is, if there was any negligence the employees were the fellow-servants of the decedent, and that the company cannot be held liable therefor. Distinction may well be made in case of corporations from that of individuals. Corporations must necessarily act through agents, who may be regarded as the representative of the corporation when acting within the scope of their authority.

It must be borne in mind that the decedent was performing his duty as a servant under the direction of a superior; it was incumbent upon him to obey. It was not right in the agent to render the service dangerous by his negligence. The employee had a right to assume that his superior would exercise proper care. The company had given to the employer of the decedent ample authority.

He states as a witness, and his statement is not contradicted: "The company gave me full power to act, and I used every precaution to prevent accident." Having been placed in this position of trust, he may fairly be considered as the representative of the corporation in operating the factory and in all acts needful to the protection of the company's servants. In superintending the coal-passer's work and that of the fireman, he was not their fellow-servant. Thus authorized, he was bound to exert such intelligence, skill, and experience as is to be required from one to whom the safety of others is intrusted: *Darrigan v. New York etc. R. R. Co.*, 52 Conn. 305; 52 Am. Rep. 590.

This court has adopted the decision of *Chicago etc. Ry. Co. v. Ross*, 112 U. S. 377, in which the doctrine is announced "that a conductor having the entire control and management of a railway ¹⁵⁴⁰ train occupies a very different position from the brakeman, the porters, and other subordinates employed. He is, in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. This view of his relation to the corporation seems to us a reasonable and just one, and it will insure more care in the selection of

such agents, and thus give greater security to the servants engaged under him in an employment requiring the utmost vigilance on their part and prompt and unhesitating obedience to his orders."

In that case the court also holds that "whenever a train or engine is run without a conductor, the engineman thereof will also be regarded as conductor, and will act accordingly. The argument is a short one. The conductor of a train represents the company, and is not a fellow-servant with his subordinates on the train."

When applied to the case at bar, we find analogy in that the engineer had charge of the ice factory, and that the fireman had charge of the boilers and the pumps in the boilerroom, and that he was under the direction and superintendence of the chief engineer, who represented the company in operating the factory.

It is not the mere fact that the chief engineer had control over the fireman and the coal-passer that destroys the relation of fellow-servants between him and the servants, but the additional fact that he succeeded the superintendent and vice-principal, George Smith; that he had full authority to provide for the safety of the servants and had the management of the factory, and in view of the further fact that it is the duty of the master to supply machinery and tools and to see to their repair, and that they are kept in good repair.

When it was discovered that the boiler was out of repair and out of condition, it became the duty of the master, and in his absence of the vice-principal, the chief engineer in charge of the factory, to attend to its repair and restore it to a safe condition. The case from which we have quoted was cited with approval in *Chicago etc. Ry. Co. v. Ross*, 112 U. S. 377, in *Towns v. Vicksburg etc. R. R. Co.*, 37 La. Ann. 630; 55 Am. Rep. 508.

In *Van Amburg v. Vicksburg etc. R. R. Co.*, 37 La. Ann. 655, 55 Am. Rep. 517, this court said: "The defense that no recovery can be had because, even admitting that the fault lies with the conductor, his act was that of a fellow-servant, is no longer tenable to the extent formerly admitted. . . . The case of *Chicago etc. Ry. Co. v. Ross*, 112 U. S. 377, has made an inroad on jurisprudence in the right direction."

¹⁵⁴¹ Our examination of the authorities enables us, we think, to quote the following as a correct statement by Bailey in his work entitled "Master's Liability for Injuries to Servants," without consulting this court to the full extent of the principles of the decision to which allusion is made: "In the federal courts, the

courts of New York, Wisconsin, Maine, and many others, the doctrine is that the master is personally present all the time, even in the performance of actual labor; while in Massachusetts and some other states the extreme is not held in the case of corporations, but rather, when the master has used due care in the first instance, and provided suitable and reasonably safe appliances, and provided suitable means for keeping and maintaining them in proper repair, and employed competent servants to see that the means were properly used, it had fulfilled its duty."

We hold to the rule laid down by the first courts referred to, that is the federal and other courts, to this extent only: That the knowledge of the vice-principal, who is present, that machinery was dangerously defective is the knowledge of the principal. The one in charge of a factory should be bound to guard against threatening accidents. Business enterprises extend beyond a continent and at great distances from the domicile of the owners securely managed by faithful agents and skilled men. Their knowledge that the use of machinery is unsafe is notice to the owner.

Finally the defense urges if there was negligence, that the company's payment of the funeral expenses was accepted by the plaintiff in satisfaction for all claims. The conversation by the father of the deceased and the president of the company falls far short of a compromise, or of any understanding respecting any claim for damages. There was nothing said regarding the accident and damages.

The testimony of other witnesses does not establish an abandonment of any claim, so as to bind the father and plaintiff. He may have expressed himself as satisfied with the company's generosity in paying the expenses; his utterances have not the effect ¹⁵⁴³ of preventing him from recovering a right in regard to which it does not seem he knew anything. The fact that the company paid the funeral expenses of its late servant reflects to its credit, and should not prejudice the rights of plaintiff or defendant.

As to the quantum of damages, the plaintiff is only entitled to such damages as the deceased himself could have recovered at the moment when he died; that is, compensation for the suffering he endured.

It is not possible to determine with great precision the amount of damages that should be allowed for such suffering.

In the case of *Poirier v. Carroll*, 35 La. Ann. 699, they were

limited to two thousand five hundred dollars. The deceased had suffered about twenty-four hours.

In *Van Amburg v. Vicksburg etc. R. R. Co.*, 37 La. Ann. 655, 55 Am. Rep. 517, the court said: "The death was immediate, if not instantaneous. No arithmetical calculation can compute the intensity of that agony that overwhelms the victim of such an accident when he confronts death, but a sum has been adopted, and its apportionment is not determined by fixed rules." The judgment of the district court was reduced to eighteen hundred dollars.

In the case of *Towns v. Vicksburg etc. R. R. Co.*, 37 La. Ann. 636, 55 Am. Rep. 508, the sufferings were endured about four hours before death; the amount of one thousand dollars was allowed as damages. In this case the sufferings were about twelve hours. We think the amount allowed should be reduced to one thousand dollars.

It is therefore ordered that the judgment appealed from be amended by reducing the same to one thousand dollars and legal interest from the date of the judgment of the district court, and that as amended the same be affirmed, appellee paying the costs of appeal.

Rehearing refused.

MASTER AND SERVANT—MASTER'S LIABILITY FOR NEGLIGENCE OF VICE-PRINCIPAL.—The acts of a person authorized by the master to perform a duty which the master owes to his servant, in so far as they pertain to that duty, are acts of the master, and when the servant is injured by reason of a failure to perform it, the master cannot escape liability by setting up that the duty devolved upon a fellow-servant of the person injured: *Oheeney v. Ocean S. S. Co.*, 92 Ga. 726; 44 Am. St. Rep. 113, and note. But a servant sustaining an injury from the negligence of a superior servant engaged in the same general business cannot maintain an action against the common employer, although he was subject to the control of such superior agent and could not guard against his negligence or its consequences: *Keenan v. New York etc. R. R. Co.*, 145 N. Y. 190; 45 Am. St. Rep. 604, and note.

NEGLIGENCE CAUSING DEATH—DAMAGES.—In an action for the death of a person caused by the wrongful act of the defendant, the basis of recovery is the proof of pecuniary damage caused by the wrongful or negligent act of the defendant: *Klepsch v. Donald*, 4 Wash. 436; 81 Am. St. Rep. 936, and note. See, also, *Pierce v. Conners*, 20 Col. 178; 46 Am. St. Rep. 279, and note; and especially the extended note to *Louisville etc. Ry. Co. v. Goodykoontz*, 12 Am. St. Rep. 375.

STATE v. VALLERY.

[47 LOUISIANA ANNUAL, 182.]

HOMICIDE—ADMISSIBILITY OF DECLARATIONS AS TO THREATS.—The declaration of one indicted for homicide, made shortly prior to the killing, that he would put fourteen buckshot into the deceased, being complete as to the purpose, is admissible in evidence, where there is nothing to indicate that it was subject to any qualification, though the witness cannot recollect all that was said.

HOMICIDE—EVIDENCE AS TO DANGEROUS CHARACTER OF DECEASED—PROOF OF OVERT ACT.—Testimony, in a murder case, to show the dangerous character of the deceased is admissible only when self-defense is set up and the accused proves a hostile demonstration on the part of the deceased menacing the life of the accused. Whether such overt act of the deceased was proved must be determined by the appellate court from the bill of exceptions and the qualifying statement of the trial judge.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—As the granting of new trials in criminal cases rests largely in the discretion of the trial judge, a new trial upon the ground of newly discovered evidence will not be allowed, unless the bill of exceptions shows clearly the requisite basis for the application.

J. F. Ariail and H. H. White, for the appellant.

M. J. Cunningham, attorney general, and Phanor Breazeale, district attorney, for the appellee.

¹⁸² MILLER, J. The defendant, convicted and sentenced for murder, appeals to this court, relying on several bills of exception.

One of these bills is to admission of testimony of the expression of the accused, that he would put fourteen buckshot into the deceased. The objection urged to this testimony was, that forming part only of the declaration of the accused, it could not be admitted, and it was hearsay. It appears by the bill that the wife of the deceased overheard the remark of the accused that he would put the shot into the deceased. The remark was made in an adjoining room of the house, the common dwelling, we infer, of the accused and the deceased. The witness states she cannot recollect all that the accused said, but is quite distinct as to the remark in question. The general rule is, that the confession sought to be urged against the accused ¹⁸³ must be used in its entirety, so that he may have the benefit of any exculpation or explanation his whole statement may afford. Undoubtedly, where the confession offered was interrupted, or there are circumstances suggesting that the confession or declaration on the point involved was incomplete and would be modified, if all that the accused said was before the jury, in all such cases the portion of the statement offered should be excluded. Here the declaration,

preceding by only a short time the killing, appears to be complete as to the purpose. There is nothing to suggest or afford any basis for the inference of any qualification or modification. We think the tendency of the authorities in such cases is to let the testimony go to the jury, and that the objection is only to its effect, of which the jury is to judge.

Another question raised by the exception is as to the exclusion of testimony offered by the defendant to show the dangerous character of the deceased. Such testimony has no tendency to justify killing, except when self-defense is set up and the accused proves a hostile demonstration on the part of the deceased, menacing the life of the accused. Then proof of the dangerous character of the deceased is admissible, as tending to show the reasonable belief of danger under which the accused killed the deceased. Testimony of character is, hence, wholly irrelevant, and should be excluded, unless the requisite basis, usually termed the overt act of the deceased, is first proved: Wharton's Criminal Law, secs. 69, 70. This court has no means of determining whether this requisite basis has been laid, except from the bill of exceptions and the qualifying statements of the trial judge. It may be said that the weight attached to the statements in the bill tends to impair the efficacy of the appeal, presenting questions of law dependent on the facts developed before the trial judge. But none the less, this court, in determining such questions, must be governed by the bill, with the additions of the trial judge. Of course, the bill always claims the overt act was proved. Now, in this case, the statement of the trial judge is that no basis existed to permit the introduction of character testimony, and the asserted overt act of the deceased was, in fact, an effort to defend his life. We are bound by the bill, and, thus tested, the testimony was properly excluded: Const., art. 81; State v. Miller, 36 La. Ann. 158; State v. Kervin, 37 La. Ann. 782; State v. Jackson, 37 La. Ann. 896; State v. Ford, 37 La. Ann. 443.

Under another bill it is pressed upon us that a new trial should ¹⁸⁴ have been granted on the ground of newly discovered evidence. As we glean it from the bill, testimony was given by the state as to the kind of coat the accused wore the night of the offense, and this, it is charged in the bill, surprised the accused. The newly discovered evidence the bill attributes to witnesses who, if permitted, it is claimed, will swear, one, that the accused, in prison that night, wore a different kind of coat, and that coat "was as it is now cut, but the cuts seem to have become longer through wear," and both witnesses, it is claimed, will give testi-

mony tending to show there was in the prisoner's cell no other but that of the kind different from that to which testimony was given on the trial. The grounds of the application to procure testimony of those near at hand, and with whom the accused had been in contact during his confinement awaiting trial, does not impress us favorably. Nor did it the trial judge. It is our jurisprudence not to reverse the rulings of the trial judge, unless the basis for such reversal is clearly shown.

As to the other point presented by the bill—i. e., the right of the trial judge to appoint a district attorney in this case—we think the power is clearly conferred by the act No. 74 of 1876.

It is therefore ordered that the sentence of the lower court be affirmed.

EVIDENCE—THREATS—DANGEROUS CHARACTER OF DECEASED.—Upon the trial of a murder case, the declarations of the prisoner antecedent to the murder are admissible: *State v. Ridgely*, 2 Har. & McH. 120; 1 Am. Dec. 372, and note; note to *Stitt v. State*, 91 Ala. 10; 24 Am. St. Rep. 853; *Palmer v. People*, 133 Ill. 356; 32 Am. St. Rep. 146. Declarations made by the accused two days prior to the killing, upon seeing a person who had been a constable, that "I believe he is going to arrest me," and, drawing a revolver, adding, "If he tries to arrest me, he will hear from this," are admissible as showing malice or animus: *Palmer v. People*, 133 Ill. 356; 32 Am. St. Rep. 146. So a threat made by the prisoner a few minutes before the commission of the crime, "that he would kill somebody before twenty-four hours," is admissible for the same purpose, although not expressly directed to the deceased: *Hopkins v. Commonwealth*, 50 Pa. St. 9; 88 Am. Dec. 518. So a threat made a few moments before the shooting, that he would "kill the son of a —," is part of the *res gestæ*, though the threat did not disclose the name of any person, it being established by the evidence that the person so threatened was the deceased: *State v. King*, 9 Mont. 445. Evidence of the bad character of the deceased is admissible in trials for murder only when it is shown *prima facie* that the accused had been assailed, or some act on the part of the deceased was done which would arouse a reasonable belief of imminent peril to life or limb when received and considered in connection with or illustrated by such character: *Garner v. State*, 28 Fla. 113; 20 Am. St. Rep. 232; *Karr v. State*, 100 Ala. 4; 46 Am. St. Rep. 17.

NEW TRIAL.—NEWLY DISCOVERED EVIDENCE is no ground for a new trial, unless it is shown that it could not, by due diligence, have been produced at the first trial: *Brown v. Mitchell*, 102 N. C. 347; 11 Am. St. Rep. 743, and note; *Barrett v. Dodge*, 16 R. I. 740; 27 Am. St. Rep. 777.

GRAHAM v. ST. CHARLES STREET RAILROAD Co.

[47 LOUISIANA ANNUAL, 214.]

TORTS.—THE INTENTIONAL CAUSING OF LOSS by one man to another, without justifiable cause and with malicious purpose to inflict it, is of itself a wrong.

TORTS—LIABILITY FOR DAMAGE.—Every wrongful act of a man which causes temporal loss or damage to another, subjects him to an action upon the case.

TORTS—INFLUENCING ONE NOT TO DEAL WITH ANOTHER.—While a person has an absolute right to refuse to have business relations with any person, though without reason, or as the result of whim, caprice, prejudice, or malice, yet he has not a right, from pure motives of malice, to influence another person to do the same thing without incurring legal liability, which would, however, depend upon the varying conditions, relations, and special facts of each particular case.

TORTS—EMPLOYER HAS NO RIGHT TO INFLUENCE EMPLOYEE NOT TO DEAL WITH THIRD PERSON.—If the plaintiff, engaged in a lawful business, is earning his livelihood by the patronage of others, it is unlawful for a railroad corporation and its foreman, having the power of employing and discharging large numbers of persons, by threats of nonemployment or discharge without justifiable cause, but prompted solely by a malicious and wanton intent and design to injure the plaintiff, to so use their power of employment and discharge upon persons seeking employment from them, or already in their employ, as to cause those who are already dealing with the plaintiff to desist from further doing so, or to prevent those who are inclined to deal with the plaintiff from doing it.

Walter H. Rogers and William B. Lancaster, for the appellant.

Harry H. Hall, for the appellee.

215 NICHOLLS, C. J. Plaintiff seeks to recover a judgment against the St. Charles Street Railroad Company and Thomas Newman in solido for five thousand dollars. Defendants filed an exception of "no cause of action," which having been sustained and the suit dismissed, plaintiff has appealed.

The action is grounded upon the following allegations: "That Newman is the foreman of the company, and as such has the power of employing and discharging its employees; that for a considerable time, less than one year, he has persistently abused said power in making use of it for persecuting petitioner and injuring him in his business; that petitioner is proprietor of a substantial grocery store at the corner of Baronne and Eighth streets of New Orleans—the stable and buildings of said company occupying another corner of the same street intersection; that Newman has frequently and continuously instructed the men under his control in said capacity that they must not deal at petitioner's store, and that he would discharge them if they did; that he especially directed such commands and threats to

Henry Rigner, Joseph Santos, and Lee Halliday in the early part of the year 1893, says in the months of February and March and thereabouts, and to various other persons within the past eight months; that he did discharge one Andrew Heffner from the employ of said company, on or about the 19th of March, 1893, for no other cause than that said Heffner had manifested a friendship for petitioner by speaking in his favor; that the animus of all this was that of ill-will against petitioner and ²¹⁶ the deliberate desire to injure him; that in all said conduct and actions he was within the scope of his employment by said company; that in many other ways said Newman has manifested his ill-feeling and malevolence toward petitioner; that petitioner has suffered loss in his business to the extent of one thousand dollars in the patronage thus driven away and diverted, which he would otherwise have enjoyed; that petitioner has also suffered great annoyance and humiliation from the notoriety which their persecution has obtained in the neighborhood through the openness with which it was carried on and from the ridicule thereby engendered, the injury from which he estimates at not less than five hundred dollars; that he is entitled to punitive and exemplary damages in the further sum of three thousand five hundred dollars for said tortious, wanton, malicious, and unprovoked persecution."

Defendants' counsel in his brief refers us to the case of *Orr v. Home Mut. Ins. Co.*, 12 La. Ann. 255, 58 Am. Dec. 770, as containing a clear exposition of the principle upon which this defense rests. He says: "Defendants had the legal right to discharge their servants arbitrarily and without cause. The exercise of a legal right gives no cause of action against them. If the plaintiff be injured it is *damnum absque injuria*. No authority has been suggested in opposition to the principle that a man has an undoubted right to employ labor and fix the terms and conditions of that employment in his discretion. In the instant case, defendants had the absolute legal right, the exercise of which was proper in the conduct of their business, to prohibit their employees from going to grocery stores or bar-rooms, or from dealing in any way or with any person in such manner as might be prejudicial to the interest of their business. They had the legal right to insist upon abstention in dealing as a condition precedent to their employment or retention in service. If the employees did not see fit to comply with these restrictions, they were at liberty to leave the employment. They were not coerced in any sense of the word. They were

free agents. They could have continued dealing with plaintiff if they saw fit, but they could not so deal and remain in the employment of the defendant company. Defendants were exercising a legal right."

The plaintiff in this case does not appear before us either as one who, having sought employment from defendants, and been refused by reason of what he alleges to be unreasonable, unwarrantable requirements ²¹⁷ at his hands as conditions precedent to being taken into service, claims damages from defendants, nor as one who, having been employed by the defendants under circumstances such as to have legally authorized the employer, at any moment and without cause assigned, to discharge him, claims that he has legal ground of complaint, for the reason that the discharge was arbitrary, wanton, and malicious. Had this case presented features of that kind, the arguments which counsel makes would be unanswerable. A complainant, under such circumstances, would find himself met by the principle which has taken the shape of a maxim, "*Neminem laedit qui jure suo utitur.*"

The issue before us is whether, while the plaintiff, engaged in a lawful business, is legitimately earning his livelihood by and through the custom and patronage of others, the defendant, a corporation, and its foreman, having the power of employing and discharging large numbers of persons, can, without incurring legal liability therefor, without justifiable cause, and moved solely by a malicious and wanton intent and design to injure the plaintiff, use their power of employment and discharge upon persons seeking employment from them, or already in their employ, so as to cause those who are already dealing with the plaintiff to desist from further doing so, and those who would desire to do so from carrying out their wishes by threats of non-employment or discharge. In so doing the defendant would not only control their own will, action, and conduct, but forcibly control and change, from pure motives of malice, the choice and will of others through fear of nonemployment or discharge. This will and power of choice both the plaintiff and the parties themselves are entitled to have left free, and not have coerced, in order simply to work the former damage and injury.

In *Longshore etc. Pub. Co. v. Howell*, 26 Or. 527, 46 Am. St. Rep. 640, the court said: "Every man has a right to require that he be protected in his property rights"; and quotes approvingly and correctly a citation to the effect that "the labor and skill of the workman or the professional man—be it of high or low de-

gree—the plant of a manufacturer, the equipment of a farmer, the investments of commerce, are all in equal sense property.”

In *Delz v. Winfree*, 80 Tex. 400, 26 Am. St. Rep. 755, the court said: “Every man has a right to use the fruits and advantages of his own enterprise, skill, ²¹⁸ and credit. He has no right to be protected against competition, but he has the right to be protected from malicious and wanton interference, disturbance, or annoyance. If the disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right, by contract or otherwise, is interfered with. But if it comes from merely wanton or malicious acts of others, without the justification of competition or service of any interest or lawful purpose, it then stands upon a different footing.”

In the case at bar defendant has committed the error of enlarging a right into a wrong, and applying to it the maxim, “*Neminem laedit qui jure suo utitur*.” In dealing with the question before us, we could entirely disregard, as a mere incident or accident of the case, the particular instrumentality by and through which the alleged damage and injury to plaintiff was inflicted. If it was accomplished under circumstances such as to give rise to legal liability, it would matter little whether it was through the power and influence which an employer can bring to bear upon the conduct and actions of his actual or prospective employees or through some other means.

For the purposes of this opinion, we have taken up and followed the line of discussion and argument adopted and presented by both sides, and passed upon the general legal proposition advanced by plaintiff and disputed by defendant, without subjecting plaintiff's petition, as to its exact language and arrangement, to the strictest rules of pleading. From that standpoint it is open to some criticism, but we have viewed it as substantially raising the issues presented in the briefs.

We do not undertake to lay down any general rule by which should be ascertained and tested the right of one man to control and direct, against his will, the action and conduct of another, to the injury and prejudice of third persons, under the different relations and varying conditions of life. We do not mean for an instant to say that defendants may not, on the trial of this case upon the merits, justify any conduct which they may have pursued in respect to the plaintiff. We simply say that the whole matter should be thrown open to inquiry and investigation.

In the case of *Delz v. Winfree*, 80 Tex. 400, 26 Am. St. Rep.

755, counsel laid down a proposition which the court said might be conceded as correct, to the ²¹⁹ effect that "a person has an absolute right to have business relations with any person whomsoever, whether the refusal is based upon reason or is the result of whim, caprice, prejudice, or malice, and there is no law which forces a man to part with his title to his property," but it declared that "the privilege here asserted must be limited, however, to the individual action of the party who asserts the right. It is not equally true that a person may, from such motives, influence another person to do the same. If, without such motive, the cause of one person's interference with the property or privilege of another is to serve some legitimate right or interest of his own, he may do acts himself, or cause other persons to do them, that injuriously affect a third party, so long as no definite legal right of such third party is violated. In the case of *Walker v. Cronin*, 107 Mass. 562, it was recognized to be a general principle that "in all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages. The intentional causing of such loss to another without justifiable cause, and with malicious purpose to inflict it, is of itself a wrong."

We are of the opinion that the exception of no cause of action should have been overruled, and the parties should have been made to go to trial on the merits. It is ordered, adjudged, and decreed that the judgment appealed from is annulled, avoided, and reversed, and that the exception of no cause of action filed by the defendant in the district court be and the same is hereby overruled, and this cause is ordered to be remanded to the lower court for further proceedings according to law.

TORTS—DAMAGE—ACTION.—Every person has a right to require that he be protected in his property rights: *Longshore Printing Co. v. Howell*, 26 Or. 527; 46 Am. St. Rep. 640. A special action on the case was introduced, for the reason that the law will never suffer an injury and a damage without a remedy. Any interference with the free exercise of another's trade or occupation or means of livelihood by fraud or force, such as preventing people, by threats or intimidation, from trading with or continuing him in their employment, is an actionable wrong: *Lucke v. Clothing etc. Assembly*, 77 Md. 396; 39 Am. St. Rep. 421. The absolute right of a person to refuse to have business relations with another, whether the refusal is based upon reason or is the result of whim, caprice, prejudice, or malice, must be limited to the individual action of the party who asserts the right. It is not true that one person may, from such motives, influence another person to do the same thing: *Delz v. Winfree*, 80 Tex. 400; 26 Am. St. Rep. 755. For questions decided on a subsequent appeal of the principal case, see *Graham v. St. Charles etc. R. R. Co.*, 47 La. Ann. 1656; post, p. 436.

**BLACKWELL v. ST. LOUIS, IRON MOUNTAIN, AND
SOUTHERN RAILROAD COMPANY.**

[47 LOUISIANA ANNUAL, 268.]

RAILROAD COMPANIES—CONTRIBUTORY NEGLIGENCE IN CROSSING TRACK—OMISSION TO GIVE TRAIN SIGNALS.—A traveler with a wagon approaching a railroad track with the intention of crossing must exercise reasonable care to avoid collision with an approaching train, and if its near approach is ascertainable by the usual precautions, but which are not observed by him, he cannot recover damages if he is struck by the locomotive and injured while attempting to cross, though the train signals are not given.

RAILROAD COMPANIES—CONTRIBUTORY NEGLIGENCE—CROSSING TRACK.—A railroad company is not liable for damages caused by a locomotive striking a traveler crossing the track with a wagon, if the evidence shows that the usual signals of the approaching train were given and should have been heard and heeded.

Fred G. Hudson, for the appellant.

Newton & Madison and Garrett & Munholland, for the appellee.

268 **MILLER, J.** Plaintiffs in these consolidated cases sue for damages alleged to have been caused by the fault of those in charge of defendant's trains of cars striking the wagon of plaintiffs, at the time crossing the tracks of defendant's railroad. The result of the accident was the bodily injuries of plaintiffs and the damage to the wagon and horse. From judgments based on verdicts of the jury against defendant, this appeal is prosecuted.

The freight train was proceeding north from Monroe, and plaintiffs in the wagon were knocked off the track at Sicard crossing. Almost parallel with the track is the road from Monroe, and along this road the wagon was on its way, intending to cross the tracks at Sicard. On the west side of the track, from which side plaintiffs attempted to cross, there is a seedhouse about one hundred and forty feet in length, placed there by defendant; south of the crossing, and between the crossing and the house, there was, when the accident occurred, two box-cars on a siding. It is charged in the petition, the house and box-cars obstructed the view of the train coming from the south, and made it impossible, until on the main track, for anyone to see a train approaching in that direction. It is alleged that when the plaintiffs in the wagon reached the crossing, with no view to the south, owing to the obstructions of the house and box-cars, and not warned by any whistle of the approaching train nor able to hear any train or noise, they started to cross, but be-

fore clearing the track the wagon was struck by the engine, the plaintiffs thrown to the ground with great violence, causing serious internal injuries to plaintiffs, besides the damage to the wagon and the crippling of the horses. The negligence attributed to defendant is, that the train was running at an unusual rate of speed, passing the station at an unexpected time not scheduled; that the engineer failed to ring the bell or sound the whistle at the whistling board, about one thousand feet from the crossing, and the obstacles placed by the defendant preventing anyone from seeing the train.

370 We have given all due attention to plaintiffs' argument inferring the negligence of defendant from the fact that the seedhouse prevented the sight of the track south. It must necessarily happen, from the accumulation of freight or other causes, that such obstructions from sidetracking of cars will occasionally exist. While such obstructions should prompt a greater degree of vigilance on the part of railroad companies to guard against accidents, the very fact of such obstructions calls for carefulness from travelers proposing crossing the tracks: See Beach on Contributory Negligence, sec. 196, p. 254. "In proportion as the danger is increased must the vigilance of the traveler who approaches the crossing be increased," is the text of the author. In our view, the imprudence of the plaintiffs, exhibited by the record, overshadows the alleged negligence of the company in respect to the sidetracking of the cars: See, also, 1 Thompson on Negligence, sec. 7, p. 422.

The train leaving Monroe going north stops at Parker's crossing. Next is Sicard, about a mile distant. The train on the track is easily perceived from the road approaching the track, and almost parallel to it in some places. Along this road the plaintiffs in the wagon were riding on the evening of the accident, and another wagon was a short distance behind. We do not affirm it to be the duty of a traveler to look behind, but it cannot fail to impress the mind that a freight train of eleven cars moving along this railroad near by, making the usual noise and nearing the point the wagon was to cross, should have attracted no attention from the plaintiffs in the wagon. Anyone approaching the track he is to cross is usually prompted to use both sight and hearing. Those in the rear wagon both saw and heard the train and halloosed, as they express it, to plaintiffs. Plaintiffs heard neither voice or train. When plaintiffs reached the crossing, the train was very close at hand, striking the wagon before it cleared the track. Sicard is a flag station, where the

train does not stop, unless flagged. It is such a point freight trains may be expected to pass, if not at all times, as one of the witnesses expressed it, at least not with the regularity of passenger trains. True, the sight south was interfered with by the side-cars and the seedhouse. These obstructions, while they are not to be lost sight of in considering the question of responsibility, certainly should have suggested caution to travelers about crossing the tracks. It seems to us that caution could not have been observed by the plaintiffs. If, ²⁷¹ when this wagon reached the crossing, there had been a pause and the listening which ordinary prudence and the law exacts, how is it possible the plaintiffs could fail to hear the noise of this long train, then within the short distance demonstrated by the collision before the wagon reached the other side. The suggestiveness of negligence on plaintiffs' part is not lessened on examining the testimony as to plaintiffs' course on reaching the crossing. One of the plaintiffs, he says, checked up and took time to go across; the statement of the other is, he checked up, halted a little; another witness, in the wagon behind, who, admitting he was trying to beat the train, was close behind plaintiffs, and barely escaped their fate by turning his horse away from the crossing just in time to escape being struck on the track, asked what plaintiffs did on reaching the crossing, answers, they did as one does coming to a bridge, or something of that kind, don't come to a full stop, but check up. We think this testimony indicates that there was no full pause and attentive ear given by plaintiffs, or they would have heard the train so near to the crossing and refrained from attempting to pass the track in front of the advancing train. Aside from the inferences naturally suggested by the testimony produced by plaintiffs, we have in the record the testimony of the conductor, brakemen, firemen, and others, that the usual signals by whistles were given, and, besides, the fireman testifies he rung his bell for half a mile before the crossing was reached. The whistling board is fourteen hundred feet from Sicard. It may well be that the whistles were not sounded at that precise point. If only that whistle had been given at that short distance, it would not have been as efficient a warning as whistles from one-quarter, one-half, and a mile, the distances given by the witnesses. There is negative testimony that none were given. The affirmative testimony outweighs that of the witnesses, who it may well be said did not hear. We think on this branch, as on the whole case, there is no basis for the judgment against the company.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be avoided, annulled, and reversed at plaintiffs' costs.

Rehearing refused.

RAILROAD COMPANIES—DUTY TO LOOK AND LISTEN—SIGNALS.—A person about to cross a railroad is bound to look and listen. A failure to do so is such negligence as will bar his recovery for an injury which might have been avoided had he done so. A train should give timely notice of its approach toward a public highway by the usual signals, and the company will be liable in damages to one injured by a failure to give such signals, unless it can be affirmatively shown that ordinary care was not taken by the person injured to avoid accident: *Atchison etc. R. R. Co. v. Hague*, 54 Kan. 284; 45 Am. St. Rep. 278, and note.

STATE v. KING.

[47 LOUISIANA ANNUAL, 696.]

A MANDATORY INJUNCTION to compel the abatement of a nuisance will not issue ex parte before the trial of the cause, or be used to oust a party in possession.

PROHIBITION—CONTEMPT IN VIOLATING MODIFIED INJUNCTION.—If an original order of injunction is modified, one imprisoned after such modification for violating the original order will be discharged on habeas corpus, and prohibition will issue to restrain further proceedings.

E. Howard McCaleb, Benjamin Rice Forman, and Thomas M. Gill, for the relator.

Lazarus, Moore & Luce, for the respondent.

⁶⁹⁷ **WATKINS, J.** The complaint of the relator, substantially, is that his business has been summarily closed up, and he has been incarcerated in jail under orders of the respondent in a suit wherein he has been allowed a suspensive appeal which has been perfected; and the averment of the relator is that the judge of that court "has no power or authority, under the laws of Louisiana, pending a suspensive appeal to this honorable court, to thus summarily close up the business of your relator and put him in jail."

Wherefore he prays for a writ of habeas corpus, that he may be discharged from custody, for certiorari, that the record be brought up and examined, to the end that the validity of the proceedings be ascertained, and for prohibition, to restrain further proceedings by the respondent in the premises.

Primarily, in the month of December, 1893, an injunction was granted, on the petition of James A. Koehl and others,

against the relator, as defendant, ordering and enjoining him from carrying on his business as the keeper of a concert saloon at the corner of Royal and Customhouse streets, in the city of New Orleans.

Subsequently, on the 20th of December, 1893, the aforesaid injunction was, at his request, so modified by the respondent as only to prohibit and enjoin him from carrying on his barroom and concert saloon and variety entertainments at the aforesaid place in any manner violative of the laws of this state or ordinances of the city of New Orleans, and forbidding him from permitting disorderly persons to congregate therein, or otherwise to create a nuisance in his establishment injurious to the plaintiffs in injunction.

^{see} Relator avers that, subsequently, an application was made to this court for writs of mandamus, certiorari, and prohibition in respect to said injunction, and the action of the respondent was affirmed to the effect that mandatory writs of injunction will not issue ex parte before the trial of the cause, nor be used to oust a person in possession, and that such mandatory injunction, compelling an abatement of a nuisance, could not be made upon interlocutory motion, and that he was thereafter authorized by law to continue his business under the restrictions of the modified injunction, and that he has done so, not in any manner violating the laws of the city or state in the conduct of said business or the terms or conditions of said modified injunction.

Relator further avers that said injunction suit was tried in June, 1894, and that the trial resulted in a verdict against him, sustaining the modified injunction without damages, and thereupon the respondent rendered judgment condemning him to close his said establishment and to cease prosecuting his business altogether.

That from that judgment he applied for and obtained an order of suspensive appeal, and thereafter perfected his appeal by furnishing the necessary appeal bond on the 12th of June, 1894, and his representation and averment are that the effect of said appeal was to suspend the judgment, and that authority and jurisdiction to inquire into the legality or illegality of carrying on his business are vested exclusively in this court, and not in the respondent.

That, notwithstanding said final judgment and appeal on the 12th of June, 1894, plaintiffs therein immediately thereafter, to wit, on the 13th of June, 1894, procured another rule upon him for contempt, on the averment that he had wantonly violated the

writ of injunction thereon by opening and conducting his saloon and variety hall on the night of the 12th of June, 1894, and prayed that he be punished therefor. That he, at the time, excepted to this proceeding, because the petition failed to disclose the particular acts which were alleged to have been in violation of the injunction, and failed to allege that relator has carried on his concert saloon in violation of the laws of the state or city, or, if so, what laws of the state or city, and has failed to allege that he has permitted disorderly persons to congregate there and perform acts that constitute a nuisance to the plaintiffs in injunction, and, in the alternative that these pleas be overruled, he made answer, alleging that he had violated ^{any} no law of the state or city in the conduct of his business, but had conducted the same in strict conformity with the terms of the modified injunction. But the respondent overruled relator's exceptions and made the rule absolute and forced him to close his establishment, basing his judgment exclusively upon the testimony that was introduced over his objection and exception during the trial of the injunction suit, in reference to relator's acts and doings from the 3d of January to the 6th of June, 1894, and erroneously holding that the mere opening of his establishment was a violation of the injunction, and constituted a contempt of court. That, upon thus deciding, the respondent found the relator guilty of contempt and committed him to the parish prison for the term of ten days.

The respondent's returns contain precisely a similar statement of facts to that set out by the relator; and, amongst other things, says that: 1. "The defendant filed an exception to the jurisdiction of the court, and in the argument conceded that the court had jurisdiction to punish the defendant for a violation of the modified and preliminary injunction, but had no jurisdiction to punish him for a violation of the judgment rendered and signed by the court, on the verdict of the jury"; and 2. "That the said rule was then tried and evidence heard; and that on the evidence then heard (as well as) the evidence which the court had previously heard taken before a jury, and of which the court had judicial cognizance, the court overruled the exception, maintained the rule, and adjudged the defendant guilty of contempt for violating the preliminary and modified injunction issued herein, and sentenced the defendant to the parish prison for ten days."

But the foregoing is supplemented by the further statement of the respondent, viz: "Your respondent further says that the relator was found guilty of contempt in the breach and viola

tion of the preliminary writ, and that was the only question decided by the court, and the only authority exercised by the court. The court, however, respectfully submits that the defendant could not obey the preliminary injunction, close his establishment in accordance with the order of the court, acquiesce therein in open court by his conduct, and then, by an appeal from the judgment rendered on the verdict of the jury on the trial of the case on its ⁷⁰⁰ merits, suspend the preliminary injunction, and divest the court of all power over him, and by an appeal reopen and continue to conduct his establishment."

Therefore, we have these propositions for consideration, viz: The relator, as defendant, was preliminarily enjoined from carrying on his concert saloon altogether, but same was, on his application, so modified by the respondent as to permit his continuance of his business in such manner as not to violate any law of the state or ordinance of the city. That on this court having been applied to for relief, the action of the respondent in modifying the preliminary writ of injunction was approved and sustained, on the ground that a mandatory writ of injunction will not issue *ex parte* before the trial of the cause, nor be used to oust a party in possession. That upon a final judgment having been rendered against the relator as defendant, perpetuating the modified injunction, he suspensively appealed therefrom, the effect of which appeal was to leave matters in statu quo. That subsequently to said judgment and appeal, plaintiffs in injunction proceeded against the relator for contempt, on the sole ground that he had opened and conducted his establishment on the night of the 12th of June, 1894, that is to say, on the night of the same day on which judgment had been rendered, and for that sentenced him to imprisonment.

And, having considered the foregoing propositions, we are to determine whether respondent had authority and jurisdiction to entertain the contempt proceedings and punish the relator, as the defendant therein, for a violation of the preliminary writ of injunction, at all. It is our opinion that he had not.

The preliminary order of injunction prevented the defendant from opening his establishment and prosecuting his business at all, but the order modifying the injunction permitted defendant to so conduct his business as not to violate any city or state law. We refused to disturb this modifying order.

When judgment was rendered and suspensively appealed from, the modified order remained unaffected and in statu quo. While there is no question of respondent's authority and jurisdiction

to entertain contempt proceedings predicated upon a violation of the modified order of injunction, notwithstanding the rendition of a judgment on ⁷⁰¹ the merits and a suspensive appeal therefrom, yet we are clear to the effect that his jurisdiction does not extend retroactively to the preliminary order of injunction before same was modified and instituted. It little matters what the judgment decreed, because its effect is restrained by the appeal. If, indeed, antecedent facts can be examined, and an original order of injunction, since modified, be made the basis of contempt proceedings, where can the limit to its exercise be set? It is a quasi criminal proceeding, and should be, therefore, strictly construed, and courts of justice very properly incline to that construction of the law which favors the liberty of the citizen.

After careful consideration of this case in all of its bearings, we have reached the conclusion that relator has presented a case entitling him to relief.

It is therefore ordered, adjudged, and decreed that the respondent direct and require the defendant to be released from imprisonment, constructive or actual, that he be prohibited from any further proceeding in said contempt proceedings, and that relator be released from the payment of all costs.

MANDATORY INJUNCTIONS are sometimes granted in England on motion or interlocutory application before the final hearing, but the inclination of American courts is against the issuance of such injunctions before final hearing. The cases in which they are most frequently employed are those of nuisances and trespasses of an irreparable nature: See monographic note to *Murdock's Case*, 20 Am. Dec. 391, 394, on jurisdiction to grant mandatory injunctions, showing that such injunctions are preventive remedies and not remedial processes.

HABEAS CORPUS AND PROHIBITION. — A person committed for contempt in violating an order which the court had no jurisdiction to make is entitled to discharge on habeas corpus: Note to *Morrill v. Morrill*, 23 Am. St. Rep. 110, discussing, at length, collateral attacks upon judgments. A writ of prohibition lies to prevent action in excess of the jurisdiction conferred by law: Note to *Bullard v. Thorpe*, 44 Am. St. Rep. 875.

BOLLINGER v. TEXAS AND PACIFIC RAILWAY Co.

[47 LOUISIANA ANNUAL, 721.]

RAILROAD COMPANIES—SIDETRACK.—THE RISK OF PASSING from one side of a spur railroad track, or switch, to the other, by going through freight-cars standing thereon, is apparent and should not be taken.

RAILROAD COMPANIES ARE NOT LIABLE FOR INJURIES RECEIVED WHILE PASSING THROUGH FREIGHT-CARS ON SIDETRACK.—Though it is customary for persons, without objection on the part of a railway company, to pass from one side of a spur railroad track, or switch, to the other, by going through freight-cars standing thereon, the company is not liable for damages, when a boy, eleven years old, in attempting so to pass, was fatally injured by the violent closing of a side door of one of the freight-cars, caused by its being pulled out to be coupled with a passing freight train, after warning by the bell of the locomotive, and its lurching suddenly to one side on account of a defect in the track, especially where his presence was unknown to the railroad employees, and it did not appear that the switch was, at the time of the accident, impassably blocked by standing cars. The company owed him no duty.

Samuel Matthews and Gus A. Breaux, for the appellants.

Howe & Prentiss and L. De Poorter, for the appellee.

722 BREAX, J. The plaintiffs, appellants, claim ten thousand dollars damages from the defendant, sustained in consequence of the death of their son, caused by the violent closing of a sliding door of one of the freight-cars of the defendant company.

The lad, aged about eleven years, was leaning against the door casing of the car; when it reached a sunken part of the switch the car lurched to the lower side of the track, collided with a platform erected near the spur track, or switch, and in the sudden and violent shutting of the door the boy's head was caught between it and the post of the door. He died about twenty-four hours after the accident.

The spur track in question is not for public traffic. It was constructed for the Whitecastle Lumber and Shingle Company, at the town of Whitecastle, and is operated by the agents and other employees of the defendant company in hauling the mill's products of the lumber company to the main trunk of the defendant road.

The spur track measures about one thousand feet in length, and begins at the east line of the main trunk, and runs in a westerly **723** direction through the mill-yard of the lumber company to a point across a street known as Cypress.

Platforms at places are erected about the level of the floor of

the cars, on either side of the spur, and a space of about one foot was left on each side, between the platform and the car.

Frequently during the day the railway company hauls loaded cars from the spur to be coupled with the passing freight trains. Cars are also left on this track to be loaded by the laborers in the service of the Whitecastle Lumber and Shingle Company. There are quite a number of laborers and other employees of this company who dwell in houses near this track. It is stated that when there are a number of freight-cars standing on the spur, the employees quite often pass through the cars from one side of the track to the other, as it is quite convenient. The water supply of the company was on the south side of the track. The dwelling-house of the plaintiff on the north.

On the 14th of August, 1893, the plaintiff sent his son, a bright lad, for water to the artesian well, on the south side of the track.

There were two ways—one, the convenient, through the cars, or the other around the cars. Boylike, naturally he chose the former. As he entered the car a locomotive began to pull the cars toward the main track.

A witness, the only witness who was present when the accident occurred, stepped on the car from the platform. The boy was at the time in the car leaning against the door casing. He did not see the boy get in; nor did anyone else. The car in which they were was partly loaded with laths. It was a stock-car, not a close box-car. Having just commenced to pull out, the movement of the cars was not rapid when this witness stepped onto the train. It was a moment after the witness stepped in that the car touched the platform, where there was a defect in the track, and pressed against the sliding door and closed it violently against the head of the boy. The oscillation converted the sliding door and its post into an improvised trap, which would seize, and did seize, the lad's head. The employees of the defendant, who were operating the locomotive and the cars, testify that the usual warning was given to give notice that they were coupling the cars and about to move. That at the time of leaving for the main track they did not see anyone on the stock-car in question. The foregoing are the facts disclosed by the evidence.

724 The chief contention in behalf of plaintiff is that it was common for the employees and members of their families to cross the spur track through the cars when they are open. Conceding that it was usual, it none the less devolved upon those

crossing to exercise due care and prudence. It was, at most, customary to cross. This did not involve a ride of some distance on the moving train.

It is not our impression that he could not have stepped across immediately after he had stepped into the car. He must have known that the engine was coupled to the car, and that unless he hastened to pass, he would be carried away with the moving train. He did not, after the car was hauled away, become a passenger, entitled to the protection due a passenger, or to one who is invited on the train, and, therefore, whatever negligence on the part of the defendant there may have been in not repairing the track was not legal cause for complaint on the part of anyone who thus continued on the train. He did not come within the measure of the duty of the carrier to his passenger, or of the employer to his employee. The risk of passing through the cars likely to get on the way at any moment, or in the act of moving, was apparent and should not have been taken.

We have thus far assumed that he was not negligent in attempting to cross as he did, but it is not in proof that the spur track was filled with cars at the time, and that it was not possible to pass at some other point without the greatest inconvenience. There were four or five cars, as we understand from the evidence, standing on this track. There was, we judge, very little difference in the distance to the well to which it was his intention to go for water. The injury might have been avoided by walking a few yards further. In view of the fact that cars were being moved, it was imprudent to attempt to pass through the open doors of one of the number.

Where a boy climbed in play into an open freight car standing, and was injured by the falling upon him of the door of the car, which was insecurely hung, the court considered that "the fact that the defendant knew that the car was left upon the track where it would be an enticing, attractive, and inviting object to children, and that the children were and had been accustomed in and about such cars, upon the defendant's sidetrack, was not an invitation or inducement ⁷²⁵ held out by the plaintiff to the defendant, and that the defendant owed no duty to the plaintiff, he being a trespasser": *Boswell on Personal Injuries*, p. 104, par. 78. See, also, *Beach on Contributory Negligence*, 2d ed., p. 274, par. 212.

"But that there has grown up a habit on the part of individuals, or of the public generally, to travel over the track on foot, and that no measures have been taken to prevent it, does not change

the relative rights and obligations of the public and the company. It is not the less a trespass in that it is repeated or that there are many trespassers": Beach on Contributory Negligence, sec. 212.

In the light of doctrine and authorities, we are of opinion that plaintiffs cannot recover damages for the loss and severe affliction sustained. Our brother of the district court excluded the testimony offered to prove the habit alleged of passing through the car. We have none the less given due weight to the facts alleged upon that point.

It is therefore ordered, adjudged, and decreed that the verdict of the jury and the judgment of the court based thereon are affirmed at appellant's costs.

RAILROAD COMPANIES—CONTRIBUTORY NEGLIGENCE.—

The act of a grown person, or of a boy between nine and ten years of age, in climbing over standing cars, or in attempting to pass between freight-cars standing on one of the sidetracks across a street, without looking to see whether they are attached to an engine or not, or in disregarding the situation if an engine is found to be attached, is such contributory negligence as to prevent any recovery for injuries received while so doing: *Corcoran v. St. Louis etc. Ry. Co.*, 105 Mo. 399; 24 Am. St. Rep. 394; *Burger v. Missouri Pac. Ry. Co.*, 112 Mo. 238; 34 Am. St. Rep. 379; note to *Spencer v. Baltimore etc. R. R. Co.*, 54 Am. Rep. 272, 274, showing a conflict of authority on the question. The subject of negligence in dealing with children is treated in an extended note to *Barnes v. Shreveport City R. R. Co.*, post, p. 400. A failure to avoid apparent danger is contributory negligence: Note to *Savannah etc. Ry. Co. v. Flannagan*, 14 Am. St. Rep. 188.

BRASHEAR v. HOUSTON, CENTRAL ARKANSAS, AND NORTHERN RAILROAD COMPANY.

[47 LOUISIANA ANNUAL, 735.]

RAILROAD COMPANIES—MOVING TRAIN—PASSING STATION WITHOUT SLOWING UP.—A passenger on a railroad train, with a ticket for a station at which it is not customary for the train to stop, but to slow its movement, so as to allow passengers to alight, if called to the platform by the announcement of the station, where he is thrown from the steps of the car and injured by a sudden increase of the speed of the train, which should be slowed or stopped, is entitled to damages, though he is thrown from the car on the side opposite to his station, the train having passed it and the passenger having crossed to the other side of the train under the reasonable expectation that it would be slowed at his destination, a few feet beyond the station.

APPEAL—EXCESSIVE DAMAGES.—If a passenger, while endeavoring to alight from a moving railroad train, is not seriously injured, and works at his business after the accident with no diminution

of his physical ability apparent to his fellow workmen, though he is subsequently made sick from the effects of the fall, a verdict of three thousand dollars is excessive, and the appellate court will reverse the judgment, but will allow five hundred dollars, to cover the expenses of sickness and loss of time, with some allowance for suffering.

Frederick G. Hudson, for the appellant.

H. H. White, for the appellee.

737 MILLER, J. The plaintiff, a passenger on defendants' train, alleges he was thrown with violence to the ground by the movement of the cars while he was endeavoring to alight at his place of destination. The defense is the general issue and contributory negligence. The judgment of the lower court, based on the verdict of a jury, was against the defendant for three thousand dollars, and defendant appeals.

The plaintiff's ticket on the train was for a flag station, at which the trains made no stop, unless flagged or to put out passengers, and the testimony is that, for the last purpose, it was customary to slow the train instead of coming to a full stop. It is in proof that, as the train approached, the station was called by the train officials, and accordingly plaintiff went to the platform to find that the train had passed his station. He supposed the purpose was to put him off at the mill where he was working, a short distance from the station, and with that idea he stood on the steps of the car, but, instead of slowing, the train, as the petition alleges, "gave a sudden jerk," which threw him to the ground. If not this jerk, it is in proof the speed of the train was increased, so that there was no slowing, either at the plaintiff's station, or after it was passed to enable plaintiff to alight. The plaintiff's testimony is, he was thrown from the train, nor is there any testimony that he made the attempt to alight from the **738** moving train. We note the reference in the brief of the defendant to the petition, and the inference from the petition, it is claimed, is that plaintiff's fall was due to his stepping or jumping from the train. The allegations were, the custom of the trains to slow and not to stop at the station; that plaintiff was familiar with the custom, and had on several occasions got off while the train was in motion; that as the station was neared the usual stopping signals were given, that plaintiff went to the platform, and when about to step off there was the jerk and increased speed, throwing him to the ground. We do not think there is any sensible variance between the petition and the plaintiff's testimony that he was thrown from the train, and, as stated, he is not contradicted on that point.

In our appreciation of the testimony, the defense that the passenger, carried beyond his station, cannot recover for injuries ensuing from attempting to leave a train in motion, has no application. That defense is recognized in the text-books and adjudicated cases: 1 Thompson on Negligence, 115; *Damont v. New Orleans etc. R. R. Co.*, 9 La. Ann. 441; 61 Am. Dec. 214; citing the leading Pennsylvania decision of *Aspell v. Railroad Co.*, *Walker v. Vicksburg etc. R. R. Co.*, 41 La. Ann. 796; 17 Am. St. Rep. 414. If, indeed, under the impulse of the moment due to the signal of the train official, and the custom not to come to a stop, the plaintiff had jumped, his imprudence might, perhaps, be deemed attributable to the implied direction of the company. It has been held that where the imprudence of the passenger, under such circumstances, is due to the error or fault of the train official, he will not be disentitled to recover for injuries: *Wharton on Negligence*, secs. 375, 377; 2 *Redfield on Railways*, sec. 194; 2 Thompson on Negligence, 1174; *Lehman v. Louisiana etc. R. R. Co.*, 37 La. Ann. 708; *Odom v. St. Louis etc. R. R. Co.*, 45 La. Ann. 1201. The plaintiff was invited by the train signal to leave his seat and go to the platform. Under the natural expectation the train would slow, if not stop, to enable him to alight, it cannot be deemed negligence that he stood on the steps of the car. It is urged on us that his station was passed, and he went from one, i. e., the station side, to the other, and was standing on the steps on that side when the accident occurred. This was because he supposed, as he states, not putting him out at the station, it was intended to slow up at the mill a few feet beyond. We cannot hold this change in his position, induced by the natural expectation of a chance to alight, the company owes to its passengers, charges the plaintiff with negligence. ⁷²⁰ Called to the platform and to the steps of the car, for that is the significance of the whistle and the announcement of the station by the train official, the train is neither slowed or stopped, passes the station and the mill with a speed accelerated, when it should have been diminished, and the result the plaintiff is thrown to the ground and injured. We think the record shows a case of responsibility of the defendant.

We have given very careful attention to the question of damages. The plaintiff describes himself as a handy laboring man, had followed blacksmithing, repairing machinery, and had followed farming; when working he received two dollars and fifty cents per day, and when the accident occurred was engaged in making a "slab conveyer," for which he was to get fifty dollars.

The fall bruised him in his back, ribs, and shoulders. He testifies his arm was disabled, his leg shortened, and other resulting injuries are stated by him. There is in the record the testimony of a number of physicians. Two called by plaintiff testify to the injuries, but the statement from one as to the result of the injuries is that his sufferings may be serious, accompanied with the qualification he may recover. Another physician, who called on the plaintiff with his family physician, negatives any serious injuries to plaintiff. Two physicians, experts, appointed by the court to examine plaintiff, report no injuries to shoulders, hip, back, or legs, no difference in the length of the legs, and ascribe plaintiff's pains to some nervous trouble. We cannot find in the record any satisfactory basis for damages, on the theory of permanent diminution of the plaintiff's working capacity.

It weighs with us, too, that the plaintiff, after the accident, worked at his job with no diminution of his physical ability apparent to his fellow workmen; but, of course, the effects of the fall might not then have been developed. Indeed, we think it proved the plaintiff was made sick later from the effects of the fall. The jury gave three thousand dollars. We cannot perceive the basis for this verdict. We think the damages should cover the expenses of his sickness and loss of time, and some allowance should be made for his suffering. But from the examination of the record we are brought to the conclusion the judgment should be reduced.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be avoided and reversed, and it is now ordered, ⁷⁴⁰ adjudged, and decreed that the plaintiff recover from defendant five hundred dollars, with interest from date of judgment of the lower court, and the costs of the lower court, those of the appeal to be paid by him.

RAILROADS.—IT IS NEGLIGENCE in a railroad company to suddenly and violently start its train when passengers are expected to be getting off, although the train has not come to a full stop and is moving slowly: See note to *Walker v. Vicksburg etc. R. R. Co.*, 17 Am. St. Rep. 429; and it is liable for injuries to passengers if too little time is afforded them to alight at their destination: *Pennsylvania R. R. Co. v. Kilgore*, 32 Pa. St. 292; 72 Am. Dec. 787; *Fairmount etc. Ry. Co. v. Stutler*, 54 Pa. St. 375; 93 Am. Dec. 714.

AM. ST. REP., VOL. XLIX.—38

STANDARD COTTON SEED OIL COMPANY v. EXCELSIOR REFINING COMPANY.

[47 LOUISIANA ANNUAL, 781.]

SALES—QUALITY OF ARTICLE CONTRACTED FOR.—If parties make a contract on the tenth day of January for the sale of prime crude cotton-seed oil, to be thereafter manufactured and to be delivered as made, the quality of oil contracted for is necessarily that kind which can be manufactured at that late season by the seller.

Action on contract. The Standard Cotton Seed Oil Company, the plaintiff, on January 10, 1894, sold to the defendant, the Excelsior Refining Company, five hundred barrels of prime crude cotton-seed oil. Shortly afterwards the plaintiff delivered and received pay for one hundred and twenty-four barrels of oil. A little later the plaintiff tendered the remainder of the five hundred barrels, but the defendant, on the ground of inability to pay, requested the plaintiff to sell the remainder of the five hundred barrels to other persons and allow it to take a like number of barrels thereafter. The plaintiff, in conformity with this request, sold such remainder to the Union Oil Company, which was accepted and paid for as being up to the grade of oil stipulated. Under the second contract, the plaintiff tendered oil made by it to the defendant, which the latter at first declined to receive, because it was not prepared to pay the price, and subsequently, upon the ground that the oil tendered was not up to the grade of oil stipulated. The question as to whether the oil tendered was prime or not was, by consent, submitted to arbitration. The arbitrators differed in opinion. One of them reported that the oil was "crude—made of slightly mixed seed—seed over-cooked. Oil not settled—not prime." The other reported: "I have critically examined the said oil. I do not hesitate to say that, in my opinion, it is fully prime, and should be accepted as such." W. A. Lawler was appointed an umpire, in view of this disagreement. His report was: "I call the oil prime crude cotton-seed oil of the season. The oil is not properly settled—containing light settlings." The arbitrators then joined in a report as follows: "The umpire's opinion, as above expressed, is in favor of the plaintiff, and therefore makes the oil offered by the said mill a good tender." The defendant company refused to accept or approve this report, and called in question the right of the arbitrators to express any opinion as to the conclusions of the umpire, insisting that his report was really in its favor. The plaintiff, in the mean time and after notice to the defendant, sold the oil at a loss for account of defendant. The

plaintiff sued for the price under the contracts, subject to the credits resulting from the subsequent sales for account of defendant. The defendant obtained judgment, and the plaintiff appealed.

Gus A. Breaux and Percy Roberts, for the appellant.

Gilmore & Baldwin, for the appellee.

⁷⁸³ NICHOLLS, C. J. A great many witnesses were placed upon the stand, and a great deal of testimony was taken as to whether there was any difference between "prime crude cotton-seed oil" and "prime crude cotton-seed oil of the season," as to what that difference was, and whether the former quality of oil was better or worse than the latter. Among the witnesses examined were the two arbitrators and Lawler, the umpire.

Plaintiff attempted to elicit from Lawler, as a witness, his opinion as to whether the oil tendered was a good tender under the contracts, but defendant successfully objected to his answering questions directed to that end, on the ground that that was matter for the court, and not the witness, to pass upon, but none the less we think his opinion pretty clearly appears from the evidence actually received.

He said, among other things: "The difference [between the two classifications of oils] is this: prime crude cotton-seed oil is made from seed in the early part of the season, while the seed is nice and fresh. You can store away a thousand barrels of such oil in tanks and put it on the market in March, and you can take oil that is made from good sound seed and you will find that there is a difference in the oils, both in color, taste, odor, and refining properties in favor of the oil of the early months of the year—the first oil made.

The following questions and answers followed:

⁷⁸⁴ Q. A contract is made for oil on the 10th of January for oil delivered the last of January and the early part of February, the oil to be made under that contract and to be delivered on that contract; I ask you if an oil of that kind, with good color, with proper smell, proper taste, and with light settlings, would be accepted under a contract for prime crude oil? A. Well, I consider oil prime whether it has got settlings in it or not.

Q. It is prime? A. Yes, sir.

Q. In other words, there is settlings in all oils? A. An oil may be prime and good, but it may not be well settled.

Q. What I want to get is this: Here is a contract made on January 10th for prime crude oil delivered in the latter part of

January and in the early part of February; now I want to know from you whether or not such oil, oil as you examined, whether or not that oil should have been receivable under that contract?

(Defendant's counsel objected as above stated.)

Q. This is your decision, Mr. Lawler, which I now hand you?

A. Yes, sir.

Q. Now, I want to know precisely what you mean; I cannot determine from that whether you determined that oil could be delivered under the contract or not?

(Defendant's counsel objected to any statement of the witness that the oil is receivable under the contract, because the contract speaks for itself, and on the ground that if there is anything ambiguous in the contract it should be considered against the vendor.)

By the Witness: What I mean by "crude cotton-seed oil of the season," when I mentioned those two samples taken from those two cars, I mean that it was oil that was perfect in every respect, and as good oil as could be made out of sound seed, at that time, properly handled.

By the Court: Do you mean that it was as good as prime crude cotton-seed oil?

A. It was not as good as oil that could be made out of seed during the months of October, November, and December.

Q. Was it such oil as the people interested in the contract would call for? A. I have never seen the contract.

⁷⁸⁸ Q. Well, the contract calls for prime cotton-seed oil on the tenth day of January, deliverable in the latter part of January and the first part of February. Here is the contract; I will read it to you. (Counsel reads the contract.)

A. This oil, if I remember aright, had a good deal of light settlings in it.

Q. That is your opinion? A. No, sir; not my opinion merely. I should have considered it good delivery, but as the oil was not well settled—the contract not saying anything about well-settled oil—it is between the buyer and vendor to settle this matter.

Q. In other words, you did not decide whether it was a good delivery or not? A. No, sir; I am not able to, on account of the settlings.

Lapeyre, the refiner of the defendant, upon the stand as a witness, being asked the question whether there was a difference in the trade between "prime crude cotton-seed oil" and "prime crude cotton-seed oil of the season," answered: "Well, there is only one quality of prime crude cotton-seed oil, as I said, prop-

erly manipulated, and you can only get it at one season of the year, but those articles generally sell on their merits."

From the testimony which we have copied, and from that of others, it appears to us that "prime crude cotton-seed oil," in the strict sense of the word, could not be manufactured as late as the middle of January or the beginning of February, and that any oil (no matter how well made nor from what kind of seed) made as late as that would fall under the term "prime crude cotton-seed oil of the season," but an examination of the contracts will show that, in the contemplation of the parties thereto, the oil contracted for should be thereafter manufactured by the selling company at their mill and be delivered as made; if so, the article with respect to which they were contracting was necessarily the kind of article which could be manufactured at that late time by the seller. The terms employed cannot be held to have been used with reference to an oil already in existence. We think this view of matters determinative of the rights of the parties, in so far as the designation of the article contradicted for is concerned. Lawler says of the oil tendered: "It is oil that was perfect in every respect, and as good oil as could be made out of sound seed at that time properly handled."

786 We think the case is with the plaintiff. We do not think the settlings spoken of by the witnesses affected to any extent the quality of the oil. It was shown that all oils have them more or less, and we do not think it had more settlings than might have been reasonably anticipated by the parties. We are of the opinion that the judgment is erroneous, for the reasons herein assigned.

It is hereby ordered, adjudged, and decreed that the judgment appealed from be and the same is hereby annulled, avoided, and reversed, and it is now ordered, adjudged, and decreed that the plaintiffs, the Standard Cotton Seed Oil Company, do have and recover judgment against the defendant, the Excelsior Refining Company, for the full sum of four thousand and forty-two dollars and fourteen cents, with legal interest from judicial demand and costs in both courts.

SALES—ARTICLES MUST REASONABLY ANSWER THE DESCRIPTION IN THE CONTRACT.—Executory contracts of sale do not depend on the same principles as those which are executed. The doctrine of implied warranty has properly no application to the former. But where a contract is executory, that is, to deliver an article not defined at the time on a future day, whether the vendor has at the time an article of the kind on hand, or it is afterward to be procured or manufactured, the contract carries with it an obligation that the article shall be merchantable, at least of medium quality or goodness: How-

ard v. Hoey, 23 Wend. 350; 35 Am. Dec. 572; Reed v. Randall, 29 N. Y. 358; 86 Am. Dec. 305. If the article contracted for is described, it must, when delivered, reasonably answer the description of it contained in the contract, and be salable as such article. If the article described is "foreign refined rape oil," and the jury think that the article delivered is not "foreign refined rape at all," the defendant is not bound to accept it: See monographic note to Bragg v. Morrill, 24 Am. Rep. 108.

STATE v. PAYSSAN.

[47 LOUISIANA ANNUAL, 1029.]

MUNICIPAL CORPORATIONS—GARBAGE, COMPELLING REMOVAL OF.—The power to adopt ordinances to compel cleanliness includes the authority to have garbage moved away and destroyed.

MUNICIPAL CORPORATIONS—HEALTH ORDINANCES MAY BE ADOPTED WITHOUT EXPRESS AUTHORITY.—A city has implied power to adopt ordinances to protect the community against the offensive and unwholesome smell of decaying vegetable and animal substances.

MUNICIPAL CORPORATIONS—HEALTH ORDINANCE DOES NOT CREATE MONOPOLY OR DIVEST VESTED RIGHTS.—An ordinance adopted under legislative authority, authorizing the removal and destruction of garbage, is not unreasonable nor oppressive, and does not create a monopoly nor divest any one of vested rights.

MUNICIPAL CORPORATIONS MAY CONTRACT FOR THE REMOVAL OF GARBAGE.—A city has power to decide in what way garbage, or other nuisances, shall be removed. Hence, an ordinance authorizing the removal of garbage by contract is unobjectionable.

APPEAL—WHAT MAY BE CONSIDERED ON.—On appeal from a judgment sustaining the validity of an ordinance, only questions as to the legality or constitutionality of the law can be passed upon. Questions within the supervisory jurisdiction of the appellate court cannot be considered.

CERTIORARI IS THE ONLY REMEDY in the appellate court, if the amount involved in a civil suit is less than the minimum limit of that court's jurisdiction.

• P. L. Fourchy and Charles F. Claiborne, for the appellant.

Branch K. Miller, for the appellee.

1030 BREAU, J. The defendant, fined for violating the ordinance relative to garbage, urges here that the ordinance is unreasonable and oppressive, and that it was not adopted with the view of preserving health and to maintain cleanliness.

The defendant says that during about ten years he furnished milk to a boarding-house, at which house the proprietor collected for him the waste bread, meat, and soup in a can, which he carried away in the evening, and left another in its stead; that he, at times, gave small quantities of milk; that these substances are clean and healthy, and are used by him as food for his dogs, and that they are not garbage. Plaintiff introduced proof that

they were not as represented by the defendant—mere scraps and refuse of the table—but garbage.

The defendant interposes a number of grounds of defense, to be considered, we understand, if the facts are as contended by the plaintiff—that is, if the preponderance of evidence is that the substances are garbage. With reference to the unreasonableness of the ordinance and the oppression charged, we deem it in place, preliminarily, to state that the legislature delegated the authority to the municipality to adopt needful regulations for the protection of health and to maintain cleanliness.

It is true that the word “garbage” is not used in the charter, but the equivalent is therein expressed. The council is authorized to adopt ordinances for the frequent inspection of buildings and premises ¹⁰⁸¹ and to compel cleanliness. This necessarily includes the authority to have garbage moved away and destroyed that is annoying to health. The general power regarding health and cleanliness having been given, we are of the opinion that the ordinance cannot be impeached as invalid on the ground of unreasonableness.

There are a number of well-considered decisions upon that point, and text-writers upon the subject of municipal corporations have approvingly referred to them: *District of Columbia v. Waggaman*, 4 Mackey, 328; *Peoria v. Calhoun*, 29 Ill. 317, 320; *Coal Float v. Jeffersonville*, 112 Ind. 15; *St. Paul v. Colter*, 12 Minn. 49; 90 Am. Dec. 278; *Matter of Yick Wo*, 68 Cal. 294; 58 Am. Rep. 12; *Dillon on Municipal Corporations*.

If we were to concede that the authority was not, as we have just stated, express, we would nevertheless not be hasty to conclude that the ordinance, in a matter as important as health and cleanliness, is not within the inherent powers of the corporation. For it does seem to us, without reference to express power in the charter, that a municipal corporation does not legislate unreasonably by adopting ordinances to protect the community against the offensive and unwholesome smell of decaying vegetable and animal substances, and that such ordinances are consonant with the purpose of such corporation and consistent with the laws.

In an early case this court pertinently said, in *pari materiae*: “The police of cities require many regulations which grow out of their situation, climate, and their population. A much stronger reason than that now before us must be presented to induce the court to interfere”: *Milne v. Davidson*, 5 Martin, N. S., 410; 16 Am. Dec. 189.

The ordinance is general in its character and in harmony with the laws of the state, and, therefore, cannot of itself be oppressive. We are not here concerned with its enforcement, as that is not before us. As to the ordinance, we repeat, it is not oppressive. As to the grounds of the defendant that the ordinance creates a monopoly, that it divests vested rights, we think it sufficient answer to say: On this appeal we can only decide that garbage which may cause discomfort, and which is injurious to health, can be removed and destroyed under an ordinance adopted under a legislative grant of power, and that this ordinance may be adopted without creating a monopoly, or divesting one of vested rights.

¹⁰³² The scope of the defense must be restricted to the questions that the defendant is in a position to raise and have decided. He is without right to raise objections to the section of the ordinance which prohibits the occupants of premises from mixing ashes or other substance with garbage, and the section following, requiring the occupants to collect the garbage and have it ready for removal. In other words, not being the keeper of the boarding-house, none of those acts devolved upon him. He was concerned only with getting the contents of his can to feed his dogs.

We do not desire to belittle his cause by recalling the use he made of the contents of his can. It is his right to feed them with such substances as he stated in his testimony. His testimony is contradicted by plaintiff's witnesses.

Without undertaking the useless task here of determining who is right, as a matter of fact, about these substances, we will state that if the weight and preponderance of the evidence is with the plaintiff (and if it is as the plaintiff urges), it was not fit food for dogs, unless the dogs of the defendant are like those that a recent explorer saw in Africa. They were the descendants, he said, of the dogs that devoured the body of Jezebel, wife of Ahab, and they were prowling in the space, in modern eastern language, called the "Mounds," near the modern village which occupies the site of Jezreel; they were wandering without the walls of the village for offal and carrion thrown to them to consume.

The questions resolved themselves in the following: If they were garbage, the ordinance upon the issues presented is not illegal and unconstitutional. If they were sound scraps and refuse, the facts were not brought up before the court in the manner required. Questions within the supervisory jurisdiction of this court cannot be considered under our appellate jurisdiction. We can only pass on appeal upon questions of legality or

constitutionality of the law. If the recorder has decided that substances were garbage that are not garbage, that is a question of fact which does not affect the constitutionality or legality of the ordinance. The amount involved being less than the minimum jurisdiction of the court, whatever remedy there is here is under the writ of certiorari.

1033 The defendant complains of a failure to properly advertise the ordinance, another objection founded on law. The ordinance contains provisions to award the contract to the highest bidder. The contract and the proceedings prior to the award are not attacked. We are not informed that there was failure to follow the terms of the ordinance in making the award to the highest bidder.

We do not perceive that there is reason to complain of an ordinance authorizing the removal of garbage by contract. The city government has the power of deciding in what manner a nuisance shall be removed. In having the work done by a contractor, employed in the manner required by law, they have not exceeded the discretion with which they are vested in such matters. Such contracts are frequent, and, when fairly entered into, give no rise to legal objection. The issues here do not justify an inference that a privilege has been granted, unauthorized and reprobated by law.

The judgment of the recorder's court is affirmed, at appellant's costs.

MUNICIPAL CORPORATIONS—SANITARY REGULATIONS.—

The legislature, by the act authorizing the organization of a municipal corporation, expressly delegates to the municipality the power to preserve the health, safety, and property of its inhabitants: *Crawfordsville v. Braden*, 130 Ind. 149; 30 Am. St. Rep. 214, showing that the enumeration of powers in a statute for the incorporation of a city, including a portion of those usually implied, does not necessarily operate as a limitation of corporate powers, excluding those not enumerated. A city has incidental power of enacting sanitary regulations: *St. Paul v. Laidler*, 2 Minn. 180; 72 Am. Dec. 89. Under express authority to provide for the removal of garbage, a city clearly has the right to provide for the manner of its removal: *People v. Gordon*, 81 Mich. 306; 21 Am. St. Rep. 524; and it may lawfully do so by contract, though the privilege thereby conferred upon the contractor is exclusive: *Smiley v. MacDonald*, 42 Neb. 5; 47 Am. St. Rep. 684. In the monographic note to *Robinson v. Mayor*, 34 Am. Dec. 637, treating of the general limitations on the power of municipal corporations to pass ordinances, it is said that ordinances creating a monopoly, or vesting in particular persons the sole and exclusive right to carry on a business, are void.

CERTIORARI is an appropriate remedy to review a question made by the record of an inferior court or tribunal: See monographic note to *Wulzen v. Board of Supervisors*, 40 Am. St. Rep. 35, as to questions reviewable upon certiorari.

WILLIAMS v. HEWITT.

[47 LOUISIANA ANNUAL, 1076.]

CORPORATIONS, IMPERFECT—LIABILITY OF AS COMMERCIAL PARTNERSHIPS.—The members of an unincorporated association conducting the banking business are liable as commercial partners.

CORPORATIONS, IMPERFECT—PLEADING—MISJOINDER OF PARTIES.—If suit is brought against the individual members of an unincorporated association doing a banking business, there is no misjoinder in including the bank itself as a defendant.

CORPORATIONS, IMPERFECT—BURDEN OF PROOF AS TO FACT OF INCORPORATION.—If the individual members of an unincorporated association doing a banking business are sued as commercial partners, the burden is upon defendants, if they claim exemption from liability because of being a corporation, to prove that they had become a corporation by complying with the requisites of the law.

CORPORATIONS DE FACTO—INDIVIDUAL LIABILITY.—Though persons do business as a de facto corporation, they may be held liable as individuals. Hence, if they assume to do a banking business, they are liable in their individual capacities, if there is a want of the publication required by statute, or an absence of any statement of the number of shares held by shareholders.

CORPORATIONS, IMPERFECT—ESTOPPEL.—One who has deposited money with an unincorporated association doing a banking business is not estopped from holding the individual members thereof liable as commercial partners by the fact that the association assumed to be a de facto bank, with a president and cashier, and received deposits and paid checks.

CORPORATIONS.—UNINCORPORATED BANKERS ARE LIABLE to the full extent of their engagements.

CORPORATIONS, IMPERFECT—ESTOPPEL.—If an unincorporated association is conducting a banking business, the fact that the bank is sued along with the individual members of the association does not estop the plaintiff from denying the corporate capacity of the bank.

CORPORATIONS, IMPERFECT—ESTOPPEL.—The plaintiff is not estopped from denying the corporate capacity of a defendant bank by the fact that in a prior litigation, where the present plaintiff was then defendant, and one of the present defendants was then plaintiff, he averred that the then plaintiff was president of the bank, as this did not admit that the bank was a corporation.

RES JUDICATA—OVERRULED DEFENSE.—A means of defense overruled in a past litigation does not, except under peculiar circumstances, preclude the facts passed on in the previous litigation from use in a future suit.

Lee & Liverman and Alexander & Blanchard, for the appellant.

J. F. Pierson and C. W. Elam, for the appellee.

1080 MILLER, J. The plaintiffs seek to hold defendants liable for an amount deposited in the Traders' Bank, under which name it is alleged the defendants conducted the banking business, and the bank itself is included as a defendant. The de-

defendants excepted that suing the bank along with the other defendants was a misjoinder, and estopped the plaintiffs from denying the corporate capacity of the bank; that this estoppel was further supported by the fact plaintiff had recognized the corporate capacity of the bank by depositing the money and other dealings with it; and the estoppel is placed by the exceptions on the additional ground that in a previous litigation between Mrs. Williams, the plaintiff here, and Hewitt, one of the defendants, she had made averments inconsistent with her position in this case; that the defendants are liable as members of an unincorporated association. These defenses of estoppel are again urged in the answer, along with the general issue and the defense that plaintiffs dealt with a corporation and cannot hold the shareholders liable. The lower court overruled the exceptions on the merits, gave judgment against defendants, and they appeal.

The law recognizes a firm name, and the petition sues the Traders' Bank, alleging it to be an unincorporated association, and the individual members of the association averred to be commercial partners. Money in bank and other personal property of the partnership is usually held in the name of the partnership, and the law ¹⁰⁸¹ authorizes suits against the partnership and the individual members. We think there was no misjoinder: Code of Practice, art. 198; Story on Partnership, secs. 102, 142.

The defendants objected to the testimony offered by plaintiff tending to show that the articles of association relied on to sustain the defense of the corporate capacity of the bank were never published as required by law. The objection was, the petition alleged no defects in the organization of the corporation. In our view, it was unnecessary to make such allegations or offer the testimony. It is, we think, clear that, sued as commercial partners, it was for defendants to maintain they had become a corporation by complying with the requisites of the law. Hence, the ruling on the testimony is of no consequence.

The legislation authorizing the formation of banking associations requires the organization articles to be by notarial act, stating the number of shares into which the stock is divided; the names, residences, and number of shares held by the shareholders; the time, manner of payment of the shares, with other particulars; and the act must be registered in the office of the recorder of the parish; the domicile of the corporation, and the act must be published in that parish and in New Orleans, and in Baton Rouge: Rev. Stats. sec. 279.

It is conceded that the act claimed to invest the defendants with corporate capacity contained no statement of the number of shares held by defendants, and was never published in New Orleans or Baton Rouge. Mere informalities in the act may well be disregarded, but it will not be disputed it is to be presumed that the omission in the act here, and the failure to publish it as required, are material. In our view, the fact affords no defense, and, unless there is some other ground, defendants must be held as commercial partners: Cook on Shareholders, secs. 230-234, et seq; Rev. Stats. sec. 282; Field v. Cooks, 16 La. Ann. 153; Workingmen's etc. Bank v. Converse, 29 La. Ann. 370; Vrendenburg v. Behan, 33 La. Ann. 635; Story on Partnership, sec. 164; Angell & Ames on Corporations, secs. 41, 591.

It is claimed, in support of the estoppel pleaded, that the tendency of more recent authority is that those who constitute themselves and do business as a *de facto* corporation cannot be held as individuals. If this is to be accepted, there is but limited, if any, necessity for ~~1882~~ our law providing for organization of private corporations, compliance with which has been generally accepted as essential to enable individuals, without incurring personal responsibility, to do the banking business. It would be enough to assume the name, appoint officers, and receive deposits and pay checks. But if the argument is to be deemed to affirm that an attempted organization under the corporation law will relieve individuals from liability in conducting a *de facto* bank, the answer is, we think, that the organization proposed must conform to the substantial requisites of the law, or it will be abortive. Mr. Cook thus states the law: "The creditor may ignore the asserted corporation, and proceed against the supposed stockholders, if the prescribed method of incorporation has not been observed." He recognizes that mere informalities are inconsequential. He mentions want of publication as fatal, and we think no less can be said of the absence of any statement of the number of shares held by shareholders, the measure of whose responsibility, indicated by the number of shares they hold, is important to be known to all who risk their money on deposit in chartered banks: Cook on Shareholders, secs. 230-234, and our decisions cited. Rev. Stats. sec. 282; Angell & Ames on Corporations, secs. 41, 591. The fact, then, that the defendants assumed to be and did business as a *de facto* bank, even if that assumption is deemed conveyed to plaintiffs by the name of the bank and issue of the certificates, is manifestly no protection to defendants against liability in their individual capacities.

We do not understand that the testimony as to the dealings of the plaintiffs with the bank attributes to them any knowledge at the time they made the deposit of the attempted organization.

The estoppel seems to rest on the deposit and the certificate issued by the institution known as the Traders' Bank. It is possible to conceive of one depositing his money in a bank with full knowledge the institution had proposed organization as a corporation under the laws, had failed, and yet was doing business. If anybody had that knowledge, in all human probability no such deposit would ever be made, certainly not, unless the depositor was satisfied of the personal responsibility of the parties engaged in the business, and relied on it, and on it alone. We cannot, therefore, find the basis for any estoppel based on any knowledge on plaintiffs' part of the attempted organization or its failure, for if he had any such notice, he must be ~~1003~~ deemed to have acted on the faith of that personal liability it is now claimed he is estopped from asserting. If there was any estoppel of this character, the plaintiffs would be in this predicament; it is conceded the bank never organized, and hence plaintiffs have none of the remedies given by our legislation to creditors of corporations: Rev. Stats., sec. 275, et seq; Act No. 150 of 1888; Act No. 95 of 1882. Nor have they any recourse on the individual members of the unincorporated association if their theory on estoppel prevails. The plaintiffs, when they made the deposit, acted on the ordinary faith of responsibility for that deposit. Their knowledge that the institution was not chartered came to them after the deposit. There is, in our view, no basis to infer any notice to plaintiffs of any kind on which an estoppel can be based, unless we are to hold that the externals usual to all private banks, of the name of a bank and presidents and cashiers, with the issue of certificates of deposit, estop plaintiffs from asserting the individual liability of those who receive deposits.

The courts have not frequently applied the estoppel against denying the existence of the corporation. It will be found that in such cases the estoppel has rested on conduct of the corporation which made it inequitable for it to avail of the estoppel, and it strikes us, if there is any room in this case for any estoppel, it would be that arising from defendants taking plaintiff's money on deposit as bankers with no license to do that business. It would be, in our view, a palpable wrong to plaintiffs if they were not precluded from enforcing against defendants the liability, announced in express terms by our statute and with equal clear-

ness by the commercial law, that unincorporated bankers shall be liable to the full extent of their engagements: Rev. Stats., sec. 282; Story on Partnership, secs. 77, 164; Angell & Ames on Corporations, secs. 41, 591. Estoppels in favor of corporations have been placed on dealings with them resulting in some benefit or advantage obtained from the corporation, and, very naturally, it has been held that the party holding such advantage or benefit could not dispute the resulting liability by denying the existence of the corporation when sued by it on his obligation. It is in great part the long line of cases of estoppels against or for corporations, or asserted corporations, all resting on some basis of conduct or of benefit obtained, or other cause forbidding as inequitable the estoppel attempted to be invoked, from ¹⁰⁸⁴ which the defendants claim to derive support for the estoppel of conduct they plead. These cases, cited in defendant's brief, have had our attention, and are covered, we think, by the comment we make. Thus in *Douglas County v. Bolles*, 94 U. S. 104, it was held the corporate existence could not be denied by its debtors; the same principle is applied in another case cited by defendants of suits to enforce stock subscriptions: *Casey v. Galli*, 94 U. S. 680; and there are similar types. The case of *Wallace v. Loomis*, 97 U. S. 146, affirms that corporate capacity assumed to obtain a standing in court cannot be afterward denied. Another phase of estoppel having some affinity to defendants' case is that of a creditor selling to a corporation in progress of formation when the goods were sold, and the organization completed after, of all of which the creditor was fully advised when he sold the goods; in the suit brought by him against the individuals of the corporation, it was very properly held he was estopped by the explicit communication to him, arising from the transaction itself and the correspondence, that he was dealing with an inchoate corporation, and was to rely alone on its responsibility: *Whitney v. Wyman*, 101 U. S. 392. In these and similar cases, in which any dispute of the corporate existence has been deemed precluded, we can find nothing to support defendants' contention. The plaintiffs have obtained no benefit or advantage from defendants, nor done any act or pursued any line of conduct by which defendants have been prejudiced, or at all inconsistent with plaintiffs' suit to obtain their money from those who took it on deposit. The plaintiffs put their money in defendants' bank under the usual obligation of those who received the money to return the deposit

when called upon. We can find no estoppel arising out of this transaction to defeat the plaintiff.

Nor do we think the other estoppel urged on us rests on any better basis. It is, that in the suit of Hewitt, one of the present defendants, against Mrs. Williams, the present plaintiff, she urged that the notes and claims on which she was sued belonged to the Traders' Bank, of which he was president. It was a fruitless attempt of a debtor to deny the plaintiffs' title to notes and claims assigned to him, which he had no interest to question. The defense failed, and because of this defense it is now urged she cannot sue the defendants for her deposit. In the first place the averment by Mrs. Williams that Hewitt was president of the Traders' Bank in no manner ¹⁰⁸⁵ admits it was a corporation. The principle she asserted, that one could not acquire, individually, notes or claims that came into his hands, or in his fiduciary capacity, might as well be said of the president of a private bank as of a corporation. The averment admits nothing bearing on this case, and, besides, a means of defense overruled in a past litigation will not, except under peculiar circumstances, preclude the facts passed on in the previous litigation from use in a future suit.

We have given the case in all its aspects careful attention, and in our view there was no defense. If we have not noticed all phases of the able discussion of the defendants, it is because the views expressed dispose of the case.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed, with costs.

DEFECTIVE OR IMPERFECT CORPORATIONS—LIABILITY OF MEMBERS—ESTOPPEL.—Many respectable authorities hold that members of corporations who do not comply substantially with the requirements of the law in effecting their organization are individually liable, and this liability is sometimes imposed by statute. It is said that the corporate creditor seeking to enforce the payment of his debt may ignore the existence of the corporation and proceed against the supposed stockholders as partners, by proving that the prescribed method of becoming incorporated was not complied with by the company in question. He is not estopped from so doing, since he is not repudiating a contract, but is enforcing it: See monographic note to *Rutherford v. Hill*, 29 Am. St. Rep. 602, on personal liability of persons acting as a corporation, but without authority; monographic note to *People v. Montecito Water Co.*, 33 Am. St. Rep. 186, on defective formation of corporations. The weight of authority, however, is that where a contract is made with an apparent corporation, as such, and an effort has been made in good faith to organize a corporation, and thereafter, as a result of such effort, corporate functions are assumed and exercised in the belief that a valid corporation exists, persons who have dealt with the association as a corporation, and have given credit to it, and not to its individual members, cannot hold such members liable individually or jointly, as partners or otherwise, although the omission to comply

with the requirements of the law was such that no valid organization was effected: *Notes to Rutherford v. Hill*, 29 Am. St. Rep. 601; *People v. Montecito Water Co.*, 33 Am. St. Rep. 186. The plaintiff seeking to enforce an obligation against the members of such corporation as mere partners is estopped by his contract. Besides this, to permit his recovery, as against a partnership, is to give him the benefit and to impose on his adversaries the burden of a different contract from that which both he and they intended should be executed: *Note to People v. Montecito Water Co.*, 33 Am. St. Rep. 186. If a contract has been executed and fully performed on the part of a corporation, or of the person with whom it contracted, neither will be permitted to insist that the contract was not within the power of the corporation: *Note to Falls v. United States etc. Co.*, 38 Am. St. Rep. 212.

UNINCORPORATED SOCIETIES—SUITS BY AND AGAINST—PARTIES.—Unincorporated business associations do business as partnerships; each member is liable to the full extent of the partnership indebtedness, and all the members must be joined in a suit by or against the association: See monographic note to *Phipps v. Jones*, 59 Am. Dec. 712, discussing the subject.

RES JUDICATA.—A JUDGMENT UPON DEMURRER becomes res judicata as to the matters actually and necessarily determined to the same extent as any other judgment: See monographic note to *Fahy v. Esterley Machine Co.*, 44 Am. St. Rep. 564, 566, on the proof of res judicata.

BARNES v. SHREVEPORT CITY RAILROAD COMPANY.

[47 LOUISIANA ANNUAL, 1218.]

NEGLIGENCE.—A CHILD ONLY THREE YEARS OLD IS INCAPABLE, PER SE, of contributory fault.

NEGLIGENCE AS TO CHILD, WHAT CONSTITUTES—DUTY TOWARDS CHILDREN.—Although a child of tender years may be in the highway through the fault or negligence of its parents, and so be improperly there, yet, if it is injured through the negligence of the defendant, it is not precluded from redress. If the defendant knows that such a person is in the highway, he is bound to a proportionate degree of watchfulness—to the utmost circumspection; and what is but ordinary neglect in regard to one whom he supposed to be a person of full age and capacity is gross neglect as to a child, or one known to be incapable of escaping danger.

STREET RAILWAYS—DUTY OF STREET-CAR DRIVER.—It is the duty of the motorman in charge of an electric street-car, not only to see that the railroad track is clear, but also to exercise constant watchfulness and care for persons who may be approaching the track.

STREET RAILWAYS—NEGLIGENCE IN MANAGEMENT OF CAR.—In an action against a street railway company for negligence in running an electric street-car over a child of tender years, the proper inquiry is whether the motorman failed to observe or do something which he ought to have seen or done, and which he would have seen or done with ordinary vigilance.

WITNESSES—FAILURE TO CALL.—It is defendant's duty, in an action for negligence, to call and examine a witness whose fault caused the injury, and if he fails to do so, all legal presumptions are unfavorable to his testimony.

DAMAGES—INADEQUATE.—An allowance of three thousand dollars against an electric street railway company for negligently running over a child three years of age, and resulting in the loss of an arm, is not enough, and will be increased on appeal to five thousand dollars.

Wise & Herndon, for the appellants.

T. F. Bell and E. H. Randolph, for the appellee.

¹²¹⁹ **WATKINS, J.** This suit is for the recovery of ten thousand dollars damages against the defendant for injuries sustained by the plaintiff's infant child of three years of age, it being run over by one of defendants' street-cars, which was operated by electricity, and its ¹²²⁰ arm so broken and crushed that it had to be amputated, leaving it in a permanently crippled condition.

The statement of the petition is that the accident occurred at the intersection of Texas and Crocket streets, in the city of Shreveport, defendants' car being at the time operated on Texas street in carrying passengers. That at the time of the occurrence plaintiff's child was standing at or near the railroad track, where there is a curve or turn, thus being in a position in which the motorman operating the car could have easily seen it, had he been at his proper place and carefully attending to his duties. That the accident was occasioned by the gross carelessness and negligence on the part of the railroad company, its servants, agents, and employees. That the injury inflicted upon the child caused it great pain and suffering, and resulted in its being maimed and disfigured for life. The defendants' answer is a general denial, coupled with the plea of contributory negligence on the part of the child and its parents.

The cause was tried by a jury, who rendered a verdict in favor of the plaintiff for three thousand dollars, and from the judgment of the court thereon based the defendant has appealed. In this court the plaintiff and appellee filed an answer to the appeal, and demands an amendment of the decree so as to award him the full amount claimed in his petition.

The testimony of all the witnesses concurs as to the following established facts, viz: That the accident happened in open daylight, while the car was slowly moving down grade of its own weight and momentum, the electric current having been cut off; that the track and car were in apparently good order, and the motorman in charge of the car was a sober, prudent, and experienced employee; that not one of the several passengers who were in the car at the time either saw or knew of the happening of the accident.

One witness states that as he was entering the car he saw the car strike the child, but that he did not notice what the motorman was doing at the time. Another witness states that as he came to the car, he saw it just as it was checking up, and just then the little boy rolled out from under it.

A physician from the Charity Hospital testifies that he was a passenger on the car on the morning of the occurrence, and the substance of his statement is as follows: "That he was sitting near the fare-box when a passenger came in ¹²²¹ and spoke to him, handing a quarter of a dollar to the motorman to make change, so he could deposit his fare in the fare-box. Heard the passenger ask the motorman for change, and saw the motorman give him the change. That just as he gave him the change, witness observed the motorman apply the brake in a rather excited manner; and soon afterwards all the passengers became excited and stood up—the witness among the number. That just about that time he heard a little child's scream, and, looking out of the window, he saw a little fellow holding his arm in his hand. That he ran out quickly and caught hold of the arm to prevent a hemorrhage. That upon learning whose child it was, he directed that he be at once carried home, and that he went there also, and applied a bandage on the broken limb, and just as speedily as possible telephoned to the hospital for his instruments and amputated it. That he amputated it just about the junction of the upper and middle third, just above the elbow. That the arm was crushed above the elbow, and there was no such thing as saving the arm—amputation being absolutely necessary.

Another witness corroborates the physician's statement with reference to the motorman giving a passenger change about the moment of the occurrence. He heard the cry of alarm made by some passengers, and saw the motorman catch hold of his brake, "as quickly as possible," and try to stop the car, "but it was a little too late to stop the car." He states that there was no conductor on the car; and defendants' cars are not provided with conductors—the double duty being, by the company's regulations, imposed on the motorman of handling the car and making change for the passengers. He says that when the car is in motion, the motorman's post of duty is on the front platform of the car, and that he occupies a position so he can look on either side. That the car is provided with a brake on the front platform, so that he can arrest the speed of the car, and also with an apparatus so that he can cut off and turn on the electric current at will. He says that, at the place where the accident occurred,

there is a switch, and the car passes slightly down grade from the switch to the main line, and that, in thus passing off of the switch, it is customary for the motorman to slow up by cutting off the current and permitting the car to run down of its own momentum.

Another witness, who had a seat in the car by the side of the physician who testified, gives much the same relation of facts as the latter ¹²²² did. He speaks of the passenger who came in and walked up to the motorman to get change to pay his fare. He states that "the motorman turned around to make the change for him about the time [the car] was going out of the switch." That it had gone probably fifteen or twenty feet [while] he was making change; and he turned partially around so as to make the change for the passenger. That immediately after having received his change, the passenger made some remark, and the motorman commenced turning his brake to stop the car.

Another witness, standing at a blacksmith shop near the switch, saw the car just as it came in contact with the child and push him over. He ran to the child immediately, and picked him up and carried him into his father's house, which was near by.

Another witness, who was driving his cart, states that he was in the rear of the car, about thirty feet distant, and a little to the left of it, driving in the same direction in which the car was moving, and saw the accident. Saw the car just as it was checking up, and the little boy rolling out from under it.

The passenger who was obtaining change from the motorman for the purpose of paying his fare states that he was standing at the front door when the accident occurred. He says that while the motorman was engaged in making change for him the little boy was standing outside of the railroad track—possibly at a distance of three to six feet. That when the car was within three feet of the child, he took a notion to run across the track to the other children who were on the opposite side, and came in collision with the car.

There were five or six children playing on the track before the car had reached the point where the accident happened; but they had moved on upon the approach of the car, separating from the little fellow who was run over. That, as he observed the movement of the little boy, he caught at the brake, and the motorman caught it at that instant and checked the car. That he thinks the motorman saw the child just about the time he

started, but he did not have sufficient time to stop the car—it was too late.

The foregoing is a fair summary of all the testimony which was adduced on the trial in favor of the plaintiff, and nothing to the contrary was developed by the witnesses for the defendant.

It is a noteworthy fact that the motorman, White, who was operating the car which inflicted the injury, was neither summoned nor ¹²²³interrogated as a witness for the defendant, notwithstanding he was known to have been in the adjoining parish at the time of the trial, he being no longer in the service of the company.

Following a general rule which has ever been in favor with this court, we feel at liberty to presume that if he had been produced as a witness by the defendant, his evidence would have been averse to its pretensions.

Having been the motorman who had charge of the car, and through whose carelessness and negligence the accident and injury happened, it was defendants' duty to have placed him on the stand and purged him of his fault, if indeed he could have done so, and, as he was neither produced nor interrogated, all the legal presumptions are unfavorable to his testimony.

Imprimis, we may dispose of the defendants' charge of contributory negligence, in respect to the child, by observing that it was only three years old and incapable, per se, of contributory fault; and in respect to that of the parents, there is no proof of contributory fault of any kind: *Westerfield v. Levis*, 43 La. Ann. 63.

Mr. Thompson states the rule thus pertinently, viz: "Although a child of tender years may be in the highway through the fault or negligence of its parents, and so be improperly there, yet, if he be injured through the negligence of the defendant, he is not precluded from his redress. If the defendant knows that such a person is in the highway, he is bound to a proportionate degree of watchfulness, to the utmost circumspection, and what would be but ordinary neglect in regard to one whom he supposed to be a person of full age and capacity would be gross neglect as to a child, or one known to be incapable of escaping danger": 2 Thompson on Negligence, 1129.

The same author says: "It is the duty of the driver of street-cars, not only to see that the railroad track is clear, but also to exercise a constant watchfulness for persons who may be approaching the track": 1 Thompson on Negligence, 398.

But in even clearer and more cogent terms Mr. Beach states

the rule thus: "If, however, he [the engineer or driver] sees a child of tender years upon the track, or any person known to him to be, or from his own experience giving him good reason to believe that he ¹²²⁴ is, insane or badly intoxicated, or otherwise insensible to danger or unable to avoid it, he has no right to presume that he will get out of the way, but should act on the belief that he might not, or would not, and should therefore take means to stop his train in time": Beach on Contributory Negligence, 395.

Defendant invokes the rule as announced in *Gallaher v. Crescent City R. R. Co.*, 37 La. Ann. 288, to the effect that "a car-driver can be justly charged with negligence only when he fails to observe or do something he ought to have seen or done, and would notice or do with ordinary vigilance—when he fails to be prepared for something visible, or at least of probable occurrence, or that might be reasonably expected of him.

"If the accident happened from a sudden and unanticipated act, which is the result of the thoughtless impulse of a child, of which human forethought could not be prescient, no liability attaches to the driver or to his employer."

The rule thus formulated is undeniably correct, and does not differ from the rule we have quoted from Thompson and Beach. But is this one such a case? Evidently not. For instead of the motorman of defendant's car being on the lookout while his car was slowly descending the switch to the main track, propelled by its own momentum, he was engaged in making change for a passenger; and, in consequence of his attention having been thus diverted, he failed to observe the perilous situation of the child in time to arrest the progress of the car, and prevent the happening of the untoward event. It seems quite apparent to us that if the motorman had postponed making change for the passenger until his car had passed off the switch, he could, and most likely would, have seen the child, and averted the accident.

The judge a quo, in his charge to the jury, very correctly said: "A railway company is bound to keep a proper lookout, especially in populous localities, for objects on its tracks ahead of a moving train, and, if a child is seen thereon, it should bring its train to a stop, and upon its failure to do so, it is chargeable with actionable negligence. The same rule applies to an electric-car company, and, in case of children of tender age, the proper inquiry is, whether the person in charge of the motor-car failed to observe or do something which he ¹²²⁵ ought to have seen or

done, and which he would have seen or done with ordinary vigilance."

This charge, in our view, is in strict keeping with the rule that is announced by authors and jurists, and that the jury were evidently mindful of the judge's instructions in rendering a verdict in favor of the plaintiff. We think a case of damages is made out by the law and the evidence, but our opinion is, that the allowance made by the jury is not enough, and that it should be increased to five thousand dollars.

It is therefore ordered that the amount of damages be increased to five thousand dollars, and as thus amended the judgment be affirmed.

Nicholls, C. J., absent.

APPELLATE PROCEDURE—DIRECTING WHAT JUDGMENT SHALL BE ENTERED.—If the facts are not in dispute, and all the matters appear on the face of the record, enabling the appellate court to ascertain and declare the justice of the case, it will render such a judgment as will secure to each party his just rights, instead of remanding the cause for a new trial: *McAfee v. Reynolds*, 130 Ind. 33; 30 Am. St. Rep. 194.

Negligence in Dealing with Children.*

The object of this note is to give a general view of the law of negligence, as applied in cases where children have been injured by the wrongful act or negligence of another person, and to show with some particularity what acts or omissions constitute negligence in dealing with children. Among the multitude of cases on the difficult and complex subject of negligence, uniformity need not be looked for and cannot be expected. The subject of negligence, as applied to children, has been discussed through the reports from various standpoints. Opinions diverge on nearly every important subdivision of the matter. The old classification of the doctrine of negligence, a measure with "three marks on it," is also inconvenient in handling this subject, because a different measure is needed—an instrument of more gradations and capable of more accurate adjustment to the facts of each particular case. Hence, the present tendency, in at least a large class of cases, is to take ordinary care as a quantity, variable as the occasion may require, to measure the duty, "sliding it up or down, so as to adjust it as near as may be to the reasonable requirements of the particular case." The application of this measure of care will be shown below.

Injury to Child—Recovery by Parent—Negligence.—The degree of care required of parents or guardians in keeping their children off of streets, highways, or other places of danger, so as to entitle them to recover for injuries to such children inflicted upon them while

*** REFERENCE TO MONOGRAPHIC NOTES.**

- Negligence, contributory, infant trespasser: 81 Am. Rep. 206-218.
 Negligence, dangerous premises, hotel elevator: 34 Am. Rep. 233-236.
 Negligence, contributory, infant trespasser: 40 Am. Rep. 667-670.
 Negligence, parent and child, imputed: 57 Am. Rep. 474-479.
 Negligence, dangerous premises, infant trespasser: 59 Am. Rep. 23-28.
 Master and servant, scope of employment, infant trespasser: 59 Am. Rep. 601-604.
 Contributory negligence, general principles of law of: 55 Am. Dec. 666-678.
 Negligence of infant as bar to recovery for personal injuries: 14 Am. St. Rep. 590-596.
 Railroad companies, duty to trespassers on the track: 30 Am. St. Rep. 53-55.
 Proximate and remote cause: 36 Am. St. Rep. 807-861.

in such places, is such as persons of ordinary prudence exercise and deem adequate for that purpose: *Mangam v. Brooklyn R. R. Co.*, 33 N. Y. 455; 93 Am. Dec. 66; *O'Flaherty v. Union Ry. Co.*, 45 Mo. 70; 100 Am. Dec. 343. It is the duty of a parent to shield his young child from danger, and if, by his own carelessness and neglect of the duty of protection, he contributes to an injury to it, he is in *pari delicto* with a negligent defendant, and cannot recover for such injury. Whether the parent is negligent depends on whether, under the circumstances, he takes reasonable care of his child: *Johnson v. Reading Passenger Ry.*, 160 Pa. St. 647; 40 Am. St. Rep. 752; *Grant v. Fitchburg*, 160 Mass. 16; 39 Am. St. Rep. 449; *Western Union Tel. Co. v. Hoffman*, 80 Tex. 420; 26 Am. St. Rep. 759; note to *Atlanta etc. Ry. Co. v. Gravitt*, 44 Am. St. Rep. 180; *Westbrook v. Mobile etc. R. R. Co.*, 66 Miss. 560; 14 Am. St. Rep. 587; *Norfolk etc. R. R. Co. v. Groseclose*, 88 Va. 267; 29 Am. St. Rep. 718; *Pratt Coal etc. Co. v. Brawley*, 83 Ala. 371; 3 Am. St. Rep. 751; *Hemmingway v. Chicago etc. Ry. Co.*, 72 Wis. 42; 7 Am. St. Rep. 823; *Bliss v. Inhabitants of South Hadley*, 145 Mass. 91; 1 Am. St. Rep. 441; *Pittsburg etc. Ry. Co. v. Bumstead*, 48 Ill. 221; 95 Am. Dec. 539; *Bamberger v. Citizens' Street Ry. Co.*, 95 Tenn. 18; *Senn v. Southern Ry. Co.*, 124 Mo. 621; *Johnson v. Reading City etc. Ry.*, 160 Pa. St. 647; 40 Am. St. Rep. 752; *Jeffersonville etc. R. R. Co. v. Bowen*, 40 Ind. 545.

This is generally a question for the jury: *Chicago v. Major*, 18 Ill. 349; 68 Am. Dec. 533; *Barrett v. Southern Pac. Co.*, 91 Cal. 296; 25 Am. St. Rep. 186; *Lynch v. Smith*, 104 Mass. 52; 6 Am. Rep. 188; *Weil v. Dry Dock etc. R. R. Co.*, 119 N. Y. 147; *Slattery v. O'Connell*, 153 Mass. 94; *Higgins v. Deeney*, 78 Cal. 578; *Fink v. Missouri Furnace Co.*, 10 Mo. App. 61; *O'Brien v. McGlinchy*, 68 Me. 552; *Pittsburg etc. R. R. Co. v. Pierson*, 72 Pa. St. 169; *Mangam v. Brooklyn R. R. Co.*, 33 N. Y. 455; 93 Am. Dec. 66; *O'Connor v. Boston etc. R. R.*, 135 Mass. 352; *McGeary v. Eastern R. R. Co.*, 135 Mass. 363; *Keyser v. Chicago etc. Ry. Co.*, 56 Mich. 559; 56 Am. Rep. 405; *Fallon v. Central Park etc. R. R. Co.*, 64 N. Y. 13; *Ihl v. Forty-Second Street etc. R. R. Co.*, 47 N. Y. 317; 7 Am. Rep. 450; *Mulligan v. Curtis*, 100 Mass. 512; 97 Am. Dec. 121; *Cosgrove v. Ogden*, 49 N. Y. 255; 10 Am. Rep. 361; *Lederman v. Pennsylvania Ry. Co.*, 165 Pa. St. 118; 44 Am. St. Rep. 644; *Mareland v. Murray*, 148 Mass. 91; 12 Am. St. Rep. 520.

As to what facts and circumstances show negligence on the part of parents in the care, management, and control of their children, where injuries have resulted through various agencies, see the following cases: *St. Louis etc. Ry. Co. v. Freeman*, 36 Ark. 41; *Casey v. Smith*, 152 Mass. 294; 23 Am. St. Rep. 842; *Foley v. New York etc. R. R. Co.*, 78 Hun, 248; *Wright v. Malden etc. R. R. Co.*, 4 Allen, 283.

As to when parents are not guilty of negligence *per se* in the care, management, or control of their children, such as to prevent a recovery for injuries occasioned by various agencies to their children through the negligent acts of third persons, see illustrations given in the following cases, viz: *Cleveland etc. Ry. Co. v. Keely*, 138 Ind. 600; *Weissner v. St. Paul etc. Ry. Co.*, 47 Minn. 468; *O'Flaherty v. Union Ry. Co.*, 45 Mo. 70; 100 Am. Dec. 343; *Schmidt v. Milwaukee etc. Ry. Co.*, 23 Wis. 186; 99 Am. Dec. 158; *Hedin v. Suburban Ry. Co.*, 26 Or. 155; *Huerzeler v. Central Cross etc. R. R. Co.*, 139 N. Y. 490; *Wiley v. Long Island R. R. Co.*, 76 Hun, 29; *Skelton v. Larkin*, 82 Hun, 388; *Alabama etc. R. R. Co. v. Dobbs*, 101 Ala. 219; *Karr v. Parks*, 40 Cal. 188; *Lederman v. Pennsylvania Ry. Co.*, 165 Pa. St. 118; 44 Am. St. Rep. 644; *Rosen-cranz v. Lindell Ry. Co.*, 108 Mo. 90; 32 Am. St. Rep. 588; *Donahoe v. Wabash etc. Ry. Co.*, 83 Mo. 560; 53 Am. Rep. 594.

The parent may, of course, recover for an injury to his child of tender years, occasioned by the negligent act of a third person, if the parent was not negligent, and the child exercised care and prudence equal to his capacity: *Pittsburg etc. Ry. Co. v. Brumstead*, 48 Ill. 221; 95 Am. Dec. 539. All the circumstances are to be taken into account, and if the parent took as much care of the child as reasonably prudent persons of

the same class, and in the same situation in life ordinarily do, then the parent is not to be held guilty of such negligence as will defeat his action: *Winters v. Kansas City etc. Ry. Co.*, 99 Mo. 509; 17 Am. St. Rep. 591. He may also recover where the injury was committed wantonly, willfully, or recklessly: *O'Flaherty v. Union Ry. Co.*, 45 Mo. 70; 100 Am. Dec. 343; *Westbrook v. Mobile etc. R. R. Co.*, 66 Miss. 560; 14 Am. St. Rep. 587; *Hartfield v. Roper*, 21 Wend. 615; 34 Am. Dec. 273; *Mangam v. Brooklyn R. R. Co.*, 38 N. Y. 455; 98 Am. Dec. 66.

The negligence of the parent to defeat his action must be the proximate cause of the injury: *Winters v. Kansas City etc. Ry. Co.*, 99 Mo. 509; 17 Am. St. Rep. 591. But the negligence of a defendant in injuring a person is not relieved by the fact that he is diseased. Thus, if a boy, at the time of receiving a personal injury, has microbes in his system, which aggravate the injury, that fact does not relieve from responsibility the person whose negligence caused the injury, where it does not appear that the microbes would have done harm by themselves: *Crane Elevator Co. v. Lippert*, 63 Fed. Rep. 942.

The negligence of a parent or custodian of a child, however, is not, according to what we conceive to be the preponderance of authority, any justification for others to injure it. Hence, if suit is brought by or on behalf of an infant for an injury sustained through the act of another, contributory negligence on the part of its parents, or others standing in loco parentis, does not operate as a bar to recovery, or present any defense to the suit: *Atlanta etc. Ry. Co. v. Gravitt*, 93 Ga. 369; 44 Am. St. Rep. 145, and note; *Western Union Tel. Co. v. Hoffman*, 80 Tex. 420; 26 Am. St. Rep. 759; *Rosenkranz v. Lindel Ry. Co.*, 108 Mo. 9; 32 Am. St. Rep. 588; *Westbrook v. Mobile etc. R. R. Co.*, 66 Miss. 560; 14 Am. St. Rep. 587, and note; *Norfolk etc. R. R. Co. v. Groseclose*, 88 Va. 267; 29 Am. St. Rep. 718; *Bottoms v. Seaboard etc. R. R. Co.*, 114 N. C. 699; 41 Am. St. Rep. 799, where many cases are cited and discussed; *Wiswell v. Doyle*, 160 Mass. 42; 39 Am. St. Rep. 451, and note; *Winters v. Kansas City etc. Ry. Co.*, 99 Mo. 509; 17 Am. St. Rep. 591; *Wymore v. Mahaska County*, 78 Iowa, 396; 16 Am. St. Rep. 449; *Westbrook v. Mobile etc. R. R. Co.*, 66 Miss. 560; 14 Am. St. Rep. 587; *Pratt Coal etc. Co. v. Brawley*, 83 Ala. 371; 3 Am. St. Rep. 751; *Daley v. Norwich etc. R. R. Co.*, 26 Conn. 591; 68 Am. Dec. 413; *McGary v. Loomis*, 63 N. Y. 104; 20 Am. Rep. 510; *G. etc. Ry. Co. v. Moore*, 59 Tex. 64; 46 Am. Rep. 265; *Huff v. Ames*, 16 Neb. 139; 49 Am. Rep. 716; *Erie City etc. Ry. Co. v. Schuster*, 113 Pa. St. 412; 57 Am. Rep. 471; *Bellefontaine etc. R. R. Co. v. Snyder*, 18 Ohio St. 399; 98 Am. Dec. 175; *Chicago City Ry. Co. v. Robinson*, 127 Ill. 9; 11 Am. St. Rep. 87; *Government etc. R. R. Co. v. Hanlon*, 53 Ala. 70; *Frick v. St. Louis etc. Ry. Co.*, 75 Mo. 595; *Ferguson v. Columbus etc. Ry.*, 77 Ga. 102; *Baltimore City etc. Ry. Co. v. McDonnell*, 43 Md. 534; *Donahoe v. Wabash etc. Ry. Co.*, 83 Mo. 543; *Texas etc. Ry. Co. v. Fletcher*, 8 Tex. Civ. App. 736.

Injury to Child—Recovery by Infant—Plaintiff's Negligence as a Defense.—If an infant is injured by the wrongful act of a third person, and the negligence of the parent, if any, cannot be imputed to it, it is clear that the questions in the case are narrowed down to that of the defendant's negligence and that of the infant's contributory negligence. If the infant is negligent, it cannot, of course, recover, but the question of determining its liability for negligence is not without difficulty, as that depends much upon varying age. The rule of contributory negligence is not to be applied against children as it applies against adults. Children must use ordinary care to escape injury; but ordinary care in children is that care which children of the same age, of ordinary prudence, generally exercise, under circumstances of a similar character: *Rolling Mill Co. v. Corrigan*, 46 Ohio St. 283; 15 Am. St. Rep. 596; and the degree of care and diligence required from a child of tender years is not as high as that required from an adult of presumed judgment and discretion: *Pierc v. Connors*, 20 Cal. 178; 46 Am. St. Rep. 279. Neither is a very young child ex-

pected to be as careful as an older one: *Baltimore City etc. Ry. v. McDonnell*, 43 Md. 534; *Government Street R. R. Co. v. Hanlon*, 53 Ala. 70; *Chicago etc. R. R. Co. v. Murray*, 71 Ill. 601; *Swift v. Staten Island etc. R. R. Co.*, 123 N. Y. 645; *Hayes v. Norcross*, 162 Mass. 546; *Wright v. Detroit etc. Ry. Co.*, 77 Mich. 123; and the jury's attention should be called to this principle: See case last cited. The rule that one who sues for damages for a personal injury sustained by defendant's negligence must have been free from negligence upon his own part, applies where the person injured is an infant, except as to one of extremely tender years and therefore incapable of negligence; and it has sometimes been held that if the neglect of a child to exercise the degree of care which an adult of ordinary prudence would use contributed to the injury, there can be no recovery: *Honegsberger v. Second Avenue R. R. Co.*, 2 Abb. App. Dec. 378; *Wiswell v. Doyle*, 160 Mass. 42; 39 Am. St. Rep. 451; *Burke v. Broadway etc. R. R. Co.*, 49 Barb. 529; 34 How. Pr. 239; but to say that children of varying ages are bound to the same legal rules in regard to the exercise of care and diligence in avoiding danger, and escaping the consequences of neglect on the part of others, which are applied to persons of full age and capacity, is unreasonable. All that is demanded in such cases is a degree of care or diligence equal to the capacity of the child. In other words, the care and caution required of the child are such only as children of its age usually exercise, and so the cases hold.

A child of immature years has capacity to exercise only such care and self-restraint as belong to childhood. A reasonable man must be presumed to know this and required to govern his actions accordingly. In all cases the caution required is according to the maturity and capacity of the child, a matter to be determined in each case by the circumstances of that case, and is such only as children of its age usually exercise: *Haynes v. Raleigh Gas Co.*, 114 N. C. 203; 41 Am. St. Rep. 786; *Pekin v. McMahon*, 154 Ill. 141; 45 Am. St. Rep. 114; *Pierce v. Connors*, 20 Col. 178; 46 Am. St. Rep. 279, and collected cases; *Brinkley Car Co. v. Cooper*, 60 Ark. 545; 46 Am. St. Rep. 216; *Lynch v. Smith*, 104 Mass. 52; 6 Am. Rep. 188; *Barrett v. Southern Pac. Co.*, 91 Cal. 296; 25 Am. St. Rep. 186; *Rauch v. Lloyd*, 31 Pa. St. 358; 72 Am. Dec. 747; *Sheridan v. Brooklyn etc. R. R. Co.*, 36 N. Y. 39; 93 Am. Dec. 490; *O'Flaherty v. Union Ry. Co.*, 45 Mo. 70; 100 Am. Dec. 343; *Moebus v. Hermann*, 108 N. Y. 349; 2 Am. St. Rep. 440; *Cooper v. Lake Shore etc. Ry. Co.*, 66 Mich. 261; 11 Am. St. Rep. 482; *Railroad Co. v. Gladmon*, 15 Wall. 401; *Railroad Co. v. Stout*, 17 Wall. 657; *Thurber v. Harlem etc. R. R. Co.*, 60 N. Y. 326; *Schmidt v. Milwaukee etc. Ry. Co.*, 23 Wis. 186; 99 Am. Dec. 158; *Union Pac. Ry. Co. v. McDonald*, 162 U. S. 262; *Spillane v. Missouri Pac. Ry. Co.*, 111 Mo. 555; *Schmitz v. St. Louis etc. Ry. Co.*, 119 Mo. 256; *Rockford etc. R. R. Co. v. Delaney*, 82 Ill. 198; 25 Am. Rep. 308; *St. Louis etc. Ry. Co. v. Valirus*, 56 Ind. 511; *McMillan v. B. etc. R. Co.*, 46 Iowa, 231; *Thompson v. Buffalo Ry. Co.*, 145 N. Y. 196; *Smith v. O'Connor*, 48 Pa. St. 218; 86 Am. Dec. 582; *Byrne v. New York etc. R. R. Co.*, 83 N. Y. 620; *Omaha etc. Ry. Co. v. Cook*, 42 Neb. 577, 906; *Springfield etc. Ry. Co. v. Welsh*, 155 Ill. 511; *Georgia etc. R. R. Co. v. Evans*, 87 Ga. 673; *Wabash R. R. Co. v. Jones*, 53 Ill. App. 125; *Illinois etc. R. R. Co. v. Slater*, 129 Ill. 91; 16 Am. St. Rep. 242; *Baltimore City etc. Ry. v. McDonnell*, 43 Md. 534; *Eswin v. St. Louis etc. Ry. Co.*, 96 Mo. 290. Thus an action may be maintained for an injury done by a dog to a boy thirteen years old, although the boy struck the dog and thereby incited the dog to bite, and was old enough to know that his act would be likely to so incite the dog, if the boy was in the exercise of such care as could reasonably be expected from a boy of his age and capacity: *Plumley v. Birge*, 124 Mass. 57; 26 Am. Rep. 645.

A child too young to exercise any care or discretion in any matter whatever is clearly incapable of contributory negligence, and not amenable to the disabling effects of that doctrine. Hence, if the child is of such extremely tender years that it cannot be deemed capable of exer-

cising any degree of care as to its personal safety, it will be conclusively presumed incapable of contributory negligence, and the court will so declare the law: *Westbrook v. Mobile etc. R. R. Co.*, 66 Miss. 560; 14 Am. St. Rep. 587; *Kay v. Pennsylvania R. R. Co.*, 65 Pa. St. 268; 3 Am. Rep. 628; *Mangam v. Brooklyn R. R. Co.*, 38 N. Y. 455; 98 Am. Dec. 66; *Schmidt v. Milwaukee etc. Ry. Co.*, 23 Wis. 186; 99 Am. Dec. 158; *Pratt Coal etc. Co. v. Brawley*, 83 Ala. 371; 3 Am. St. Rep. 751; *Western Ry. v. Mutch*, 97 Ala. 179; 38 Am. St. Rep. 179; *Wisewell v. Doyle*, 160 Mass. 42; 39 Am. St. Rep. 451; *Haynes v. Raleigh Gas Co.*, 114 N. C. 203; 41 Am. St. Rep. 786, and note; *Bottoms v. Seaboard etc. R. R. Co.*, 114 N. C. 699; 41 Am. St. Rep. 799; *Summers v. Bergner Brewing Co.*, 143 Pa. St. 114; 24 Am. St. Rep. 518; *Guli etc. Ry. Co. v. McWhirter*, 77 Tex. 356; 19 Am. St. Rep. 755. That a child under five years of age is not capable of contributory negligence is very generally conceded: *Schmidt v. Milwaukee etc. Ry. Co.*, 23 Wis. 18; 99 Am. Dec. 158; *Walters v. C. etc. R. R. Co.*, 41 Iowa, 71; *Keyser v. Chicago etc. Ry. Co.*, 56 Mich. 559; 58 Am. Rep. 405; *Norfolk etc. R. R. Co. v. Ormsby*, 27 Gratt. 455; *Fink v. Missouri Furnace Co.*, 10 Mo. App. 61; *Hamilton v. Morgan's etc. Co.*, 42 La. Ann. 824; *East Saginaw etc. Ry. Co. v. Bohn*, 27 Mich. 503; *Chicago etc. R. R. Co. v. Gregory*, 58 Ill. 226; *McGarry v. Loomis*, 63 N. Y. 104; 20 Am. Rep. 510; *Westerfield v. Levis*, 43 La. Ann. 63. Children six and seven years old have been held not chargeable with contributory negligence: *Central Trust Co. v. Wabash etc. Ry. Co.*, 31 Fed. Rep. 246; *Texas etc. Ry. Co. v. Fletcher*, 6 Tex. Civ. App. 736; *Oldfield v. New York etc. R. R. Co.*, 3 E. D. Smith, 103; *Honegsberger v. Second Avenue R. R. Co.*, 1 Daly, 89. As capacity, however, changes with age, the question of negligence becomes one for the jury with the increase of years.

It is said in *Indianapolis etc. Ry. Co. v. Pitzer*, 109 Ind. 179, 58 Am. Rep. 387, that throughout all branches of the law, whether of tort or contract, there runs, "like the marking red cord of the British navy, a line distinguishing children of years too few to have judgment or discretion from those old enough to possess and exercise those faculties." But we have not discovered this line. The law, in administering civil remedies, does not, so far as we have found, fix any arbitrary age when an infant is deemed capable of exercising judgment and discretion. From the nature of the case it is impossible to fix an exact period when a child becomes *sui juris*. Some children reach the point earlier than others. It depends upon many things, such as natural capacity, physical conditions, training, habits of life, and surroundings. These and other circumstances may enter into the question. It becomes, therefore, a question of fact for the jury, when the inquiry is material, unless the child is of such very tender years that the court can safely decide the fact. And along with this fact the jury, in determining the defendant's liability for negligence in injuring a child, must pass upon the question as to the contributory negligence of the child, where it has reached such an age that it may be capable of exercising some judgment and discretion. It cannot be asserted as a proposition of law that a child just past seven years of age is *sui juris*, so as to be chargeable with negligence: nor does its measure of discretion make any sudden leap at the age of fourteen, but varies with each additional year, and the increase of responsibility is gradual. Hence, where the question is involved, the contributory negligence, capacity, intelligence, and discretion of a child injured by the wrongful act of another person should be submitted to the jury in cases where it is not so young as to be deemed incapable of negligence, or where it has omitted some act, or done some act, which must, as a matter of law, be pronounced negligence: *Stone v. Dry Dock etc. R. R. Co.*, 115 N. Y. 104; *Pekin v. McMahon*, 154 Ill. 141; 45 Am. St. Rep. 114; *Kehler v. Schwenk*, 144 Pa. St. 348; 27 Am. St. Rep. 633; *Rodgers v. Lees*, 140 Pa. St. 475; 23 Am. St. Rep. 250; *Avery v. Galveston etc. Ry. Co.*, 81 Tex. 243; 26 Am. St. Rep. 809; *Gulf etc. Ry. Co. v. McWhirter*, 77 Tex. 356; 19 Am. St. Rep. 755; *Rhodes v. Georgia R. R. etc. Co.*, 84 Ga. 320; 20 Am. St. Rep. 362; *Tucker v.*

New York etc. R. R. Co., 124 N. Y. 308; 21 Am. St. Rep. 670; Cook v. Houston etc. Nav. Co., 76 Tex. 353; 18 Am. St. Rep. 52; Strawbridge v. Bradford, 128 Pa. St. 200; 15 Am. St. Rep. 670; Westbrook v. Mobile etc. R. R. Co., 66 Miss. 560; 14 Am. St. Rep. 587; Bridger v. Asheville etc. R. R. Co., 27 S. C. 456; 13 Am. St. Rep. 653, and collected cases in note thereto; Twist v. Winona etc. R. R. Co., 39 Minn. 164; 12 Am. St. Rep. 626; Connolly v. Knickerbocker Ice Co., 114 N. Y. 104; 11 Am. St. Rep. 617; Houston etc. Ry. Co. v. Booser, 70 Tex. 530; 8 Am. St. Rep. 615; Hemmingway v. Chicago etc. Ry. Co., 72 Wis. 42; 7 Am. St. Rep. 823; Hartfield v. Roper, 21 Wend. 615; 34 Am. Dec. 273; Messenger v. Dennie, 137 Mass. 197; 50 Am. Rep. 295; Pratt Coal etc. Co. v. Brawley, 83 Ala. 371; 3 Am. St. Rep. 751; Daley v. Norwich etc. R. R. Co., 26 Conn. 591; 68 Am. Dec. 413; Birge v. Gardner, 19 Conn. 507; 50 Am. Dec. 261; Eswin v. St. Louis etc. Ry. Co., 96 Mo. 290; Chicago etc. R. R. Co. v. Becker, 76 Ill. 25; Cassida v. Oregon Ry. etc. Co., 14 Or. 551; Iaquina v. Citizens' Traction Co., 166 Pa. St. 63; Jones v. Utica etc. R. R. Co., 36 Hun, 115; Barry v. New York etc. R. R. Co., 92 N. Y. 289; 44 Am. Rep. 377; San Antonio Street Ry. Co., 79 Tex. 341; Whalen v. Chicago etc. Ry. Co., 75 Wis. 654; Gibbons v. Williams, 135 Mass. 333; O'Connor v. Boston etc. R. R. Corp., 135 Mass. 352; Dealey v. Muller, 149 Mass. 432; Rosenberg v. Durfee, 87 Cal. 545; McGuire v. Chicago etc. Ry. Co., 37 Fed. Rep. 54; Ridenhour v. Kansas City etc. Ry. Co., 102 Mo. 270; Central R. R. Co. v. Golden, 93 Ga. 510; Crane Elevator Co. v. Lippert, 63 Fed. Rep. 942. The question as to whether a child's capacity is such that he may be chargeable with contributory negligence is properly left to the jury, when he is not so young as to require the judge to say that he could not contribute to his injury, nor so old that the presumption must exist, in the absence of evidence to the contrary, that he must suffer the consequences of his own neglect: Bridger v. Asheville etc. R. R. Co., 27 S. C. 456; 13 Am. St. Rep. 653. In Payne v. Chicago etc. R. R. Co., 129 Mo. 405, the rule was announced that, if from the evidence there is no doubt as to a child's capacity to know and avoid danger in the particular case, the court should, as a matter of law, determine the question, otherwise it should be referred to the jury. In New York it is held that the question at what age an infant's responsibility for negligence may be presumed to commence is not one of fact, but of law: Tucker v. New York Cent. etc. R. R. Co., 124 N. Y. 303; 21 Am. St. Rep. 670. The age of fourteen is simply the convenient point at which the law changes the presumption of capacity to avoid danger, and puts upon an infant the burden of showing his personal want of intelligence, prudence, foresight, or strength usual in those of that age, to excuse his negligence: Kehler v. Schwenk, 144 Pa. St. 348; 27 Am. St. Rep. 633. But, in the absence of clear proof to the contrary, an infant of the age of fourteen years will be presumed to have sufficient capacity to recognize and avoid danger: Nagle v. Allegheny Valley R. R. Co., 88 Pa. St. 35; 32 Am. Rep. 413. There is, however, no presumption of law that a boy between ten and fourteen years of age is not capable of exercising such care as may be requisite for avoiding injury from a railroad train in motion, whether the train is run negligently or not: Central R. R. etc. Co. v. Golden, 93 Ga. 510. The contributory negligence that precludes a minor's recovery, in those jurisdictions where the doctrine of imputed negligence does not prevail, must be that of the minor himself, and whether it existed or not is a question for the jury to decide, taking into consideration the age and situation of the minor, and all other circumstances connected with the case: Western Union Tel. Co. v. Hoffman, 80 Tex. 420; 26 Am. St. Rep. 759. The question of the infancy of the person injured as affecting the question of contributory negligence is more minutely discussed in the monographic notes to Freer v. Cameron, 55 Am. Dec. 676, and Westbrook v. Mobile etc. R. R. Co., 14 Am. St. Rep. 590-596, on negligence of infant as a bar to recovery for personal injuries. The following cases show what facts and circumstances, in actions for injuries to children caused by the wrongful

acts of third persons through various agencies, constitute such contributory negligence on the part of children as will prevent a recovery for damages: *Central R. R. v. Brinson*, 70 Ga. 207; *Sinclair v. Berndt*, 87 Ill. 174; *Atchison etc. R. R. Co. v. Todd*, 54 Kan. 551; *Masser v. Chicago etc. Ry. Co.*, 68 Iowa, 602; *Johnson v. Chicago*, 24 Ill. App. 26; *Chicago etc. Ry. Co. v. Eininger*, 114 Ill. 79; *Hayes v. Norcross*, 162 Mass. 546; *Messenger v. Dennie*, 141 Mass. 335; *Cleveland etc. Ry. Co. v. Tartt*, 64 Fed. Rep. 830; *Morrissey v. Eastern R. R. Co.*, 126 Mass. 377; 30 Am. Rep. 686; *Messenger v. Dennie*, 137 Mass. 197; 50 Am. Rep. 295; *Twist v. Winona etc. R. R. Co.*, 39 Minn. 164; 12 Am. St. Rep. 626; *Baltimore etc. R. R. Co. v. State*, 71 Md. 590; *Lofdahl v. Minneapolis etc. Ry. Co.*, 88 Wis. 421; *Flanagan v. People's etc. Ry. Co.*, 163 Pa. St. 102; *Fenton v. Second Avenue R. R. Co.*, 126 N. Y. 625; *Ogier v. Albany Ry.*, 88 Hun, 486; *Chilton v. Central Traction Co.*, 152 Pa. St. 425; *Kennedy v. St. Louis Ry. Co.*, 43 Mo. App. 1; *Thompson v. Buffalo Ry. Co.*, 145 N. Y. 196; *Potter v. Wilmington etc. R. R. Co.*, 92 N. O. 541; *Murray v. Richmond etc. R. R. Co.*, 93 N. C. 92; *Martin v. Cahill*, 39 Hun, 445; *Mitchell v. Philadelphia etc. R. R. Co.*, 132 Pa. St. 226; *Gaughan v. Philadelphia*, 119 Pa. St. 503; *Lennon v. New York etc. R. R. Co.*, 65 Hun, 578; *Friess v. New York etc. R. R. Co.*, 67 Hun, 205; *Payne v. Chicago etc. R. R. Co.*, 129 Mo. 405; *Powers v. Chicago etc. Ry. Co.*, 57 Minn. 332; *Westbrook v. Mobile etc. R. R. Co.*, 66 Miss. 560; 14 Am. St. Rep. 587; *Oregon Ry. etc. Co. v. Egley*, 2 Wash. 409; 26 Am. St. Rep. 860; *Houston etc. Ry. Co. v. Bolling*, 59 Ark. 395; 43 Am. St. Rep. 38. If, however, a child exercises the ordinary care and caution reasonable for one of its age and discretion, it satisfies the requirements of the law, and it cannot be held negligent so as to prevent a recovery against one wrongfully injuring it. This is illustrated in the following cases: *Omaha etc. Ry. Co. v. Morgan*, 40 Neb. 604; *Cleveland etc. Ry. Co. v. Keely*, 138 Ind. 600; *Faulk v. Central R. R. etc. Co.*, 91 Ga. 360; *Weber v. Atchison etc. R. R. Co.*, 54 Kan. 389; *McGary v. Loomis*, 63 N. Y. 105; 20 Am. Rep. 510; *Texas etc. Ry. Co. v. Fletcher*, 6 Tex. Civ. App. 736.

Where children are injured by the negligent acts of another, a recovery is frequently denied upon the express ground that they are trespassers: *McMullen v. Pennsylvania R. R. Co.*, 132 Pa. St. 107; 19 Am. St. Rep. 591, and cases there cited: *Matson v. Port Townsend etc. R. R. Co.*, 9 Wash. 449; but such decisions could be put equally as well upon the ground that the defendant was not negligent. It will not do to say that the defendant is not liable simply because the infant plaintiff was a trespasser, without taking the question of age into consideration, and irrespective of other questions. If an engineer, following the usual course of his business, and taking the ordinary precautions, should run over and injure a child without knowing anything about the presence of the child, the railroad company would clearly not be liable, not because the child is a trespasser, but because of no negligence on the part of the company. It is difficult to understand how a child too young to be chargeable with contributory negligence can be called a trespasser. The ordinary understanding of mankind is that a child incapable of contributory negligence is too young to be a trespasser. If the person in danger is seen or can be seen by those in charge of a train, injury must be avoided if possible, as humane treatment must be given even to trespassers, especially children non sui juris. The just and sensible rule, therefore, is that a defendant is liable for an injury to a child which might have been avoided by the use of reasonable care: *Baltimore etc. R. R. Co. v. Breining*, 25 Md. 378; 90 Am. Dec. 49; *Mitchell v. Tacoma etc. Ry. Co.*, 9 Wash. 120; *McGuire v. Vicksburg etc. R. R. Co.*, 46 La. Ann. 1543; *Lake Roland Co. v. McKewen*, 90 Md. 593; *Albertson v. Keokuk etc. R. R. Co.*, 48 Iowa, 292; *Mauerman v. St. Louis*, 41 Mo. App. 348; *Chicago etc. R. R. Co. v. Grablin*, 38 Neb. 90. The defendant is not liable, if not negligent: *Williams v. Kansas City etc. Ry. Co.*, 96 Mo. 275; *Barkley v. Missouri Pac. Ry. Co.*, 96 Mo. 367; but the child may recover if the defendant was negligent: *Ihl v.*

Forty-Second Street R. R. Co., 47 N. Y. 317; 7 Am. Rep. 450; Schmits v. St. Louis etc. Ry. Co., 119 Mo. 256. The question as to defendant's care is for the jury: *Lederman v. Pennsylvania R. R. Co.*, 165 Pa. St. 118; 44 Am. St. Rep. 644; *Johnson v. Reading City etc. Ry. Co.*, 160 Pa. St. 647; 40 Am. St. Rep. 752; *Schnuer v. Citizens' Traction Co.*, 153 Pa. St. 29; 34 Am. St. Rep. 680; *Rosencrans v. Lindell Ry. Co.*, 108 Mo. 9; 32 Am. St. Rep. 588; *Summers v. Bergner Brewing Co.*, 143 Pa. St. 114; 24 Am. St. Rep. 518; *Illwaco Ry. etc. Co. v. Hedrick*, 1 Wash. 446; 22 Am. St. Rep. 169; *Taylor v. Delaware etc. Canal Co.*, 113 Pa. St. 162; 57 Am. Rep. 446; *Frick v. St. Louis etc. Ry. Co.*, 75 Mo. 595. But where the defendant is not shown to be negligent, there is nothing to submit to a jury, and a nonsuit should be entered: *Atlantic etc. R. R. case*, 4 Hughes, 157; *Miles v. Receivers*, 4 Hughes, 172; *Wendell v. New York Cent. etc. R. R. Co.*, 91 N. Y. 420. And a nonsuit is sometimes awarded on the ground of the child's contributory negligence: *Moore v. Pennsylvania R. R. Co.*, 99 Pa. St. 301. So if the injury to a child is the natural consequence of his own recklessness, he cannot recover, as where, being between nine and ten years old, it walked backward in crossing a street, and fell into a manhole left open and unguarded: See *Casey v. Malden*, 163 Mass. 507; 47 Am. St. Rep. 473.

Injury to Child—Doctrine of Imputed Negligence.—In cases where a child has been injured by the negligence of another, the courts have often denied a recovery upon the ground that the negligence, if any, of the parents, or others standing in loco parentis, should be imputed to the child. In other words, many of the courts have held that the negligence, if any, of the parents, or others standing in loco parentis, is a defense to an action brought by the child, or in its behalf, for such an injury, notwithstanding the negligence of the defendant: See many cases cited and discussed in *Atlanta etc. Ry. Co. v. Gravitt*, 93 Ga. 369; 44 Am. St. Rep. 145, and note; *Casey v. Smith*, 152 Mass. 294; 23 Am. St. Rep. 842; *Westerberg v. Kinzua Creek etc. R. R. Co.*, 142 Pa. St. 471; 24 Am. St. Rep. 510; collected cases in monographic note to *Westbrook v. Mobile etc. R. R. Co.*, 14 Am. St. Rep. 591, on negligence of infant as bar to recovery for personal injuries: *Mangam v. Brooklyn R. R. Co.*, 38 N. Y. 455; 98 Am. Dec. 66; cases cited and discussed in *Bellefontaine etc. R. R. Co. v. Snyder*, 18 Ohio St. 399; 98 Am. Dec. 175; *Pittsburgh etc. Ry. Co. v. Vining*, 27 Ind. 513; 92 Am. Dec. 269; *Fitzgerald v. St. Paul etc. Ry. Co.*, 29 Minn. 336; 43 Am. Rep. 212; *Smith v. Hestonville etc. Ry.*, 92 Pa. St. 450; 37 Am. Rep. 705; *Grant v. Fitchburg*, 160 Mass. 16; 39 Am. St. Rep. 449; collected cases in note to *Kerr v. Forgue*, 5 Am. Rep. 148.

Negligence can only be imputed to the child through the parents, and when the child has done no negligent act, the conduct of the parents is immaterial: *McGary v. Loomis*, 68 N. Y. 104; 20 Am. Rep. 510. On the other hand, the absence of negligence in the parents fixes the defendant's liability: *Ihl v. Forty-Second Street R. R. Co.*, 47 N. Y. 317; 7 Am. Rep. 450. The above general rule, that a child suing for a wrong done him shall be denied relief because others have neglected their duty to it, has, however, been denied and severely criticized in many jurisdictions, as being "repulsive to our sense of justice." "The conversion of the infant," it is said, "who is entirely free from fault into a wrongdoer by imputation is a logical contrivance uncongenial with the spirit of our jurisprudence," and the better opinion seems to be, as elsewhere shown in this note, that where a suit is brought by, or in behalf of, the infant in its own right, for a negligent injury caused by a third person, contributory negligence on the part of its parents, or others standing in loco parentis, is no bar to a recovery, or any defense to the suit.

With respect to the question as to negligence in allowing a child to go alone to a place of danger, the cases are summed up by Field, J., in *Collins v. South Boston R. R. Co.*, 142 Mass. 301, 56 Am. Rep. 675, as follows: "Courts have held that up to a certain age, not very accu-

rately defined, it must be conclusively presumed that a child has not sufficient intelligence and discretion to exercise due care under the circumstances and in the place in which he is found, and that it is negligence on the part of the persons who have charge of him to permit him to go there unattended. If such a child has not acted as reasonable care would dictate, judged by the ordinary standards for adult persons, and this has contributed to the injury, and if the persons having the charge of such a child have negligently permitted him to go there alone, both these facts constitute negligence which will prevent him from maintaining an action. There is also an age within which courts have held that one child is conclusively presumed not to have sufficient intelligence and discretion to take charge of another who is younger, and that it is negligence on the part of the parents or guardians of such children to permit them to go together to places of danger, and if they do, and the children do not use reasonable care, and this has contributed to the injury, they cannot recover. Beyond these ages, courts have left it to the jury to determine whether the parents or guardians were negligent in permitting a child to go alone to a place of danger, or in permitting him to go there in charge of another child, and if it is found that they were not negligent, then it has been left to the jury to determine whether the child or children reasonably exercised that degree of care of which they were capable, and it has been said that it is only necessary for them 'to exercise such capacity as they had.'"

Injury to Child—Defendant's Liability for Want of Ordinary Care.—

With respect to injuries from negligence, some of the courts take what may be termed a middle ground. The doctrine is thus stated in Shearman and Redfield in their work on the law of negligence, fourth edition, volume 1, section 99: "It is now perfectly well settled that the plaintiff may recover damages for an injury caused by defendant's negligence, notwithstanding the plaintiff's own negligence exposed him to the risk of the injury, if such injury was proximately caused by the defendant's omission, after becoming aware of the plaintiff's danger, to use ordinary care for the purpose of avoiding injury to him. We know of no court of last resort in which this rule is any longer disputed. . . . The plaintiff should recover, notwithstanding his own negligence exposed him to the risk of injury, if the injury of which he complains was proximately caused by the omission of the defendant, after having such notice of the plaintiff's danger as would put a prudent man upon his guard, to use ordinary care for the purpose of avoiding such injury. It is not necessary that the defendant should actually know of the danger to which plaintiff is exposed. It is enough if he has sufficient notice or belief to put a prudent man on the alert, and he does not take such precautions as a prudent man would take under similar notice or belief." And this doctrine has been applied to cases of injuries to children: *Robinson v. Cone*, 22 Vt. 213; 54 Am. Dec. 67; *Walsh v. Fitchburg R. R. Co.*, 145 N. Y. 301; 45 Am. St. Rep. 615; *Haesley v. Winona etc. R. R. Co.*, 46 Minn. 233; 24 Am. St. Rep. 220; *Harriman v. Pittsburgh etc. Ry. Co.*, 45 Ohio St. 11; 4 Am. St. Rep. 507; *Chicago v. Starr*, 42 Ill. 174; 89 Am. Dec. 422. In case of injuries to children where they go upon another's premises, instead of placing the decision upon the ground of an implied invitation, it is said in *Heaven v. Pender*, L. R. 11 Q. B. Div. 503, that a more accurate and satisfactory ground of recovery, embracing all cases of implied invitation, is to be found in the proposition that whenever one person is by circumstances placed in such a position, with regard to another, that every one of ordinary prudence would recognize, that if he did not use ordinary care and skill in his own conduct with regard to these circumstances, he might cause danger of injury to the property of the other, a duty arises to use ordinary care and skill to avoid such injury. All that the law, therefore, requires of a child suing for a personal injury caused by negligence of a third person is care and prudence equal to its capacity; and, though it is in the highway from the fault or negligence of its parents, and so is improperly there, yet if it is

hurt by the negligence of the defendant, it is not precluded from redress. One knowing that a child of tender years is in the highway is bound to a proportionate degree of watchfulness, and what would be but ordinary neglect in regard to one whom he supposed to be a person of full age and capacity would be gross neglect as to a child, or one known to be incapable of escaping danger. In the case of a child four years old, he is bound to the utmost circumspection: *Robinson v. Cone*, 22 Vt. 213; 54 Am. Dec. 67. In this class of cases it has been held that the defendant is not liable unless there is proof of his want of ordinary care at the time when and place where the injury occurred: *Philadelphia etc. R. R. Co. v. Spearen*, 47 Pa. St. 544; 86 Am. Dec. 544.

Injury to Child—No Recovery Unless Defendant was Negligent.—

A child cannot recover unless defendant was negligent, and there can be no negligence without a breach of duty. Hence if there is no breach of duty by the defendant, the incapacity of the child creates no liability, and its injury is its own misfortune, which it must bear. For example, if a boy five or six years old goes for his own amusement on the platform of a railway station, and stands at the edge to watch an approaching train, which draws up at the rate of three or four miles an hour, and an iron step, bent and projecting a few inches outward, strikes and injures him, he cannot recover therefor: *Baltimore etc. R. R. Co. v. Schwindling*, 101 Pa. St. 258; 47 Am. Rep. 706. So, if a small boy, nearly five years of age, goes upon one of several flat cars, without any right or authority so to do, without the knowledge or consent of the railroad company, not accompanied by any person, and unfastens the brake on the car which moves down a steep grade by its own weight, and the boy either falls off or jumps off in front of the car, and is run over and killed, the company is not liable. The cars were so well fastened that no danger was possible unless some person climbed upon them and unfastened the brakes. Danger was then almost impossible to any ordinary person, and the accident was wholly unanticipated: See note to *Kansas etc. Ry. Co. v. Fitzsimmons*, 31 Am. Rep. 210; *Central Branch etc. R. R. Co. v. Henigh*, 23 Kan. 347; 33 Am. Rep. 167. So, where two street-cars are being drawn by a single horse from the stables to the repair shops, in charge of a driver on the rear platform, and a lad six years old in play jumps on the rear platform, and falls off or jumps off and sustains an injury, without the knowledge of the driver, there is no negligence on the part of the railroad company, and it is not liable: *Bishop v. Union R. R. Co.*, 14 R. I. 314; 51 Am. Rep. 386. It is said in this case that "ordinarily a man who is using his property in a public place is not obliged to employ a special guard to protect it from the intrusion of children, merely because an intruding child may be injured by it. We have all seen a boy climb up behind a chaise or other vehicle for the purpose of stealing a ride, sometimes incurring a good deal of risk. It has never been supposed that it is the duty of the owner of such vehicle to keep an outrider on purpose to drive such boys away, and that if he does not, he is liable to any boy who is injured while thus secretly stealing a ride. In such a case no duty of care is incurred." There are some risks in regard to which a child ought to be enlightened before he is committed to the chances of the street; and it may be assumed that a child old enough to be trusted to run at large has wit enough to avoid ordinary danger. Hence, persons who have business on the streets may reasonably conclude that such a one will not voluntarily thrust itself under the feet of their horses or under the wheels of their carriages, and, a fortiori, may they conclude that they are not to provide against possible damages that may result to the infant from its own willful trespass. "The defendant company is not liable for the injury to the plaintiff because it never incurred any duty or obligation of care to him. If the driver had seen the boy on the platform, it might have been his duty, notwithstanding the boy was a mere intruder, to stop the cars and put him safely off. If the driver had stopped the cars so as to afford the boy an inviting opportunity to get on them, thus tempting his childish

instinct, it might have been his duty to look through the cars before starting, and if he found the boy to remove him. The present case presents no such circumstances": *Bishop v. Union R. R. Co.*, 14 R. L. 314; 51 Am. Rep. 386. In *Ostertag v. Pacific R. R. Co.*, 64 Mo. 421, a boy sitting on a trestlework under a freight-car at the depot was run over by the starting of the train, and it was held that there could be no recovery. It was not clear whether a locomotive was attached when the boy took his position, and it appeared that boys were in the habit of going under the cars to pick up what dropped from them. The question was left to the jury.

So, where the defendant placed a shutter against the wall in a public street, and a child playing in the street was injured by the fall of the shutter, occasioned by the child jumping from it with its dress caught thereon, he is not liable to an action by the child: *Note to Kerr v. Forgue*, 5 Am. Rep. 149.

Injury to Child Trespassing Upon Another's Premises—Generally.—A private owner or occupant of land or other premises is under no obligation to strangers to place guards thereon to keep them out, or to place guards around excavations thereon to prevent injuries. He is not required to keep his premises in a safe condition for the benefit of trespassers or those who come upon them without invitation, either express or implied, merely to seek their own pleasure or to gratify their own curiosity: *Pekin v. McMahon*, 154 Ill. 141; 45 Am. St. Rep. 114.

And there is one line of cases holding that if a child becomes a trespasser on another's premises, and is there injured, no action can be maintained for such injury, where there is no evidence of malice or gross and reckless carelessness on the part of the defendant. In other words, a trespassing child injured on another's premises by its own conduct cannot recover, unless the injury was intentional or caused by gross negligence of the defendant, or at least caused by a want of ordinary care on the latter's part: *Morrissey v. Eastern R. R. Co.*, 128 Mass. 377; 30 Am. Rep. 686; *Walsh v. Fitchburg R. R. Co.*, 145 N. Y. 301; 45 Am. St. Rep. 615; *McGuinness v. Butler*, 159 Mass. 233; 33 Am. St. Rep. 412; *Grindley v. McKechnie*, 163 Mass. 494; *Witte v. Stifel*, 126 Mo. 295; 47 Am. St. Rep. 668; *Richards v. Connell*, 45 Neb. 467; *Lafayette etc. R. R. Co. v. Huffman*, 28 Ind. 287; 92 Am. Dec. 318; *Rogers v. Lee*, 140 Pa. St. 475; 23 Am. St. Rep. 250; *Cauley v. Pittsburg etc. Ry. Co.*, 95 Pa. St. 398; 40 Am. Rep. 664; note to *Central R. R. etc. Co. v. Vaughan*, 30 Am. St. Rep. 54, discussing the liability of railroad companies to trespassers on the track: *Gay v. Essex etc. Ry.*, 159 Mass. 238; 38 Am. St. Rep. 416; *Walsh v. Fitchburg R. R. Co.*, 145 N. Y. 301; 45 Am. St. Rep. 615, and note; *Mergenthaler v. Kirby*, 79 Md. 182; 47 Am. St. Rep. 371; *Shea v. Gurney*, 163 Mass. 184; 47 Am. St. Rep. 446. According to the doctrine of this class of cases, the owner is not required to fence ponds of water or dangerous excavations, to insure the safety of strangers, old or young, who may resort to his premises, not by invitation, express or implied, but for the purpose of amusement or from motives of curiosity: *Richards v. Connell*, 45 Neb. 467.

On the other hand, however, there is a class of cases which constitutes an exception to the general rule, that the law does not require the owner of premises to keep them in safe condition for the benefit of trespassers, or those who come upon them without invitation, either express or implied, merely to seek their own pleasure or to gratify their own curiosity; and this exception exists in favor of children. "Although a child of tender years, who meets with an injury upon the premises of a private owner, may be a technical trespasser, yet the owner may be liable, if the things causing the injury have been left exposed and unguarded, and are of such a character as to be an attraction to the child, appealing to his childish curiosity and instincts. Unguarded premises, which are thus supplied with dangerous attractions, are regarded as holding out implied invitations to such children. 'The

owner of land, where children are allowed or accustomed to play, particularly if it is unfenced, must use ordinary care to keep it in safe condition; for they, being without judgment and likely to be drawn by childish curiosity into places of danger, are not to be classed with trespassers, idlers, and mere licensees." In such case, the owner should reasonably anticipate the danger which has happened": *Pekin v. McMahon*, 154 Ill. 141; 45 Am. St. Rep. 114, per Magruder, J., where the conflicting authorities are collected and discussed. The owner of land is not required to provide against remote and improbable injuries to children trespassing thereon; but he is liable for injuries received by them while trespassing upon his private ground, when it is known to him that they are accustomed to go upon it, and that, from the peculiar nature and exposed and open condition of something therein which is attractive to children, he ought reasonably to anticipate such an injury to a child as that which actually occurs: *Brinkley Car Co. v. Cooper*, 60 Ark. 545; 46 Am. St. Rep. 216; monographic note to *Cauley v. Pittsburgh etc. Ry. Co.*, 40 Am. Rep. 667-670; *Mackey v. Vicksburg*, 64 Miss. 777; *Callahan v. Eel River etc. Co.*, 92 Cal. 89; *Westerfield v. Levis*, 43 La. Ann. 63; note to *Central R. R. etc. Co. v. Vaughan*, 30 Am. St. Rep. 54, discussing the liability of railroad companies to trespassers on the track. Persons are required to use greater care in dealing with children of tender years than with older persons who have reached the age of discretion; and greater care is required to avoid injury to such children, even though they are trespassers: *Penso v. McCormick*, 125 Ind. 116; 21 Am. St. Rep. 211, a case of injury from falling into a concealed pitfall.

Unguarded premises supplied with dangerous attractions are regarded as holding out an implied invitation to children, which will make the owner of the premises liable for injuries to them, even though they be technical trespassers; but whether or not the dangerous premises are so attractive to children as to suggest the probability of the accident and thus render the owner liable, is a question for the jury: *Pekin v. McMahon*, 154 Ill. 141; 45 Am. St. Rep. 114. Of course a violation of a statutory duty to fence makes a much clearer case in favor of the plaintiff. Thus, a railway company, which operated a coal mine near one of its stations in Colorado, was in the habit of depositing the slack on an open lot between the mine and the station in such quantities that the slack took fire, and was in a permanent state of combustion. This fact had been well known for a long time to the employees and servants of the company, but no fence was erected about the open lot, and no efforts were made to warn people of the danger. A lad twelve years of age and his mother arrived by train at the station and descended there. Neither had any knowledge of the condition of the slack, which on its surface presented no sign of danger, but there was fire underneath. Soon afterwards some "trapper" boys came out of the coal pit with lamps upon their heads and with dirty faces. They yelled, concerning the plaintiff, "Let's grease him," "Let's burn him." This frightened the plaintiff and he ran in the direction where his mother was staying. He accidentally fell into the slack heap, and was badly burned. Suit was brought to recover damages from the railway company for the injuries thus inflicted upon him, and it was held that the company was guilty of negligence, in view of the statutory obligation to fence; that the lad was not a trespasser, under the circumstances, and had not been guilty of contributory negligence. It was also held that the case was within the rule that the court may withdraw a case from the jury altogether and direct a verdict, when the evidence is undisputed, or is of such conclusive character that the court would be compelled to set aside a verdict returned in opposition to it: *Union Pac. Ry. Co. v. McDonald*, 152 U. S. 262.

It is the duty of a railway company to so fasten its turntable as to prevent injury to those who, by reason of their tender years, are incapable of comprehending its dangerous character, either by locking it, or in some other way preventing access to it. A failure to take such

precaution is negligence on the part of the company, for which it must respond in damages: *Ilwaco Ry. etc. Co. v. Hedrick*, 1 Wash. 446; 22 Am. St. Rep. 169; *Kansas etc. Ry. Co. v. Fitzsimmons*, 22 Kan. 686; 81 Am. Rep. 203, and monographic note discussing the question; *Keffe v. Milwaukee etc. Ry. Co.*, 21 Minn. 207; 18 Am. Rep. 393; note to *Cauley v. Pittsburgh etc. Ry. Co.*, 40 Am. Rep. 668; *Nagel v. Missouri Pac. Ry. Co.*, 75 Mo. 653; 42 Am. Rep. 418; *Evansich v. Railway Co.*, 57 Tex. 126; 44 Am. Rep. 586; note to *Schmidt v. Kansas City Distilling Co.*, 59 Am. Rep. 23, 26; *Frost v. Eastern R. R.*, 64 N. H. 220; 10 Am. St. Rep. 396; *Bridger v. Asheville etc. R. R. Co.*, 27 S. C. 456; 13 Am. St. Rep. 653; *Gulf etc. Ry. Co. v. McWhirter*, 77 Tex. 356; 19 Am. St. Rep. 755.

In this class of cases, the question as to whether or not a railway company is guilty of negligence in leaving its turntable unfastened, thereby injuring a child of tender years, is held to be a question for the jury under all the facts and circumstances of each particular case: *Ilwaco Ry. etc. Co. v. Hedrick*, 1 Wash. 446; 22 Am. St. Rep. 169.

The "turntable" cases, however, are not harmonious. Thus, in *Walsh v. Fitchburg R. R. Co.*, 145 N. Y. 301, 45 Am. St. Rep. 615, it is held that if premises are open and unguarded, and the public is permitted to cross and to be upon them at will, the landowner owes to every person coming thereon the duty to abstain from injuring him intentionally, or by failing to exercise reasonable care, but does not owe him the duty of active vigilance to see that he is not injured while on such premises for his own convenience. Hence, a railway maintaining a turntable upon land which the public is in the habit of crossing and being upon at pleasure but not by invitation, does not owe the duty to children to keep such turntable fastened or locked when not in use, so as to prevent access to it by children. If it is on the land of its owner, and is used by him for the sole purpose of conducting his business, and is fit and proper for that purpose, and is not built in any improper or negligent way with reference to the transaction of his business, he does not owe any further duty to persons, whether children or adults, who have no business on his land, and who are there unasked, and whose presence is merely tolerated. For similar views, see *Frost v. Eastern R. R.*, 64 N. H. 220; 10 Am. St. Rep. 396; *Bates v. Railway Co.*, 90 Tenn. 36; 25 Am. St. Rep. 665; *Daniels v. New York etc. R. R. Co.*, 154 Mass. 349; 26 Am. St. Rep. 253; note to *Schmidt v. Kansas City etc. Co.*, 59 Am. Rep. 24. These cases consider it error to submit the question of defendant's negligence to the jury where he has violated no duty owed to the plaintiff, and that he owes no duty to a trespasser: *Walsh v. Fitchburg R. R. Co.*, 145 N. Y. 301; 45 Am. St. Rep. 615. Neither is the defendant liable where the turntable is located in an isolated position: *St. Louis etc. R. R. Co. v. Bell*, 81 Ill. 76; 25 Am. Rep. 269.

A railroad company is bound to exercise its dangerous business with due care to avoid injury to others, even to the protection of a trespasser who is not guilty of contributory negligence. Hence if a boy fifteen years old, wrongfully boards a freight train to ride without paying fare, and a brakeman orders him to jump off while the train is moving rapidly, and the boy jumps, for fear of being thrown off, and is injured, the company is liable: *Kansas City etc. R. R. Co.*, 36 Kan. 635; 59 Am. Rep. 596, and note. So, if a boy nine or ten years old gets on the steps of a railroad car in motion, holding on to the railing, and a servant of the company, employed to clean and secure the cars and keep intruders out of them, kicks the boy's hand, thus loosening his hold, and he falls under the cars and is killed, the company is liable: *Northwestern R. R. Co. v. Hack*, 66 Ill. 238. So if a boy of sixteen jumps on the platform of a car moving at the rate of ten miles an hour through the streets of a city, to "catch a ride," and the conductor pushes him off, or he jumps off in obedience to a sharp command by the conductor, and is injured, the company is liable in either event: *Kline v. Central Pac. R. R. Co.*, 37 Cal. 400; 93 Am. Dec. 282. A street railway company is liable for

an injury to a child compelled by the driver to jump from the platform of a car while in motion, although a trespasser: *Biddle v. Hestonville etc. Ry. Co.*, 112 Pa. St. 551. If a child ten years of age is ordered to get off of a moving car, its obedience would be naturally expected, without regard to the risk it might incur; and, in respect to a child so young, the command would be equivalent to compulsion. It is a mistake to hold that because a child is a trespasser it may therefore be ejected from a car in motion in such a manner as to endanger its life or limbs. Even where a child is permitted by the driver to ride upon the front platform, from which, without his knowledge, it attempts to leave the car whilst in motion, and is injured, the railroad company is liable for the resulting injuries. The child in such a case is a trespasser, though it is upon the platform by the driver's invitation, as he has no authority to give such invitation. Extra precautions are not required in anticipation of the intrusions of trespassers, even though they are children, but when they do so intrude, and are known to be in an improper place, they must not be so wholly neglected as to endanger their lives or limbs. "Any other doctrine would so ill accord with Christian civilization as to render its maintenance impossible": *Note to Kansas City etc. R. R. Co. v. Kelly*, 59 Am. Rep. 603, 604.

Injury to Child Caused by Dangerous Machinery.—It is held in New York, Massachusetts, and perhaps in some other states, that if a child goes upon the premises of another person, and is there by sufferance only, or as a mere licensee or volunteer, and is there injured by coming in contact with dangerous machinery, it cannot recover damages from the owner therefor, as he owes the child no duty of active vigilance, but only the duty not to injure it intentionally, or by a failure to exercise reasonable care: *Walsh v. Fitchburg R. R. Co.*, 145 N. Y. 301; 45 Am. St. Rep. 615; *Shea v. Gurney*, 183 Mass. 184; 47 Am. St. Rep. 446.

But the better view is that children, wherever they go, must be expected to act upon childish instincts and impulses; and others who are chargeable with a duty of care and caution toward them must calculate upon this, and take precautions accordingly. If they leave exposed to the observation of children anything tempting to them, and which they in their immature judgment might be expected to play with or handle, they should expect that liberty to be taken: *Powers v. Harlow*, 63 Mich. 507; 51 Am. Rep. 154, per Cooley, C. J. Hence, though a child of tender years meeting with injury on the premises of a private owner is a technical trespasser, yet the owner is liable if the things causing injury have been left exposed and unguarded, and are of such a character as to be an attraction to a child, appealing to his childish curiosities and instincts. So it follows that if the land of a private owner is in a thickly settled community, and has upon it dangerous machinery, or a dangerous pit or pond, of such character as to be attractive to children of tender years, incapable of exercising ordinary care, and he has notice of its attractions for children of that class, he is under obligation to use reasonable care to protect them from injury when coming upon such premises, though they may be trespassers thereon: *Pekin v. McMahon*, 154 Ill. 141; 45 Am. St. Rep. 114; *Barrett v. Southern Pac. Co.*, 91 Cal. 296; 25 Am. St. Rep. 186; *Hasley v. Winona etc. R. R. Co.*, 46 Minn. 233; 24 Am. St. Rep. 220; note to *Cauley v. Pittsburgh etc. Ry. Co.*, 40 Am. Rep. 667, 668; note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 835, discussing liability for injuries received by children; note to *Kansas etc. Ry. Co. v. Fitzsimmons*, 31 Am. Rep. 209. It is for the jury to determine whether the owner of dangerous machinery is guilty of negligence, and answerable to a child for injuries suffered, and it seems that the liability of one who has left dangerous machinery unguarded and unprotected, for injuries suffered by a child of immature years, is not affected by the fact that the machinery was set in motion by the negligence of older children: *Barrett v. Southern Pac. Co.*, 91 Cal. 296; 25 Am. St. Rep. 186; *Callahan v. Eel River etc. R. R. Co.*, 92 Cal. 89. In connection with this,

compare the leading English case, *Lynch v. Nurdin*, 1 Q. B. 29, which illustrates the principle. The facts in that case were these: The defendant's carman went into a house, leaving his horse and cart standing in a street for about half an hour without any person to take care of them. The plaintiff, a lad about seven years of age, with several other children, was playing with the horse around the cart. During the carman's absence he got upon the cart. Another boy led the horse on while the plaintiff was attempting to get off the shaft. The plaintiff fell and was run over by the wheel, and his leg broken. The court was asked to direct the jury that there was no evidence in support of the plaintiff's case, his own negligence having brought the mischief upon him. This request was refused, and it was left to the jury to say: 1. Whether it was negligence in the defendant's servant to leave the horse and cart for half an hour in the manner disclosed; and 2. Whether that negligence occasioned the accident. In that case Lord Denman, C. J., observed: "If I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion, to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first." The question as to whether premises are sufficiently attractive to entice children into danger, and to suggest to the owner the probability of the occurrence of an accident, is for the jury: *Pekin v. McMahon*, 154 Ill. 141; 45 Am. St. Rep. 114. The plaintiff cannot recover without proof that the place was attractive to children, or that to defendant's knowledge they resorted to the premises for amusement, pleasure, or curiosity: *Schmidt v. Kansas City etc. Co.*, 90 Mo. 284; 59 Am. Rep. 16. In Massachusetts a wrongdoer and trespasser cannot recover for injuries which are the joint consequence of his own wrong and the negligence of another, and this remains true though the person injured is a child and only does what children of his age and intelligence may reasonably be expected to do: *Gay v. Essex etc. Ry.*, 159 Mass. 238; 38 Am. St. Rep. 415.

It must be observed, however, that all machines are not dangerous, and that the duty of protection to children is not cast upon every member of the community except their parents. Besides this the rule imposing upon the owner of premises the duty of taking precautions to avoid infant trespassers from being injured must not be carried into absurdity. Thus in *Wood v. Independent School District*, 44 Iowa, 27, it was held not negligent to leave a well-drilling machine unlocked and unguarded in the yard of a public schoolhouse, whereby one of the young investigators of science was injured, outside of the school "drill." The court said: "We are not prepared to hold that every person having upon his premises machinery, tools, or implements which would be dangerous playthings for children, and in their nature affording special temptation to children to play with them, is under obligation to guard them in order to protect himself from liability for injuries to children received while playing with them, although the children were rightfully on his premises. It would be improper to burden the mechanical industries of the country by such a rule. Without holding, therefore, that there may not be pieces of machinery so peculiarly dangerous that a right of action would exist at common law for injuries received from them if left unguarded, we do not think the drilling-machine in question is such machinery." So, if a child, while trespassing upon the open premises of a factory where type-setting machines are manufactured, and there purloining type metal or scrap iron belonging to the manufacturer, is injured by the sudden discharge of water and steam from a pipe connected with an engine in the factory, the presence of the child being unknown to the engineer, the manufacturer not owing any duty to the child, under such circumstances, is not liable in an action by its father to recover damages for the injury and for the amount

expended for medicines and medical attention: *Mergenthaler v. Kirby*, 79 Md. 182; 47 Am. St. Rep. 371.

Injury to Child—Accidents on Railroads, Highways, etc.—It has been held that railroad cars and similar machinery are not "dangerous machines" within the meaning of the rule in what are known as the "turntable cases"; and that if a person, no matter what his age, is upon the track or yard of a railroad company without inducement or invitation, express or implied, for him to enter, and he is neither a passenger nor on his way to become one, but is there merely for his amusement and using the track or yard as a playground, he is a mere intruder and trespasser, to whom the railway company owes no duty, except the negative one not maliciously, or with gross or reckless carelessness, to run over or injure him. Hence, in case of an accident, the company is not liable for injury to one so upon its property, unless it is guilty of gross negligence: *Note to Witte v. Stifel*, 47 Am. St. Rep. 673; *McMullen v. Pennsylvania R. R. Co.*, 132 Pa. St. 107; 19 Am. St. Rep. 591; *Philadelphia etc. R. R. Co. v. Hummell*, 44 Pa. St. 375; 84 Am. Dec. 457; *Central R. R. etc. Co. v. Vaughan*, 93 Ala. 209; 30 Am. St. Rep. 50, and note.

According to this line of cases, if the defendant company has no reason to suppose that either man, woman, or child may be upon a railroad track where an accident to a child occurs, it has a right to presume that no one will be on it, and to act upon the presumption. Blowing the whistle of the locomotive, or making any other signal, is not a duty owed to persons in the neighborhood, and consequently the fact that the whistle is not blown, or a signal made, is no evidence of negligence: *Philadelphia etc. R. R. Co. v. Hummell*, 44 Pa. St. 375; 84 Am. Dec. 457.

But while a railway company may not be required to fence its track to keep trespassers away (note to *Witte v. Stifel*, 47 Am. St. Rep. 674), or to make its premises a safe playground for young children strictly non sui juris (*Heasley v. Winona etc. R. R. Co.*, 46 Minn. 233; 24 Am. St. Rep. 220), it is the better view that the company does owe some duty, even to a trespassing child, and that the mere fact that a young child is on a railroad track where it has no right to be, does not relieve a street railway company from liability for its own negligence in injuring the child, though such negligence is not what might be termed wanton or gross: *Johnson v. Reading City etc. Ry.*, 160 Pa. St. 647; 40 Am. St. Rep. 752; *Galveston City R. R. v. Hewitt*, 67 Tex. 473; 60 Am. Rep. 32.

This is founded upon the humane principle that a child of such years that it is conclusively presumed to be incapable of committing a crime cannot, if it strays or sits upon a railway track, be regarded as a trespasser to whom no duty is due and for whom no lookout need be kept: *Gunn v. Ohio River R. R. Co.*, 36 W. Va. 165; 32 Am. St. Rep. 842. Therefore, according to this line of cases, a railway corporation owes, with respect to children of tender years and immature judgment, at least the duty which it owes to domestic animals straying upon its tracks, to wit, the duty of keeping a reasonable lookout to discover whether they are on the track, as well as to avoid injury to them after they are seen. A violation of this duty makes the company liable: *Gunn v. Ohio River R. R. Co.*, 36 W. Va. 165; 32 Am. St. Rep. 842; *Indianapolis etc. Ry. Co. v. Pitzer*, 109 Ind. 179; 58 Am. Rep. 387; *Bellefontaine etc. R. R. Co. v. Snyder*, 18 Ohio St. 399; 98 Am. Dec. 175; *North Pennsylvania R. R. Co. v. Mahoney*, 57 Pa. St. 187. Thus a boy seven years old, without the fault of his parents, wandered to a railroad station, entered a passenger train and was carried to a distant station, where the conductor put him off, leaving him in charge of no one, and giving no instructions concerning him. The child, left to himself, went upon the track near a highway crossing, where he could be seen for three-fourths of a mile by persons in charge of a train coming from the south. A freight train moving northward, in the daytime, on an ascending grade, where it could easily have been stopped, ran

upon and killed the child. The railroad company was held to be liable: Indianapolis etc. Ry. Co. v. Pitzer, 109 Ind. 179; 58 Am. Rep. 387.

Whether the servants of a railway corporation in charge of a train which ran over children of tender years, playing, sitting, or being on the track, exercised ordinary care in keeping the requisite lookout to discover such children, or, when discovered, used such measures as were proper, under the circumstances, to avoid injuring them, is, however, a question which can rarely, if ever, be determined as a matter of law, and should, therefore, be submitted to the jury: Gunn v. Ohio River R. R. Co., 38 W. Va. 165; 32 Am. St. Rep. 842; Kay v. Pennsylvania R. R. Co., 65 Pa. St. 269; 3 Am. Rep. 628; Galveston City R. R. Co. v. Hewitt, 67 Tex. 473; 60 Am. Rep. 32. For instance, if children of tender years are run over and killed by a railway train while sitting on or near the track, and the evidence tends to prove that they could have been seen in time to avoid injuring them had a reasonable lookout been kept; that the fireman had been putting coal on the fire, and did not see them until too late to stop the train before reaching them, and there is no evidence as to whether the engineer was keeping a lookout or not, and a conflict of evidence as to whether danger signals were sounded or not when the children were seen, a proper case is made for submission to the jury, and it is error for a court to direct a nonsuit: Gunn v. Ohio River R. R. Co., 38 W. Va. 165; 32 Am. St. Rep. 842. So if the negligence alleged consists of a positive act of carelessness in sending a car around a curve out of sight, on a descending grade, at a place where persons might be looked for from the permissive use suffered by the company, the question of negligence in injuring a child nineteen months old, which had strayed from its mother to the railroad track, is for the jury: Kay v. Pennsylvania R. R. Co., 65 Pa. St. 269; 3 Am. Rep. 628. When, in an action to recover for injuries to a child run over by a street car, the evidence is conflicting as to the length of time the child was on the track, and whether the driver of the car could have seen it, had he been looking at the track, in time to stop before reaching the child, the question of negligence is for the jury to determine: Johnson v. Reading City etc. Ry., 160 Pa. St. 647; 40 Am. St. Rep. 752.

"Street railroads," as said in Driscoll v. Market Street etc. Ry. Co., 97 Cal. 553, 33 Am. St. Rep. 203, "are an established feature of modern city life. They are a convenience and a necessity to all classes of people, and are desired by all; but their operation on crowded streets is necessarily attended with considerable danger to pedestrians, a danger which all people are bound to know, and against which they should protect themselves by the use of at least reasonable caution. While, therefore, the owners of these railroads are to be held to due care in the management of their lines, they, when exercising such care, are not responsible in damages to a person who, in a careless or reckless or absent-minded way, walks suddenly in front of a moving car, and is injured before there is time to stop it. The person in charge of a car, with a clear track before him, has a right to assume that people will not suddenly undertake to cross in front of it; otherwise he could not make any headway, and no street car could be successfully operated, either for the profit of the owner, or the convenience of the public; and the general rule is, that where the negligence of the injured party is a contributing, proximate cause of the accident, he cannot recover damages; but whether or not his negligence did so contribute in any particular case is generally one around which conflicting evidence will be gathered; and in such case a railroad company which was itself guilty of negligence at the time of the accident cannot often expect to be relieved from an unfavorable verdict." This case was one of an injury to an adult, but a street railway company is bound to exercise every degree of care to discover and avoid injury to a young child on its track: Galveston City R. R. Co. v. Hewitt, 67 Tex. 473; 60 Am. Rep. 32. A cable railway company, operating dangerous machinery at a rapid speed on and along the public streets of a city, is in law bound to know

that men, women, and children have an equal right to the use of the highway, and will be upon it, and its servants are bound to be on the lookout, and to take all reasonable measures to avoid injuries to persons who may be upon the streets: *Winters v. Kansas City etc. Ry. Co.*, 99 Mo. 509; 17 Am. St. Rep. 591; *Johnson v. Reading City etc. Ry.*, 160 Pa. St. 647; 40 Am. St. Rep. 752.

A child injured by running in front of a cable-car cannot, of course, recover, if the gripman operating the car was free from negligence: *Winters v. Kansas City etc. Ry. Co.*, 99 Mo. 509; 17 Am. St. Rep. 591; but in an action against a motor company for negligently running over a child of tender years on or near a crossing, the defendant is not entitled to a nonsuit on the ground of the insufficiency of the evidence, when there is evidence showing that the gripman did not keep such a lookout as the circumstances demanded, nor give any warning of approach, and that, after discovering the child on the track, the car might have been stopped sooner, if the brakes had been in proper condition: *Mitchell v. Tacoma Ry. etc. Co.*, 9 Wash. 120.

Injury to Child Occasioned by Wells, Excavations, Openings, Pools of Water, and Other Like Agencies.—The doctrine that a landowner owes no duty to a trespasser, except to avoid a wanton or willful injury to him, has been applied in cases of injuries to children occasioned by excavations, openings, wells, pools of water, dangerous objects or substances, and other like agencies. Thus, in *Gillespie v. McGowen*, 100 Pa. St. 123, 45 Am. Rep. 865, the defendants owned an abandoned brickyard with an open and unguarded well in it, in plain sight, about one hundred feet from the highway. The public were accustomed to cross the field, but the paths were somewhat distant from the well. The nearest dwelling-house was three hundred yards off. A boy eight years old was found drowned in the well. He fell in by daylight, and had evidently been fishing in it. It was held that no action would lie, the court saying: "We are unable to see anything in this case to charge the defendants with negligence in not inclosing their lot or guarding the well. There was no concealed trap or deadfall. The well was open and visible to the eye. No one was likely to walk into it by day, and this accident did not occur at night. A boy playing upon its edge might fall in, just as he might in any pond or stream of water. In this respect the well was no more dangerous than the river front on both sides of the city, where boys of all ages congregate in large numbers for fishing and other amusements. Vacant brickyards and open lots exist on all sides of the city. There are streams and pools of water where children may be drowned; there are inequalities of surface where they may be injured. To compel the owners of such property either to inclose it or fill up their ponds and level the surface, so that trespassers may not be injured, would be an oppressive rule. The law does not require us to enforce any such principle, even where the trespassers are children. We all know that boys of eight years of age indulge in athletic sports. They fish, shoot, swim, and climb trees. All of these amusements are attended with danger, and accidents frequently occur. It is part of a boy's nature to trespass, especially where there is tempting fruit, yet I never heard that it was the duty of the owner of a fruit tree to cut it down because a boy trespasser may possibly fall from its branches. Yet the principle contended for by the plaintiff would bring us to this absurdity if carried to its logical conclusion. Moreover, it would charge the duty of the protection of children upon every member of the community except their parents": See, also, note to *Cauley v. Pittsburgh etc. Ry. Co.*, 40 Am. Rep. 668.

If an excavation is made adjoining a public way so that a person walking on it might, by making a false step, or being affected with sudden giddiness, fall into it, it is reasonable that the person making such excavation should be liable for the consequences. But when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached the excavation, the case seems to be different: *Hardcastle v. South*

Yorkshire Ry. Co., 4 Hurl. & N. 67; Hounsell v. Smyth, 7 Com. B. N. S., 731.

Thus, it is negligent for a city to leave a ditch, filled with water five feet deep, bordering on a sidewalk in a public street, without any guards; and the city is liable if a child five years old leaves the house of its parents, who are laboring people, while its father is absent and its mother is engaged in her usual domestic duties, and falls into the ditch and is drowned: *Chicago v. Hesing*, 83 Ill. 204; 25 Am. Rep. 378. But it is held that the owner of a city lot is not liable for the death of a child who falls into an unfenced pond on his lot, it not being so near the street as to be dangerous to passers: *Klix v. Nieman*, 68 Wis. 271; 60 Am. Rep. 854.

There may be a recovery against a city for the death of a child caused by a defect in a sidewalk, although the child was rolling a hoop at the time: *Chicago v. Keefe*, 114 Ill. 222; 55 Am. Rep. 860, and monographic note, showing when a child can or cannot recover for injuries received on a street or highway. So if a child, prompted by childish curiosity, stops in front of a fence to look at something across the street, and is injured by the fence falling on it, the tenant, though after a surrender of the premises to the landlord, is liable, though the child would not have been hurt if it had not stopped: *Hussey v. Ryan*, 64 Md. 426; 54 Am. Rep. 772. So, in an action to recover for injuries received by the son of plaintiff in consequence of the alleged negligence of defendant in placing barrels and a counter on a public street, it appeared that the son was twelve years old, and that in passing on the sidewalk, he put his hands upon the counter, as if to jump upon it, when it fell and fractured his leg. It was held that the age and discretion of the boy were subjects of consideration by the jury, and that as the negligence of the defendant was much greater than that of the boy, plaintiff could recover: *Kerr v. Forgue*, 54 Ill. 482; 5 Am. Rep. 146. So, if a child seven years of age, while walking in the evening beside his father on a plank footway upon a bridge, which the defendant city is bound to keep in repair, steps aside to clasp in sport a post forming part of the bridge, and falls through a hole in the planking, eleven inches square, near the post, not known to either the boy or his father, into the water and is drowned, there may be a recovery for the city's negligence, though the father knew of the boy's intention to clasp the post, and did not forbid his doing so: *Gulline v. Lowell*, 144 Mass. 491; 59 Am. Rep. 102. Neither the act of the boy nor the omission of the father, in this case, was considered to be negligence per se. "The boy was a traveler, and did not cease to be one when he stepped aside for an instant to clasp in play a post in the highway, and almost in his path. The act was a natural and ordinary incident of traveling." But there is no duty to maintain a bridge so as to prevent the possibility of an accident to a child, as accidents may happen on it where travelers have no right to be. As said in *Oil City etc. Bridge Co. v. Jackson*, 114 Pa. St. 321: "A venturesome boy, in his natural love of sport, will explore every nook and recess of a bridge, climb upon the timbers, and manage in some way to get through every hole large enough for his body to pass, and is as likely to get down on the piers or upon the roof as anywhere else. The case at bar furnishes an illustration of this. The boy who met with this sad mishap was not content to walk upon the carriage-way, which was safe for all, but insisted upon walking upon a round gaspipe placed some distance above the floor, notwithstanding the remonstrance of his younger brother, who, child as he was, saw the danger. Of course no blame is imputed to the boy for this. It was child-like, and perhaps the very thing I might have done myself at his age, but the question is, Has the bridge company been guilty of such neglect as to be liable to the boy's father for his death? Some little of the responsibility for accidents to children ought to remain upon the parents, whose duty is to look after them and preserve them from danger. It must not be overlooked that this suit was brought by the father for the loss of his boy. He was in the habit of crossing this bridge daily,

perhaps several times daily, as his house was on one side of the river and his office on the other. He must have known the condition of the bridge, and may be presumed to have considered it safe, else he would not have given the permission on the day in question, as he had often done before, to cross it unattended. It is hardly possible that he had not seen these openings again and again, but he also knew that the bridge was perfectly safe for travel in the ordinary way, while a child might be injured there, as he might have been injured almost anywhere, by courting danger in walking in dangerous places. Upon careful consideration of the case, we are unable to see any such negligence on the part of the defendant company as to render them liable in this action. As before observed, it was a safe bridge for the ordinary purposes of travel. The child who was killed was not using it in the ordinary way. He was walking upon the gaspipe, where he ought not to have been, and which was so dangerous that his younger brother remonstrated with him and warned him to get off. It is not necessary to impute negligence to the child; it is sufficient that he was injured, not as the result of the use of the bridge, but as the consequence of his venturing in his childish recklessness where no one, child or adult, had any business to be": To the same effect, see *Louisville etc. Canal Co. v. Murphy*, 9 Bush, 522.

If a child falls into a canal through the culpable negligence or tort of the state in permitting a bridge to remain in an unsafe condition, and its father thereupon plunges into the canal in an attempt to rescue his child, and both are drowned, the death of both is a consequence of the negligence of the state, and it is answerable for the death of the father as well as of the child: *Gibney v. State*, 137 N. Y. 1; 33 Am. St. Rep. 690. The plea of contributory negligence is not available where a boy is warned off a gangway used as a passage for laborers to pass through with iron, trucks, wheelbarrows, etc., but is subsequently in the gangway, where he is killed by the falling of a car negligently pushed off a tramway overhead, there being no reason to expect danger from the cars above: *Gray v. Scott*, 66 Pa. St. 345; 5 Am. Rep. 371. So a recovery is justifiable where the defendant piled lumber, in a large city, on an unfenced lot which the public were accustomed to cross and children to play upon, in a negligent manner, so that it fell upon and killed a young infant who was playing on the lot near it: *Bransom v. Labrot*, 81 Ky. 638; 50 Am. Rep. 193.

The owner of a city lot, on which he is constructing a building, is not liable for injury to a trespassing child, caused by the falling of building stone, while playing on the lot without the knowledge of the owner, or any express or implied invitation or inducement to enter upon the premises: *Witte v. Stifel*, 126 Mo. 295; 47 Am. St. Rep. 668, where many cases are reviewed, and the conclusion reached that "it is only in case of attractive machinery, or objects similar in their effect, that children, when injured without fault or negligence on their part, are entitled to recover for personal injuries occasioned thereby, or, in case of their death, their legal representatives, and even then such right seems to be predicated upon the fact that children are in the habit of resorting to such places for play with the knowledge of those in charge of such object or machinery." In *Galligan v. Metacomet Mfg. Co.*, 143 Mass. 527, the plaintiff, a child seven years old, while at play, fell down a precipitous place in a vacant lot in the rear of her house, and separated therefrom by a picket fence with a gate, built by the defendant's workmen some years previously. There was no evidence that defendant owned or occupied the lot or used the road through the gate, or had any right to build a fence along the edge of the precipice, or that it ever invited plaintiff upon the premises. It merely suffered children to play on the lot. The court held that she could not recover, saying that "merely abstaining from driving the children off is not an invitation which would impose any duty or responsibility for the use of the lot." In an action to recover for personal injuries to plaintiff's intestate by the defendant's negligence, the intestate, a young boy, was standing on the sidewalk in front of a building in process of construction by the de-

fendants, in conversation with a companion in the cellar of the building, and holding in one hand a rope running over a wheel, and used for hoisting purposes, and was injured by the starting of the apparatus, which drew his hand over the wheel and crushed it. The defendants were authorised to erect barriers, and exclude the public from that part of the street where the intestate was standing, but the evidence was conflicting whether the barrier was in fact erected, and as to the exact situation and condition of the wheel and rope referred to. Children were in the habit of playing about the premises, but against the protests of the defendants, and the intestate had been warned away. The question of negligence was left to the jury: *Moynihan v. Whidden*, 143 Mass. 287.

Injury to Child — Acts and Omissions Constituting Negligence. — If a person inadvertently omits some act required in the discharge of a legal duty to another, whether such duty arises from contract or from the nature of the employment in which the person is engaged, then such omission constitutes actionable negligence: *Galveston City R. R. Co. v. Hewitt*, 67 Tex. 473; 60 Am. Rep. 32. As said in the principal case, a cardriver can be justly charged with negligence only when he fails to observe or to do something he ought to have seen or done, and would notice or do with ordinary vigilance; when he fails to be prepared for something visible, or at least of probable occurrence, or that might be reasonably expected of him. If the accident happened from a sudden and unanticipated act, which is the result of the thoughtless impulse of a child, of which human forethought could not be prescient, no liability attaches to the driver or to his employer: See principal case. The omission or failure may be classified as gross or slight negligence, or simply as negligence, or as failure to use the highest, ordinary, or slight degree of diligence, but the legal obligation, at all events, to make compensation to the injured person exists, if the omission was a breach of duty and the proximate cause of the injury. What facts will constitute that diligence which the law requires must depend on the circumstances of each particular case. The omission or failure, too, must be considered in relation to the business in which the person whose duty it is to exercise care is engaged. If the business is one hazardous to the lives of others, the care to be used must be of a nature more exacting than required where no such hazard exists; the greater the hazard the more complete must be the care: *Galveston City R. R. Co. v. Hewitt*, 67 Tex. 473; 60 Am. Rep. 32, per Stayton, A. J. The following cases illustrate the above principles: If a child on the track of a railway is of such an age that it cannot comprehend the danger, and the defendant's servants in charge of the train, by the exercise of reasonable care and prudence, may discover the child in time to stop the train, it is a neglect of duty if this is not done; or if they, in the exercise of ordinary care and prudence, may discover that the child is going toward the track or running along very near it, so as to render it probable that it will go on the track, and such discovery may be made in time to stop the train, it is their duty to exercise such care and prudence, and the railroad company is liable for an injury occasioned by their failure to stop: *Bottoms v. Seaboard etc. R. R. Co.*, 114 N. C. 699; 41 Am. St. Rep. 799; *Ross v. Texas etc. Ry. Co.*, 44 Fed. Rep. 44; *Hyde v. Union Pac. Ry. Co.*, 7 Utah, 356; *Keyser v. Chicago etc. Ry. Co.*, 56 Mich. 559; 56 Am. Rep. 406; *Meeks v. Southern Pac. R. R. Co.*, 56 Cal. 513; 38 Am. Rep. 67; *Frick v. St. Louis etc. Ry. Co.*, 75 Mo. 595; *Chicago etc. Co. v. Grablin*, 38 Neb. 90; *Kansas etc. Ry. Co. v. Whipple*, 39 Kan. 531; *Manerman v. St. Louis etc. Ry. Co.*, 41 Mo. App. 348.

Negligence is usually a question of fact. If the position and employment of the child are such as to furnish reasonable ground to apprehend that it will probably come upon the track and be subjected to injury, then reasonable prudence and care require the stopping of the car or train, if necessary to avoid injury. But whether the circumstances are such as to reasonably require a resort to such precautionary measures when the child is not upon the track, nor in a condition to be injured

If he does not approach nearer the track, the jury should be allowed to determine as a fact, in view of all the surrounding circumstances: *Walters v. O. etc. Ry. Co.*, 41 Iowa, 71.

The presumption that adults will heed the ordinary signals given by approaching trains may safely be indulged as to an intelligent youth thirteen years old. The engineer may act upon the assumption that he will step off the track in time to avoid injury: *Meredith v. Richmond etc. R. R. Co.*, 108 N. C. 616; but this presumption is not applicable to a child two years old. Even conceding that the rules of contributory negligence apply to such a child, though they do not, as shown elsewhere in this note, and that it is personally negligent in being upon the track, an engineer in charge of an approaching train, who sees it in this exposed condition, cannot presume that it will heed any warnings, or make any exertions for its own safety: *Walters v. O. etc. Ry. Co.*, 41 Iowa, 71. The same is true of children as old as nine years: *Chicago etc. R. R. Co. v. Grablin*, 38 Neb. 90; *Kansas Pac. Ry. Co. v. Whipple*, 39 Kan. 531. Where children of extremely tender years are upon a railway track, all the exertions which are to be put forward must be employed by the engineer and others in charge of the train. Under such circumstances, the demands of humanity cannot be answered, unless they use all the care and caution that they can command: *Walters v. O. etc. Ry. Co.*, 41 Iowa, 71. The liability of the company must be measured by the conduct of its employees on the train or engine after they become aware of the child's presence on the track. If the engineer, after such discovery, recklessly or wantonly runs the train or engine upon him, without doing what he reasonably can to stop and avoid the injury, the company is liable: *Kansas Pac. Ry. Co. v. Whipple*, 39 Kan. 531; *Manerman v. St. Louis etc. Ry. Co.*, 41 Mo. App. 348. If the engineer of a railway train, running through the country, observes children on or near the track, it becomes his duty to use the same care and precaution as when running through a city. In such a case he cannot act upon the presumption that the track is clear without being responsible for the consequences. A railroad company is, therefore, liable where its engineer, who has received warning giving notice of danger ahead and demanding the checking or stopping of the train, disregards such warnings and runs over and kills a child on the track, when, by regarding the warnings, he could have checked the train and averted the accident: *Donahoe v. Wabash etc. Ry. Co.*, 83 Mo. 543.

It is the duty of railroad corporations to adopt and use tried and proved modern machinery and appliances in the operation of their roads and in the management and control of their trains. The airbrake is among the modern appliances tried and proved, and that have become a necessity for the safe operation and management of railroad engines and trains, and the neglect of a railroad company to equip its trains with such brake may be negligence: *Chicago etc. R. R. Co. v. Grablin*, 38 Neb. 90. It is negligence to leave a dangerous machine in a public place, unsecured, unguarded, and unattended, which is likely to attract children, excite their curiosity and lead to injury, while they are pursuing their childish instincts: *Westerfield v. Lewis*, 43 La. Ann. 63. It is negligent on the part of a railroad company to leave its cars standing across a city street with a space of nine inches between them, and to close up such space without giving any warning: *Schmitz v. St. Louis etc. Ry. Co.*, 119 Mo. 256. But a railroad train's great rate of speed outside of cities, villages, and towns is not necessarily negligent: *Chicago etc. R. R. Co. v. Grablin*, 38 Neb. 90. It is not negligence per se for children to be upon a street railway track at a place other than that where pedestrians usually cross the street: *Mitchell v. Tacoma Ry. etc. Co.*, 9 Wash. 120. Neither is it negligence for a parent to permit his child to go on the sidewalk in front of his residence: *Westerfield v. Lewis*, 43 La. Ann. 63. Nor is it negligence in a parent to send out his eight year old boy on horse-cars without a protector: *Drew v. Sixth Avenue R. R. Co.*, 23 N. Y. 49. And it is not necessarily careless for a child four years old to run, or be sent across, the street in front of a quiet

horse, which has been stopped in a narrow street by its driver, and which is standing still without showing any signs of restiveness or impatience, and which is under control: *Wiswell v. Doyle*, 160 Mass. 42; 39 Am. St. Rep. 451. But it is *prima facie* negligent for those having in charge a child two years old to allow it to go unattended across a public street, in a city, traversed by a horse railroad: *Wright v. Malden*, 4 Allen, 283. The fact that a child eight years and four months old received injuries while engaged in playing on a public street does not show negligence *per se*: *Mitchell v. Tacoma Ry. etc. Co.*, 9 Wash. 120. If car tracks are in close proximity, to run a car or train of cars in one direction at rapid speed, and without signal or warning, over a sidewalk crossing, while another car or train bound in the opposite direction is discharging passengers at such crossing, and where the view of the approaching train is obstructed by the standing car from which the person injured has just alighted, fairly tends to prove culpable negligence on the part of the railway corporation, even though the rate of speed of the approaching train does not exceed that which is permitted by ordinance. The company is liable for injuring a child under such circumstances: *Chicago City etc. Ry. Co. v. Robinson*, 127 Ill. 9; 11 Am. St. Rep. 87. A minor child being upon the platform of a street-car, in violation of a city ordinance, while it may be proved as a fact for the consideration of the jury, does not for all purposes necessarily establish negligence on his part: *Connolly v. Knickerbocker Ice Co.* 114 N. Y. 104; 11 Am. St. Rep. 617. It is negligence for a boy twelve years old, before crossing a railroad track on a public highway, not to look and listen for the approach of railway trains: *Tucker v. New York Cent. etc. R. R. Co.*, 124 N. Y. 308; 21 Am. St. Rep. 670. The duty of the driver of a street-car is to drive with care, to be on the lookout for obstructions, whether persons or vehicles, on the track, but he may, in the performance of his duty, ascertain from a person on the side of the street, by looking at him, whether he desires to take passage, and in doing so it does not necessarily follow that he is guilty of negligence though he runs over and kills a child: *Johnson v. Reading City etc. Ry.*, 160 Pa. St. 647; 40 Am. St. Rep. 752.

It is negligent for conductor to frighten a boy off of a moving car or train whereby he falls and is injured: *Ansteth v. Buffalo Ry. Co.*, 145 N. Y. 210; 45 Am. St. Rep. 607; or to order him to jump off: *Kansas City etc. R. R. Co. v. Kelly*, 36 Kan. 656; 59 Am. Rep. 596; or to compel a child to leave a seat and stand upon the platform, from which, by the hasty and careless exit of another passenger, it is thrown off and killed: *Sheridan v. Brooklyn etc. R. R. Co.*, 36 N. Y. 39; 93 Am. Dec. 490.

It is negligence not to slacken the speed of a train so that it can be stopped if necessary, if the engineer has seen an object on the track a long way off, and cannot tell what it is: *Keyser v. Chicago etc. Ry. Co.*, 56 Mich. 559; 56 Am. Rep. 405; *Hyde v. Union Pac. Ry. Co.*, 7 Utah, 356; *Meeks v. Southern Pac. R. R. Co.*, 56 Cal. 513; 38 Am. Rep. 67; and particularly so where the object is recognizable as a child by any one using ordinary care and precaution to discover it: *Gunn v. Ohio River R. R. Co.*, 36 W. Va. 165; 32 Am. St. Rep. 842. The general doctrine is that a railroad company is entitled to a clear track; but if there is reason to believe that it is not clear, the company's servants operating a train must not act on the assumption that it is clear. If they do, the company is responsible for the consequences: *Frick v. St. Louis etc. Ry. Co.*, 75 Mo. 595.

If, on the other hand, the child came on the track suddenly and unexpectedly, so near that it could not be discovered in time to stop the train in the exercise of ordinary care, or if the engineer and fireman were, by necessary attendance on their duties, prevented from seeing the child until too late to stop the engine, in the exercise of ordinary care in time to avoid harm to the child, then there is no negligent act or liability for resulting injury: *Bottoms v. Seaboard etc. R. R. Co.* 114 N. C. 699; 41 Am. St. Rep. 799. Where both a railroad and the

public have a right to use the street, the duty of the company to look out for persons on the track is just as great as the duty of a traveler to look out for the trains, the difference being that an individual must give way to a train which, in the nature of things, cannot be stopped instantly: *Eswin v. St. Louis etc. Ry. Co.*, 96 Mo. 290. It has been held negligent for a boy ten years of age to lie on his back underneath cars, and crosswise of the track, and he cannot recover because of being a trespasser: *McMullen v. Pennsylvania R. R. Co.*, 132 Pa. St. 107; 19 Am. St. Rep. 591; but it has been held not necessarily negligent for a child six or seven years old to attempt to crawl under a freight-car obstructing a street crossing: See note to *Spencer v. Baltimore etc. R. R. Co.*, 54 Am. Rep. 274. A railway corporation is not bound to keep a lookout to prevent boys from swinging on the ladders of its moving freight trains, and its failure to do so is not negligence. Nor must the company watch to see that a boy in stealing, or attempting to steal, a ride is not injured: *Catlett v. Railway Co.*, 57 Ark. 461; 38 Am. St. Rep. 254.

It has been held that if the evidence, as a whole, shows that a boy eleven years old is injured or killed upon a railway track elsewhere than at a public crossing, and there is no negligence imputable to the company other than the failure of its servants to give signals or to check the speed of the train at a place other than a public crossing, the company is not liable: *Atlanta etc. Ry. Co. v. Gravitt*, 93 Ga. 369; 44 Am. St. Rep. 145. It is not to be understood from this, however, that the duty is not imposed upon railroad companies to observe all ordinary and reasonable care and diligence to avoid injuring or killing a human being on the track elsewhere than at a public crossing, when his presence becomes known to the engineer. The duty of stopping a train to prevent destroying human life exists when the danger becomes apparent, irrespective of the "crossing" law. In this case the boy was upon a high trestle at the time of the accident, and it was obviously out of his power to escape danger except by going forward to the end of the trestle. He could not leave his place of danger by going off to one side, and, while the whistle was not sounded, which would have been apparently an idle act under the circumstances, all was done which could possibly be done to stop the train, which was running on a down grade, and, despite all efforts, could not be stopped until it had run several hundred yards. It is evident that an act may be negligent at a particular place which would not be so at another place and under different circumstances. But even in the country, where a child six or seven years old, lying insensible or asleep on a railway track, near a highway crossing, is injured by a train, failing to give a warning signal, after the object is perceived by the fireman and engineer in time to stop, the infant may recover, although the trainmen supposed the child to be a bunch of leaves until it was too late to stop: *Meeks v. Southern Pac. R. R. Co.*, 56 Cal. 513; 38 Am. Rep. 67. So, if a child dressed in red, and easily distinguishable from a hog or a dog, is discovered on the track, and is run over and injured or killed, when those in charge of the train, by using close scrutiny, or ordinary skill and caution after they observed the object on the track, could have perceived that it was a child in time to stop the train, the company is negligent and liable: *Isabel v. Hannibal etc. R. R. Co.*, 60 Mo. 475. Locomotives with trains of cars attached should not be allowed to pass through the inhabited parts of cities with such force or speed as to be incapable of immediate and absolute control, and not then without special care to see that the track is all clear in its curves and more difficult places; and where the engineer, under such circumstances, is not conducting his train in a careful and prudent manner, and does not have the control over it which he ought to have in a city where persons are often passing and repassing over and along the track, and a child under three years of age is injured in consequence by want of such control, it is an omission to perform a duty, for which the company is liable: *Daley v. Norwich etc. R. R. Co.*, 26 Conn. 591; 68 Am. Dec. 413. If a brakeman sta-

tioned on the front car of a gravel train, whose duty it is to keep a lookout, neglects his duty by allowing his attention to be attracted to a passing express train, and a child about to cross the track is struck by a gravel-car and injured, the failure of the brakeman to do what he ought to have done renders the railroad company liable: *Bellefontaine etc. R. R. Co. v. Snyder*, 18 Ohio St. 399; 93 Am. Dec. 175. The act of a railroad company in piling wood upon the tender of an engine so as to obstruct the engineer's view ahead, together with the engineer's failing to look out upon the track as he might have done through a window, or to place a sentinel upon the tender, will make the company liable for running over and injuring an unattended child, four years of age, in the vicinity of several schools, though the engine, with the tender in front, was slowly passing through a street: *North Pennsylvania R. R. Co. v. Mahoney*, 57 Pa. St. 187. In running backward through streets, the engineer should see that the brakeman is at his post and keeps a lookout on the track to warn him in case of danger. It is the duty of the fireman to ring the bell continually while passing through a town or village. If an accident happens while thus running through the streets, and one of these three men is not immediately at his post, although near it, it gives good cause for examination and close investigation: *Hamilton v. Morgan's etc. Co.*, 42 La. Ann. 824. It is the clear duty of a railway company to provide safe egress from their cars for their passengers, infants as well as adults, to give notice of arrival at stations, to allow passengers proper and sufficient time to alight, and to take care not to start the train while passengers are in the act of getting off. For a neglect of such duties, resulting in an injury to a child passenger, the company is liable: *Lehman v. Louisiana etc. R. R. Co.*, 37 La. Ann. 705, where a child was injured as a train started with the usual jerk, without giving it time to be safely landed. It is the duty of a railroad company having cars standing on a street crossing to give notice of the starting of the train; but if a child seven years of age attempts to pass between the cars and is injured by the starting of the train, the question as to the negligence of the railroad company in starting the train without warning is generally one of fact, which may properly be submitted to the jury for their determination: *Philadelphia etc. R. R. Co. v. Laver*, 112 Pa. St. 414. It is not the duty of the employees of a railroad company, before starting a train, to make an examination to see if any children are hanging upon or have crawled under it: *East St. Louis Ry. Co. v. Jenks*, 54 Ill. App. 91.

A railway company is not, at least, liable for injuring a child ten years old, who is trespassing on the company's property without the knowledge of those operating a train, and whose presence is not known to them until after the accident: *Matson v. Port Townsend etc. R. R.*, 9 Wash. 449. Especially is this true where the child persists in going under the cars after having been warned that it is dangerous, and understands and appreciates the perilous position of one so situated. If, therefore, he goes under the cars, under such circumstances, and those in charge of the engine cannot possibly see him from their posts of duty, and none of the employees of the company are aware of his presence, or have any cause to anticipate his presence, there can be no recovery against the railroad company by reason of his injury and death: *Atchison etc. R. R. Co. v. Todd*, 54 Kan. 551.

It has been held not to be the duty of a railroad company to fence its yards in cities and towns: *Barney v. Hannibal etc. R. R. Co.*, 126 Mo. 372; and that the statute requiring railroad companies to fence their roads, and making them liable for damages sustained in consequence of neglect to do so, is inapplicable to the case of a child straying upon an unfenced railroad track: *Fitzgerald v. St. Paul etc. Ry. Co.*, 29 Minn. 333; 43 Am. Rep. 212; note to *Witte v. Stifel*, 47 Am. St. Rep. 674. But other cases hold that it is negligence for the company not to fence as required by law, and that, if a child is injured as a consequence of such neglect, the company is liable in damages therefor: *Schmidt v.*

Milwaukee etc. Ry. Co., 23 Wis. 186; 99 Am. Dec. 158; Chicago etc. R. R. Co. v. Grablin, 38 Neb. 90. In Keyser v. Chicago etc. Ry. Co., 66 Mich. 559, 56 Am. Rep. 405, a railroad company's neglect to fence its track was held to be a question for the jury to consider, as bearing on its liability for injury done to a child which got upon the track in consequence of such failure and was injured.

One who sells and delivers gunpowder to a child of tender years, knowing that it has had neither experience nor knowledge in its use, and is an unfit person to be intrusted with it, is responsible for the injuries sustained by the child by exploding it, in ignorance of its effects, and using that care of which he is capable, and this although the vendor is licensed to sell gunpowder: Carter v. Towne, 98 Mass. 567; 96 Am. Dec. 682. A railroad company is liable for the negligence of its servants in placing and leaving torpedoes on a railway track, at a point where the public, including children, are permitted to pass: Pittsburgh etc. Ry. Co. v. Shields, 47 Ohio St. 387; 21 Am. St. Rep. 840. For liability for injuries to children arising from other like agencies, see monographic note to Gilson v. Delaware etc. Canal Co., 36 Am. St. Rep. 835, discussing proximate and remote causes.

It is not sufficient care on the part of a gripman on a cable-car, on approaching a curve in a street, to ring the bell, and, observing that the way is clear in front, to go ahead, neither looking to the right nor left. If, by looking to one side, he must have seen a little child toddling along for a distance of at least thirty-five feet on the street, in the direction of the approaching car, after he saw it on the sidewalk, and where the car must have gone a much greater distance, it is negligence, if the child was run over and injured, owing to the gripman's want of ordinary care in looking out and attending to his business: Winters v. Kansas City etc. Ry. Co., 99 Mo. 509; 17 Am. St. Rep. 591. It is error, however, to rule, as a matter of law, that if the driver of a street railway car sees a child in the street approaching the car, and in such close proximity that it may reach the track before the car passes, it is negligent not to stop the car. The standard of duty in such a case is a shifting one, and it is a question for the jury to determine whether, under all the circumstances, it was his duty to stop: Philadelphia etc. Ry. Co. v. Henrice, 92 Pa. St. 431; 37 Am. Rep. 699. The substitution of the electric and cable-car for the horse-car undoubtedly renders impracticable and dangerous certain uses of the street which were once permissible and comparatively safe, and it is the duty of persons using the highway to recognize and conform to the changed condition; but it is also the duty of those operating such cars to use all the care and caution that a proper regard for the safety of those traveling upon the public highway requires, consistent with a proper enjoyment of franchises and the right to successfully operate electric and cable roads. While street-cars have no exclusive rights in the streets, they do have a preference between crossings, and, while they must be managed with such care as not to negligently injure persons in the streets, pedestrians must use reasonable caution to keep out of their way: Fenton v. Second Avenue R. R. Co., 126 N. Y. 625; Thompson v. Buffalo Ry. Co., 145 N. Y. 196. The presumption, however, that a person seen on a street-car track will leave it before a street-car reaches him, cannot be indulged in when a child of tender years is seen, though it was negligent in going on the track. If the defendant's servants see its dangerous position, it is their duty to exercise all the diligence possible to avoid injuring it: Wallace v. Suburban Ry. Co., 26 Or. 174. Streets, however, are not intended as a playground for children, and if a child several years of age, old enough to know better, recklessly or without heed, runs or darts suddenly in front of a street-car in rapid motion, and the driver stops suddenly or uses care conformable to the circumstances to avoid injury, the company is not liable: Stone v. Dry Dock etc. R. R. Co., 46 Hun, 184; but if an accident occurs to a child suddenly running under a street-car because the gripman neglects his duty to keep his eyes on the track before him, by gazing at houses or

other objects while the car is in motion, his employer is liable: *Schnur v. Citizens' Traction Co.*, 153 Pa. St. 29; 34 Am. St. Rep. 690. This is the case where a coal wagon and a motor-car, propelled by gravity, are moving in opposite directions, not at a street crossing, and a child five years of age rushes from behind the wagon and in front of the advancing motor, thereby receiving injuries, though the motorman applied the brake and then reversed the power: *Ogier v. Albany Ry.*, 83 Hun, 436. So, where a boy five and a half years old, and who is throwing stones at his brother in the street, unexpectedly, and without any warning, runs from the pavement against a moving car passing at the time, not at a crossing, and is injured before the car can be stopped, especially where the gripman has his "eye on the boy," and is trying to avoid an accident: *Chilton v. Central Traction Co.*, 152 Pa. St. 425. Again, an intelligent, strong, healthy boy, nearly ten years old, and perfectly familiar with the locality, the railroad, and its operation, attempts to run in front of a horse-car not at a crossing, and there is no reason to assume that he will not get across, even if seen by the driver, but the boy stumbles and falls on the track, and is injured and killed, the street-car company is not liable, where the driver applies the brake as quickly as possible. No negligence can be attributed to the driver because he did not apply the brake before the boy fell, because then, for the first time, the peril commenced and became apparent: *Fenton v. Second Avenue R. R. Co.*, 126 N. Y. 625. So, if a little girl seven and a half years of age starts from the pavement to run across the street, not at a crossing, diagonally in front of a car, and the driver calls out to her, "Hey, there!" to which a reply is made, "Never mind; I can get past," a nonsuit is proper, in an action against the company for running over and killing her: *Flanagan v. People's etc. Ry. Co.*, 163 Pa. St. 102. But, though a child of tender years runs suddenly under a street-car, yet if the gripman was not attending to his business, and was standing on the side of the cab with one hand out of the window looking toward the houses, and did not have hold of the grip or brake, and paid no attention to persons who halloed to him when they saw the danger of the child, it is proper to submit the case to the jury for them to determine whether or not the injuries suffered by the child were due to the negligence of the railway corporation: *Schnur v. Citizens' Traction Co.*, 153 Pa. St. 29; 34 Am. St. Rep. 690. It is the duty of a street-car driver to keep a diligent lookout both forward and to the right and to the left, "but it is practically impossible that he should have his head turned toward three points of the compass at one and the same moment." Hence, if a little girl ten years old runs from behind an ice wagon in the street upon the track, and is injured, there can be no recovery, if the driver immediately pulls up on seeing her, even if he was temporarily looking at the time in a contrary direction. Negligence cannot be predicated upon the bare fact that the driver is looking in any particular direction at any particular moment. There can be no recovery in such cases without showing that the driver did something which he ought not to have done, or omitted to do something which he ought to have done: *Kennedy v. St. Louis Ry. Co.*, 43 Mo. App. 1; and it is for the jury to judge whether the failure of a schoolchild to look or listen before attempting to cross a street-car track shows a want of that degree of care which could reasonably have been expected of such a child: *Wallace v. Suburban Ry. Co.*, 26 Or. 174, and cases there cited. A girl fourteen years of age who attempts to run across a street between crossings, and passes behind one car but gets in front of another approaching from an opposite direction on the other track, is chargeable with contributory negligence, and can maintain no action for injuries received by her act: *Thompson v. Buffalo Ry. Co.*, 145 N. Y. 196.

Street-car drivers must exercise care in putting children off the cars. If a driver permits a boy seven years old to ride with him upon the front platform for some distance, he has no right to order the boy to get off without giving him an opportunity to obey the order with safety.

His conduct in such a case, with respect to negligence, is a question for the jury: *McOahill v. Detroit City Ry. Co.*, 98 Mich. 156. Even trespassers are entitled to humane consideration. So, if a girl eleven years old gets upon the front platform of a street-car while it is in motion, and holds on by the handrails, and the driver, whipping up his horses and putting down his whip, beats her upon the hands, and finally pushes her off the car so that she falls under it and is run over, she may recover: *Barre v. Reading City etc. Ry.*, 155 Pa. St. 170. A street-car company is liable for its driver's negligence toward a child causing injury or death, where it is on a car under circumstances entitling it to the same care as a passenger: *Muehlhausen v. St. Louis R. R. Co.*, 91 Mo. 332. A railroad company may also be liable for an injury to a child occasioned by its getting off the car on a front platform in violation of a rule, if the car is not properly managed. Thus, the plaintiff, a boy ten years old, was riding on one of the defendant's street-cars, with the knowledge and consent of the conductor and driver, but without paying fare. They had no authority to carry passengers free. The driver requested him to take a package from the car and deliver it at the place where he was intending to get off. He took the papers and without notice to the conductor or driver, while the car was in motion, and before it reached the crossing where it usually stopped, he jumped off the front platform, and was thrown under the wheel and injured. A printed notice was posted conspicuously in the car, forbidding passengers to stand upon, or get on or off at, the front platform, or to get on or off the car when in motion, and declaring that the company would not be responsible for any accident happening thereby. The trial court found that the injury was caused by the careless driving and management of the car; that the plaintiff, in getting off, under the circumstances used as much care as could be expected from a person of his age, and that no contributory negligence on his part was proved. Upon these findings it was held that the plaintiff was entitled to recover: *Brennan v. Fairhaven etc. R. R. Co.*, 45 Conn. 284; 29 Am. Rep. 679.

SUCCESSION OF RABASSE.

[47 LOUISIANA ANNUAL, 1452.]

A TREATY IS THE SUPREME LAW of the land, binding all courts, state and federal.

TREATY AND ITS EFFECT—PROPER SUBJECT OF TREATY MAKING POWER.—A provision in a treaty between this country and France giving French heirs the right to be represented here by the consul of their country relates to a subject within the treaty making power, and must prevail if in conflict with a state law.

TREATY DISPLACES POWER OF COURT TO APPOINT ATTORNEY FOR FOREIGN HEIRS, WHEN.—Under the treaty between this country and France providing that, upon the death of a citizen of France in the United States without any testamentary executor by him appointed, the consul shall have the right to appear, personally or by delegate, in all proceedings on behalf of the absent or minor heirs, a delegate appointed by the French consul in Louisiana to represent the interests of French heirs in a succession there is an agent of such heirs. In such a case there is no necessity to appoint an attorney to represent them, and a court has no power to do so.

EXECUTORS AND ADMINISTRATORS.—There is no power to appoint an attorney for absent heirs, when the heirs are present or represented.

Determination of right to represent absent heirs. Rabasse, a native of France, died in New Orleans on February 26, 1895. He was at that time a citizen of France. He left heirs residing in France. The deceased also left a will. The succession was opened in the civil district court for the parish of Orleans on February 27, 1895, by a mandatory of one of the heirs, claiming the administratorship, and who was subsequently appointed dative executor. The French heirs were not represented by mandatories or representatives of their own selection. The intervenor, as delegate of the consul of France, filed a petition of intervention and opposition, claiming, as a matter of right, to represent the said absent heirs. The judge a quo dismissed this intervention and opposition, from which judgment an appeal was taken.

J. Numa Augustin, for the appellant.

Theodule Buisson and Chretien & Suthon, for the appellees.

¹⁴⁵⁴ MILLER, J. The deceased, a resident of New Orleans, left heirs residing in France. Our treaty with that country provides, in case of death of any citizen of France in the United States without any testamentary executor by him appointed, the consul shall have the right to appear, personally or by delegate, in all proceedings on behalf of the absent or minor heirs. The stipulation is reciprocal, applying to estates of Americans dying in France. The French consul here appointed a delegate to represent the French heirs, and he applied for recognition to the civil district court, in which the succession was being administered. That court denied the application, and appointed an attorney for the absent heirs. From the judgment dismissing the intervention of the appellant claiming recognition as delegate, he prosecutes this appeal.

There is a motion to dismiss the appeal, on the ground there is no pecuniary interest involved. There is involved a question of the construction and the execution of our treaty with France in respect to the interest of French heirs in a succession of over one hundred thousand dollars. The motion is denied.

If the treaty is susceptible of the construction of the appellant, the result would be to avoid the appointment of the attorney for the absent heirs, and require the recognition of the appellant as the delegate of the French consul. In our view, the stipulation in this treaty puts the delegate in the position of an agent of the French heirs, with the same effect as if he held their mandate to represent them as heirs. That was the manifest purpose, and

the language of the treaty plainly expresses that intention. There is no power to appoint an attorney for absent heirs when the heirs are present or represented: Civ. Code, art. 1210; *Robouan v. Robouan*, ¹⁴⁵⁵ 12 La. 73; *Addison v. New Orleans Sav. Bank*, 15 La. 527.

It is idle to call in question the competency of the treaty-making power, nor do we think any question can be raised that the subject of this treaty under discussion here is properly within the scope of the power. That subject is the rights of French subjects to be represented here by the consul of their country. On that subject the treaty provision is plain. The treaty by the organic law is the supreme law of the land, binding all courts, state and federal: U. S. Const., art. 6, par. 2; 1 Kent's Commentaries, 165; *Ware v. Hylton*, 3 Dall. 199; *Prevost v. Greneaux*, 19 How. 1; *Hanenstein v. Lynham*, 100 U. S. 483, 488; *Geofroy v. Riggs*, 133 U. S. 264, 266; Treaty with France, 1853; 10 Stats. 999, sec. 12; Treaty with Belgium, 1880, art. 15.

The treaty discloses no purpose to require our courts to appoint as the attorney for absent heirs the delegate of the French consul. Its purpose is accomplished by placing the delegate before the court as representing the absent heirs, and precluding the appointment of any attorney to represent them.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court, dismissing the intervention of the delegate of the French consul, be avoided and reversed, and it is now ordered, adjudged, and decreed that said delegate be recognized and, as such delegate, authorized to represent the absent heirs in this succession, and that the succession pay the costs.

ON APPLICATION FOR REHEARING.

Our decision in this case affirms that the French heirs of this succession are to be deemed represented by the delegate of the French consul, with the same effect as if the delegate held their power. This view of the treaty, to which our decision is confined, displaces the power of the lower court (exerted in ordinary cases) to appoint any attorney to represent the French heirs of this succession.

The rehearing is refused.

A TREATY IS THE SUPREME LAW OF THE LAND, and is obligatory on all departments of the government, and on parties litigating in the courts: *Howell v. Fountain*, 3 Ga. 176; 46 Am. Dec. 415. It is paramount to state law, and the latter must yield to the extent of its conflict with the treaty, but it is void only so far as it contravenes the constitution, laws, or treaties of the federal government: *Yeaker v.*

Yeaker, 4 Met. 33; 81 Am. Dec. 530, and monographic note on the effect of treaties as laws, showing that a self-executing treaty requires no legislation to put it into operation, and is therefore to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.

GRAHAM v. ST. CHARLES STREET RAILROAD Co.

[47 LOUISIANA ANNUAL, 1856.]

ACTION FOR INJURY TO LAWFUL BUSINESS.—If one man injures another in his lawful business by language or conduct preventing persons from dealing with him, such injury gives the latter a right of action.

PUNITORY DAMAGES MAY BE GIVEN in an action by one person against another for an injury to his business.

DAMAGES—SMART MONEY IS NOT GIVEN AGAINST THOSE LIABLE, if at all, by reason of their relation to the wrongdoer.

RAILROAD COMPANIES—NONLIABILITY FOR INJURY TO ANOTHER'S LAWFUL BUSINESS, OCCASIONED BY FOREMAN—SCOPE OF EMPLOYMENT.—If the functions of the foreman of a railroad company are simply to employ and discharge laborers when necessary, the company is not liable for his act in injuring a grocer by language and conduct which has the effect of diverting other employees from dealing with the grocer, as such act is not within the scope of the foreman's employment.

Harry H. Hall, for the appellant.

W. H. Rogers and W. B. Lancaster, for the appellee.

1857 **MILLER, J.** The plaintiff, the proprietor of a grocery near the station-house of the defendant company, sues for damages, alleging that the foreman of the company, also a defendant, has injured plaintiff in his business by dissuading the employees of the company under defendant's charge from dealing with the plaintiff, threatening them with discharge from the company's employment if they did so, and carrying the threats into effect. The petition charges that this conduct of the foreman has been persistent, prompted by ill-will against the defendant, the desire to injure him, and has resulted in diverting the business of the employees from plaintiff. It is further charged that plaintiff, by this course of conduct on the part of the foreman, has been annoyed and humiliated by the notoriety of the persecution and the ridicule thereby engendered, to use the language of the petition, for which punitive damages are claimed; and the liability of the company is put on the ground that the acts and conduct of the foreman were in the course of the employment of the foreman intrusted by the company with the power to employ and discharge those in its service placed under his control. The case

was before this court on a previous appeal (*Graham v. St. Charles Street R. R. Co.*, 47 La. Ann. 214, ante, p. 366) from the decision against plaintiff on the exception of no cause of action, and was remanded for trial on the merits. The defense on the merits is the general issue, and from the verdict and judgment thereunder this appeal is prosecuted by them. Plaintiff, answering the appeal, asks that the damages awarded, one hundred and seventy-five dollars, be increased.

The responsibility of a corporation for the conduct of its employees is for such acts as are within the scope of the business of the corporation intrusted to them; as the code puts it, masters and employers are answerable for the damage occasioned by their servants in the exercise of their functions, and this responsibility, the code declares, attaches when the master could have prevented the acts causing the damage: Civ. Code, arts. 2315, 2317, 2320. Thus the ¹⁸⁵⁵ obligation is put upon the master to select competent and careful servants and holds him liable for their negligence or negligence in the exercise of their duties. The principle has received application in a variety of cases in our reports, where the act of the servant complained of was incident to the discharge of the servant's duty, or rather his mode of performance. In this case the functions of the foreman was the selection of the labor of the company, carrying with it the power to discharge the employees. The damage alleged arises from the motives which it is charged actuated the foreman in his selection and dismissal of the employees. No wrong to plaintiff could have arisen from the engagement or discharge of the employees, but the alleged injury is supposed to have arisen from the discrimination of the foreman against those friendly to plaintiff, who dealt with him or were disposed to buy at his grocery. With that discrimination the company had neither knowledge or connection, and we do not perceive any basis for its supposed liability. The conduct of the foreman was in no sense within the line of his employment: *Gaillardet v. Damaris*, 18 La. 490; *Ware v. Barataria etc. Co.*, 15 La. 169; 35 Am. Dec. 189; *Hart v. New Orleans etc. R. R. Co.*, 1 Rob. (La.) 181; 36 Am. Dec. 689; *Winston v. Foster*, 5 Rob. (La.) 113.

With reference to the foreman, we think the case is different. The ground of his liability is that, from motives of ill-will, by words and conduct, he injured plaintiff's business, by preventing the employees from buying at his store. Our review of the testimony satisfies us that the foreman urged a number of the employees not to deal with plaintiff; threatened them with dis-

charge if they did so; raised the rent of premises he leased to one of the employees who dealt with Graham, assigning that as the cause for the increase; for the same reason, it is our conclusion, from the testimony, he gave another tenant of his notice to quit, and, as to two instances of discharge, the testimony strongly points for the cause to the fact that the discharged men bought of plaintiff. There is also testimony that the foreman, in his efforts to dissuade one of the men from buying of plaintiff, used language in respect to him not at all flattering. The testimony comes from number of witnesses, testifying to distinct acts, and to the conduct of the foreman on different occasions. It would serve no useful purpose to give the testimony in detail. We have given attention to that of the foreman, that he never gave ¹⁸⁵⁰ orders to the men not to deal with plaintiff, and that his motive was to prevent drinking by the men during the hours of service. We have considered the testimony of the employees, produced by the defendant, that they dealt with plaintiff and were not discharged; that there were posted in the station stringent rules against drinking by the employees, but a careful consideration of the testimony impresses us, as we must conclude it did the jury, that the defendant did use efforts to divert employees from dealing with the plaintiff, and that his motive was not to enforce the rules or discipline of the company.

The right of protection to the citizen in the pursuit of the avocations by which he gains his livelihood is as important as the security of his person and property. No man is privileged to injure another in his business. If the defendant Newman, by his conduct and language, sought to create a prejudice or feeling against plaintiff, deterring those from buying from him inclined to do so, we think reparation is due the plaintiff. Nor is that reparation to be measured by proof of actual damage. Every act of man that causes damage to another obliges the wrongdoer to restitution, is the language of the code, requiring the obvious qualification that the act must be wrongful, and in the assessment of the damages the exercise of the discretion of the jury or court is admitted: Civ. Code, arts. 1933, 2315; Chataigne v. Bergeron, 10 La. Ann. 699; Edwards v. Turner, 6 Rob. (La.) 382; Fenner v. Watkins, 16 La. 206; Wardens v. Blanc, 8 Rob. (La.) 84; McGary v. Lafayette, 4 La. Ann. 440. The fact that the defendant's tenant had a grocery in the neighborhood, apt to be benefited by a diversion of plaintiff's customers, supplies the motive of interest, but does not, in our view, at all mitigate his conduct. With all reasonable allowance for the com-

petitions of trade and the means by which the shopkeeper or merchant obtains business, words and actions to discredit it and injure a rival in business cannot be tolerated. The circumstance that the defendant, as the foreman of the company, had the power to discharge those designed to be influenced by his communications or statements with respect to the plaintiff, and that defendant had the selection of the labor of the company, tended to make more effective his efforts to injure plaintiff in his business. We recognize the principle urged by the defense, that the employer has the right to employ those he chooses, and the same liberty is allowed as to their ¹⁶⁶⁰ discharge. The authority cited by defendant is entitled to full recognition, that one may do business with those he chooses to deal with, and decline, if he pleases, the business of others: *Orr v. Home Mut. Ins. Co.*, 12 La. Ann. 255; 68 Am. Dec. 770. It is not the exercise of defendant's choice in selecting or discharging laborers for the company that makes him liable, but he is responsible because, in exercising that right, he indulges in language, uses threats, and pursues a line of conduct all directed at the plaintiff, and of a character to injure him in his lawful business.

The jury gave a verdict for one hundred and seventy-five dollars. We do not find the basis to increase it against the defendant, and the amount is sufficient to answer the purpose for which, irrespective of actual loss, the law gives damages in this class of cases. Smart money is not given against those liable, if at all, by reason of their relation to the wrongdoer, and in no respect can we appreciate that the company is responsible.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court against the company be avoided and reversed, and that the judgment against Thomas Newman be affirmed, and that he pay costs.

TORTS—DAMAGES.—AN ACTION lies against another for injury to plaintiff's business: See *Graham v. St. Charles etc. R. R. Co.*, 47 La. Ann. 214; ante, p. 366. A person doing a wrongful act that is tortious, whether criminal or not, is civilly liable to the person injured: Note to *State v. Stewart*, 59 Am. Rep. 727. Wherever a tort affecting the property of another is committed with malice, the injured party may recover exemplary damages: Note to *Austin v. Wilson*, 50 Am. Dec. 767, discussing at length the allowance of exemplary damages.

MASTER AND SERVANT.—A master is not liable for the act of his servant not done in the scope of the latter's employment: Note to *Ansteth v. Buffalo Ry. Co.*, 45 Am. St. Rep. 609.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

HILDRETH v. McDONALD.

[164 MASSACHUSETTS, 16.]

TRADE NAME—IMITATION OF MANUFACTURER'S GOODS. Where a manufacturer, for the purpose of presenting his goods to the market, has adopted a particular combination of features, in part old and in part new, he is entitled to protection against a palpable imitation.

TRADE NAME—FORM AND STYLE OF PACKAGES.—If a manufacturer of candy puts it up in packages of a particular size and shape, with a word in red script letters upon the middle and ends of the wrappers, another person may be restrained from putting up packages in the same form and size with another word printed upon the middle of the wrappers in Roman letters, if it is found that the public is thereby deceived into believing that the defendant's goods are the plaintiff's goods and that the resemblance is not accidental.

Suit in equity to enjoin the defendant corporation from putting up, selling, or offering for sale any candy, or other similar article, wrapped and labeled in the manner, or in imitation of the manner, employed by plaintiff. After a trial, the judge entered a decree in favor of the complainant, restraining the defendant from "printing, or causing to be printed, in red upon yellow wrappers, adapted to be used in putting up molasses candy, substantially in the size, shape, and manner in which said plaintiff, Herbert L. Hildreth, puts up and offers for sale the molasses candy made by him, the name 'McDonald,' or any other name, word, mark, or device whereby any candy sold or offered for sale by the defendant shall be caused to resemble in its dress and appearance said candy of the plaintiff, and also from putting up, offering for sale, or selling any molasses candy, or candy similar thereto, put up in yellow wrappers, with the red printing thereon

substantially like the method employed by the plaintiff, as shown by an exhibit annexed to the bill." The case was thereafter reported for the consideration of the full court.

J. E. Maynadier and S. R. Mitchell, for the defendant.

A. P. Browne and J. K. Berry, for the plaintiff.

¹⁶ ALLEN, J. There is no question of trademark in this case. The only question is, whether the plaintiff is entitled to an injunction on the ground that the defendant company was passing ¹⁷ off its molasses candy as and for molasses candy made by the plaintiff, and thus injuring the plaintiff by unfair competition. On the report it would seem that others before the plaintiff had made molasses candy of the same size and shape, and wrapped the pieces in the same kind and size of paper, with twisted ends. To this combination, which was not original with the plaintiff, he added the printing of the word "Velvet" in red script letters upon the middle and ends of the wrappers. The defendant company used the same combination of size and shape of the candy, and the same kind and size of paper and manner of wrapping, all of which it had a right to do. But to this it added the printing in Roman letters, instead of script, of another word, viz, "McDonald," in red ink upon the middle of the wrappers, but not upon the ends. It is found that the public is thereby in fact deceived into believing that the defendant's goods are the plaintiff's goods, and that the resemblance was not accidental. It is not expressly stated, but we must assume that the public who are deceived are persons of ordinary caution and prudence. The injunction which was granted was expressly limited to the printing in red letters upon wrappers of the same kind as those used by the plaintiff, to be used for pieces of molasses candy of the same size and shape.

There are decisions to the effect that color alone cannot become a valid trademark, and that a red label on a yellow wrapper, or a white label on a red box, cannot be registered: *In re Landreth*, in *Browne on Trademarks*, sec. 89 d; *Payson's Indelible Ink*, in *Browne on Trademarks*, secs. 271, 272; *Philadelphia etc. Mfg. Co. v. Rouss*, 40 Fed. Rep. 585; *Philadelphia etc. Mfg. Co. v. Blakesley Novelty Co.*, 40 Fed. Rep. 588; *Fleischmann v. Starkey*, 25 Fed. Rep. 127; *Faber v. Faber*, 49 Barb. 357; *In re Hanson's Trademark*, 37 Ch. Div. 112. But where, for the purpose of presenting his goods to the public, a manufacturer has adopted a particular combination of features, in part old and in part new, he may be entitled to protection against

a palpable imitation. The case of the plaintiff is not very strong on the facts, yet he seems to be entitled to the carefully limited injunction which was granted. The case of *Lever v. Goodwin*, 36 Ch. Div. 1, is in point upon the principle involved, though the facts there were stronger for the plaintiff than the facts here. See, also, *Fischer v. Blank*, 138 N. Y. 244; *Pillsbury v. Pillsbury-Washburn Flour Mills Co.*, 64 ¹⁸ Fed. Rep. 841; and the rule stated at the end of *Dover Stamping Co. v. Fellows*, 163 Mass. 191; 47 Am. St. Rep. 448; *Reddaway v. Banham* [1895], 1 Q. B. 286, 294, per Lopes, L. J.

In the opinion of a majority of the court, the entry must be, *decree affirmed*.

TRADEMARKS—INFRINGEMENT.—An injunction will issue to restrain the piracy of plaintiff's trademark, the distinguishing feature of which is used, in combination with others, to constitute a trademark or brand so similar in appearance as probably to deceive customers or patrons of plaintiff's trade or business, although it is not shown that any one has in fact been deceived or there has been any intentional fraud: *Listman Mill Co. v. William Listman Milling Co.*, 88 Wis. 334; 43 Am. St. Rep. 907, and note. Exact similarity is not necessary to constitute an infringement of a trademark; colorable imitations are as much the subject of legal redress as exact similitudes. What is necessary in all cases to constitute an infringement is a similarity which will operate to convey a false impression to the ordinary purchaser and serve to deceive and mislead him: *Solis Oigar Co. v. Pozo*, 16 Col. 388; 25 Am. St. Rep. 279, and note.

BROWNELL v. OLD COLONY RAILROAD COMPANY.

[164 MASSACHUSETTS, 29.]

A RAILWAY CORPORATION HAS NO ABSOLUTE POWER TO DETERMINE WHAT PARTS OF ITS LINE IT WILL OPERATE.—Its franchises were granted for the public good, and in exercising them it is largely subject to the control and discretion of the legislature.

CONSTITUTIONAL LAW—RAILWAY CORPORATIONS.—The legislature may, by statute, require a railway corporation to operate a public ferry which constitutes part of its line, although such operation has become unprofitable.

FRANCHISE, ACQUIESCENCE IN NONUSE OF.—The fact that a corporation has failed to operate a ferry for a period of twenty years is not a waiver on the part of the state of the right to compel such operation. Such a waiver is not to be presumed without the use of language in some statute clearly expressing or implying it.

FRANCHISE, COMPELLING EXERCISE OF.—The forfeiture of a franchise is not the only remedy for a failure to exercise it. The legislature may impose a pecuniary penalty and authorize proceedings in the courts to enforce it.

STATUTORY PENALTY, WHO MAY ENFORCE.—A statute requiring a corporation to operate a ferry, and imposing a penalty of one

hundred dollars per day for a failure to operate it, and declaring that the court shall have jurisdiction in equity, upon the petition of ten or more citizens, to enforce performance of the act, does not entitle the court to impose a penalty in such suit in equity. The jurisdiction conferred by the statute is limited to compelling the corporation to provide and operate a suitable ferry.

T. M. Stetson and L. LeB. Holmes, for the plaintiffs.

J. H. Benton, Jr., for the railroad company.

³⁰ ALLEN, J. By the statutes of 1854, chapter 124, the proprietors of the New Bedford and Fairhaven Ferry were authorized to transfer their charter to the Fairhaven Branch Railroad Company, by deed, which should vest in the latter company all the rights and ³¹ powers conferred by said charter, with a provision that the latter company should be held to perform all the duties prescribed thereby, and that from and after the execution and delivery of the deed the name of the ferry company should be changed, and that the said corporation should afterwards exist and be known by the name of the Fairhaven Branch Railroad Company, and should not be required to hold separate meetings as a ferry company, but that all acts needful and proper to be done should be done at regular or special meetings of the railroad corporation, or by the directors thereof. The deed which was executed under the above statute was expressed to be upon the condition that the railroad company and their successors should at all times discharge the duties, and become and remain subject to the liabilities, prescribed and set forth in the charter of the ferry company, and also in the statutes of 1854, chapter 124. Various intermediate transfers were made, until, in 1883, by virtue of the statutes of 1882, chapter 80, the Old Colony Railroad Company succeeded to all the franchises and property which had belonged to the Fairhaven Branch Railroad Company. The evidence in the case leaves no doubt, and it is conceded, that after the deed to the Fairhaven Branch Railroad Company, the railroad of that company and the ferry became one line, and were operated as such for a number of years. It was the same, in effect, as if the railroad company by its original charter had been authorized to establish and operate the ferry as a part of its line. The ferry became practically an extension of the railroad, just as if the railroad had been extended over a bridge. The railroad line having been thus extended and operated until 1873, the ferry was in that year discontinued as unprofitable; and by the statutes of 1894, chapter 392, the Old Colony Railroad Company was expressly required to provide and

operate a suitable ferry, in accordance with the provisions of the original ferry charter and of the statutes of 1854, chapter 124.

The first question which we have to determine is, whether this statute is within the legislative power; that is to say, whether a railroad company which owns a ferry as a part of its line, and which is operating the rest of its line, can discontinue the ferry and refuse to obey a legislative requirement to operate it. A railroad company has by no means an absolute power to determine what parts of its line it will operate. Its franchises are ^{as} granted for the public good, and in exercising them it is largely subject to the control and direction of the legislature. Either by virtue of the police power, or of the reserved power to alter charters, many acts may be required which involve expense, and which a railroad corporation, or other corporation to which like rules would apply, would not, if left to itself, undertake. Numerous illustrations of this are found in the decisions of this court, as well as in those elsewhere; *Roxbury v. Boston etc. R. R. Co.*, 6 Cush. 424; *Commonwealth v. Hancock Free Bridge Corp.*, 2 Gray, 58, 64; *Fitchburg R. R. Co. v. Grand Junction R. R. Co.*, 4 Allen, 198; *Commonwealth v. Eastern R. R. Co.*, 103 Mass. 254; 4 Am. Rep. 555; *Commissioners v. Holyoke Water Power Co.*, 104 Mass. 446; 6 Am. Rep. 247; *Worcester v. Norwich etc. R. R. Co.*, 109 Mass. 103; *In re Northampton*, 158 Mass. 299, 301; *Union Pac. R. R. Co. v. Hall*, 91 U. S. 343; *Railroad Commrs. v. Portland etc. R. R. Co.*, 63 Me. 269, 277; 18 Am. Rep. 208; *State v. Hartford etc. R. R. Co.*, 29 Conn. 538; *People v. Albany etc. R. R. Co.*, 24 N. Y. 261; 82 Am. Dec. 295; *People v. Boston etc. R. R. Co.*, 70 N. Y. 569; *Montclair v. New York etc. Ry. Co.*, 45 N. J. Eq. 436; *People v. Louisville etc. R. R. Co.*, 120 Ill. 48; *State v. Iowa etc. Ry. Co.*, 83 Iowa, 720. The present case is merely an instance of compelling a railway company to operate its entire line. The legislature has seen fit to pass an imperative statute to this effect. In view of this statute, it is not open to the railroad company to determine that the ferry should be discontinued while all the rest of its various lines are operated. The defendant appears to rely on *Commonwealth v. Fitchburg R. R. Co.*, 12 Gray, 180, as sanctioning a contrary doctrine. But in that case there was no statute requiring that the railroad company should run the unprofitable trains. There is nothing in the decision which declares or implies that the legislature might not have imposed this as an absolute duty. The same thing may be said of *People*

v. Rome etc. R. R. Co., 103 N. Y. 95, and People v. New York etc. R. R. Co., 104 N. Y. 58; 58 Am. Rep. 484.

The defendant contends that the statutes of 1894, chapter 392, did not impose a new obligation on the defendant, but only required the defendant to perform such obligation as the ferry company would have been ²³ under to maintain and operate the ferry if it had not transferred its charter in 1854; and an elaborate argument is made to show that the original ferry company was not bound to maintain the ferry for all time. But whatever may have been the obligation of the original ferry company, the Fairhaven Branch Railroad Company, when it made the ferry a part of its line, no longer had the power to discontinue the ferry, provided the legislature expressly required that it should be operated. And we are unable to give to the statute of 1894 the construction suggested by the defendant. This statute makes it the imperative duty of the defendant to operate the ferry, whether it is profitable or not.

The defendant contends that the statute requires it to provide and operate a "suitable" ferry, and that there is no proof before the court upon which it can be definitely decided what kind of a ferry suitable. We think, however, that an order to provide a suitable ferry is sufficient in the first instance, and that, if complaint is made that a ferryboat which may be provided is not suitable, a further application may be made to the court.

The defendant further contends that the requirement to operate a ferry forces it into a new business, and that, if the legislature can require it to operate a ferry for a mile, it could also require it to maintain a line of steamboats to Nantucket. The only answer which needs to be given to this argument is, that the ferry by legislative authority was adopted by the railroad company as a part of the line of the railroad, and that its subsequent maintenance is no more outside of the business of the railroad company than the maintenance of any other part of the railroad line.

The defendant further contends that the only liability of the defendant for failure to operate the ferry is a liability to forfeit the ferry charter. This argument cannot prevail since the blending of the ferry franchise with that of the railroad company.

The defendant also contends that it has never acquired the franchise to maintain the ferry. The ground of this argument is that the deed of the ferry franchise to the Fairhaven Branch Railroad Company was upon condition, and that the deed be-

came void by the failure to perform the duties required by the condition; and, moreover, that in the recent transfers no express³⁴ mention has been made of the ferry franchise. But the deed of the proprietors of the ferry to the Fairhaven Branch Railroad Company cannot be considered as technically a deed upon condition subsequent. No clause of re-entry for breach of condition was inserted, and the purpose of the proviso was rather to show that the grantee was to assume and perform the duties prescribed and set forth in the charter: *Rawson v. Uxbridge School Dist.*, 7 Allen, 125; 83 Am. Dec. 670; *Sohier v. Trinity Church*, 109 Mass. 1, 19; *Episcopal City Mission v. Appleton*, 117 Mass. 326. No conveyance upon condition subsequent was contemplated by the statutes of 1854, chapter 124, or by the vote of the stockholders of the Fairhaven Branch Railroad Company to make the purchase. The effect of the transaction was to transfer the duties from one corporation to another, after which the original corporation had no further interest in the matter, but the railroad company was bound by law to perform all and singular the duties of the ferry company. The ferry company was not authorized to make a conditional transfer. By section 3 of the statute, its only existence after the transfer was as the Fairhaven Branch Railroad Company. Moreover, an estate on condition subsequent is not defeated except by re-entry for breach of condition. No such re-entry has been made in this case, nor is it easy to see how it could be, since the ferry company as a separate corporation has ceased to exist. In reference to the suggestion that no special mention of the ferry franchise has been made in the recent conveyances, it may be said that none need be, since the provisions of the statutes of 1854, chapter 124, and the delivery of the deed thereunder. Since that time, the ferry corporation has existed and been known by the name of the Fairhaven Branch Railroad Company, and has been included in all transfers of that company.

The defendant further contends that it cannot be required to maintain the ferry during the term of the lease of its railroads and property to the New York, New Haven, and Hartford Railroad Company. This lease, which was executed in 1893, was not pleaded in defense, and we have no reason to suppose that the omission was through inadvertence. Its admission in evidence was objected to as incompetent and not open, and no motion was made to amend the answer by pleading it. We therefore have no occasion to consider whether the existence of the lease³⁵ would exonerate the defendant as lessor from its

obligations to the commonwealth; respecting which, however, see *Braslin v. Somerville etc. R. R. Co.*, 145 Mass. 64; *Davis v. Providence etc. R. R. Co.*, 121 Mass. 134.

The defendant also suggests that any obligation to the commonwealth to operate the ferry was waived by the acquiescence of the commonwealth in its abandonment for a period of twenty years after 1873, and also by legislation subsequent to the abandonment in 1873, by which the railroads were permitted to lease and consolidate upon the basis of such abandonment. But no such waiver on the part of the commonwealth is to be presumed, without the use of language in some statute clearly expressing or implying it. The omission by officers of the commonwealth, or by others, to take steps earlier for enforcing the duty signifies nothing. No statute has been pointed out showing an intention on the part of the legislature to waive the performance of it.

The defendant contends that the legislature could not provide for the specific enforcement of the obligation to maintain the ferry by a suit in court, such as is provided for in the statutes of 1894, chapter 392. The numerous cases already cited in which resort has been had to the courts for the enforcement of similar obligations and duties show to the contrary, and that the forfeiture of the charter is not the only remedy.

Finally, it is contended that the penalty of one hundred dollars a day for each day's delay in operating such ferry cannot be enforced in this suit. Upon this point the statute is not clear, but we have come to the conclusion that the better construction of the statute is as the defendant contends. The principal reasons supporting this view are as follows:

The forfeiture of the sum prescribed is to the commonwealth, but the statute contains no provision making the commonwealth or any one of its officers a party to the suit, which ten or more citizens may bring to enforce the provisions of the act. The maintenance of the ferry is for the peculiar benefit of New Bedford and Fairhaven, but the citizens of those places have no special interest in the enforcement of the penalty. The legislature can hardly have intended that the penalty should be paid to the ten or more citizens who are authorized to file a petition in equity to enforce the provisions of the statute, yet nobody else is required to be a party plaintiff. The plaintiffs have made the attorney general a party to represent the commonwealth. But he is not a financial officer of the state, and we are at a loss to see how he can properly be made a party, or be entitled to appear in his own name to represent the pecuniary interest of

the commonwealth under this statute. The ordinary way of enforcing a penalty which is to go to the commonwealth is by a proceeding in the name of the commonwealth, unless some other mode is enacted by statute or established by custom. We have a difficulty in inferring that the legislature intended that a heavy pecuniary penalty inuring to the commonwealth should be enforceable by a suit or petition in equity in this court, which suit is instituted, managed, controlled, and subject to be discontinued solely by private citizens who have no interest in such penalty. The provision of the statute, that this court should have jurisdiction in equity upon the petition of ten or more citizens of New Bedford or Fairhaven to enforce the provisions of this act, is satisfied by holding that it means the provisions requiring the Old Colony Railroad Company to provide and operate a suitable ferry. These citizens may maintain a petition in equity to enforce so much of the statute as concerns the citizens of New Bedford and Fairhaven. The commonwealth may enforce the penalty which inures to its benefit. This view derives some confirmation from the public statutes, chapter 217, section 2, providing that "all fines and forfeitures . . . expressly appropriated to the use of the commonwealth . . . may, unless otherwise expressly provided by law, be prosecuted for and recovered by indictment in the superior court, . . . or the same may be recovered in an action of tort."

The result is, that the plaintiffs are not entitled to a decree for enforcing the forfeiture of one hundred dollars a day to the commonwealth, but, in the opinion of a majority of the court, they are entitled to a decree requiring the defendant to provide and operate a suitable ferry.

Ordered accordingly.

FRANCHISES—EXERCISE OF.—A railroad company has not the option to discontinue part of its road and forfeit its franchise, but the remedy is not by action in equity for a specific performance, but by mandamus or indictment, or, at the election of the people, by action to annul the charter of the corporation: *People v. Albany etc. R. R. Co.*, 24 N. Y. 261; 82 Am. Dec. 205, and especially the note.

PAGE v. COOK.

[104 MASSACHUSETTS, 116.]

NOTE PAYABLE WHEN THE PARTIES AGREE.—A promissory note promising on demand to pay a sum designated, payable when payor and payee mutually agree, is collectible on demand, if the payor does not agree within a reasonable time that it shall be paid.

Action on a promissory note in the words and figures following:

"\$500.

. Boston, May 1, 1891.

"On demand, after date, I promise to pay to the order of Hollis Bowman Page five hundred dollars, payable when payor and payee mutually agree. Value received.

"GRACE V. COOK."

The defendant, besides interposing a general denial, claimed that the suit was prematurely brought, and that while the plaintiff was a pupil of the defendant, he deposited in her hands five hundred dollars as a payment for instruction partly received and partly to be received as the plaintiff should request; that the plaintiff had received much valuable instruction, and the defendant requested him to continue to receive such instruction, and was ready to fulfill her contract and had so notified plaintiff. The judge at the trial directed the jury to return a verdict for the defendant, on the theory that there was no evidence that the parties had ever agreed upon any time when the note should be paid.

N. F. Hesseltine, for the plaintiff.

E. J. Jones and C. W. Cushing, for the defendant.

¹¹⁷ **MORTON, J.** According to the literal construction of this note, although the defendant promises to pay the plaintiff the sum named when he demands it, she may escape the performance of his promise by refusing to agree with the plaintiff when it shall be paid. We think that it hardly could have been the intention of the parties to put it into the power of the defendant thus to avoid payment, and that it is more reasonable to construe it as meaning that it is payable when and after the payor ought reasonably to have agreed: *White v. Snell*, 5 Pick. 425; *Sloan v. Hayden*, 110 Mass. 141; *Black v. Bachelder*, 120 Mass. 171; *Hawkins v. Graham*, 149 Mass. 284; 14 Am. St. Rep. 422; *Crooker v. Holmes*, 65 Me. 195; 20 Am. Rep. 687; *Works v. Hershey*, 35 Iowa, 340; *Lewis v. Tipton*, 10 Ohio St. 88; 75 Am. Dec. 498. The promise to pay is absolute. It is only the time of payment which is left to future agreement. Evidently, it is expected

from the tenor of the note that the parties will agree, and that a time will be fixed, and that the note will be paid. But no time is fixed within which that agreement is to be made. The law will therefore imply a reasonable time. Besides it is the payment, not the nonpayment, of the note for which the parties are providing. If the payor does not, within a reasonable time, agree when the note shall be paid, there is nothing unjust nor at variance with the real meaning of the contract in holding that the payee may thereupon demand payment, and, if the note is not paid, proceed to collect it. The case of *Barnard v. Cushing*, 4 Met. 230, 38 Am. Dec. 362, is distinguishable. The question chiefly discussed in that case was whether the indorsement on the note constituted a part of it, and the court held that it did. The indorsement expressly provided, not only that the payees would receive the amount of the note when convenient for the promisors to pay, but that they would not compel its payment. In bringing suit the payees proceeded, therefore, in direct violation of their agreement. Possibly, if the question arose now, a different result might be reached from that arrived at in that case.

According to the terms of the report the entry must be, verdict set aside, and judgment for the plaintiff for the amount of the note, with interest from the date of the writ.

NEGOTIABLE INSTRUMENTS—STIPULATIONS AS TO TIME OF PAYMENT.—A note is payable within a reasonable time after its execution and delivery, where the maker promises by it to pay a certain sum of money "when I can make it convenient": *Lewis v. Tipton*, 10 Ohio St. 83; 75 Am. Dec. 498, and note. Where promissory note was made "payable when I sell my place where I now live," it was held that the maker was bound to sell his place within a reasonable time, and failing in that the note was due: *Crooker v. Holmes*, 20 Am. Rep. 687. Defendant executed his promissory note promising to pay a certain sum in six months, or as soon as I can with due diligence make the money out of the sale of a patent right. It was held that the note was payable in six months: *Palmer v. Hammer*, 10 Kan. 464; 15 Am. Rep. 353.

FOWLE v. CHILD.

[164 MASSACHUSETTS, 210.]

COLLATERAL SECURITIES.—UNTIL THE INDEBTEDNESS IS EXTINGUISHED, the right to retain collateral pledged as security for its payment remains. Such indebtedness may, therefore, be given in evidence though it has been pleaded as a setoff in an action still pending.

EVIDENCE OF OTHER CRIMES OR ACTS.—Acts which are part of one general scheme or plan of fraud, designed or put in execution by the same person, are admissible to prove that an act which has been done by someone was in fact done by the person who designed and pursued the plan, if the act in question was a necessary part of the plan. Hence, where it is claimed that a party has been guilty of defrauding another by showing money, placing it in possession of the latter, and securing a loan thereon, after which the money was abstracted by some sleight of hand, evidence of such practices and fraud upon others is admissible.

A JUDGMENT OF ACQUITTAL IN A CRIMINAL PROSECUTION IS NOT ADMISSIBLE in favor of the accused in a civil action to prove that he was not guilty of the crime with which he was charged.

Action for money had and received. During three years plaintiff had been in the habit of borrowing moneys from the defendant, giving notes therefor secured by cash deposits in boxes in safety vaults in Boston taken in the names of the plaintiff and the defendants. In May, 1886, the accounts were adjusted, the plaintiff giving a note to each of the defendants, secured by a pledge of moneys so deposited in the vaults. In November, 1888, the plaintiff was arrested on a criminal charge, and, while he was in confinement, the defendants obtained from him a power of attorney authorizing them to open the safety vaults. The plaintiff contended that the defendants did so and took therefrom a large sum of money which it was the object of the present action to recover. The defendants, on their part, insisted that they found nothing in the vaults but scraps of paper and other worthless stuff. There was evidence tending to prove that the plaintiff had never gone to the vaults and examined their contents, except in company with one of the defendants or their agent. The defendants, to show that if any money was taken by them from the vaults they were entitled to retain it as collateral security, introduced in evidence the notes given in May, 1886, to the admission in evidence of which plaintiff excepted on the ground that the same notes had been pleaded as a setoff in another action and allowed in the report of the referee therein. Final judgment, however, had not been entered in the action, and the record thereof was excluded from evidence. The defendants insisted that the plaintiff had cheated and de-

frauded them, and introduced evidence tending to show that the boxes in the safe deposit vaults, when opened, were found to contain nothing of value, and that the plaintiff had had other transactions of a similar character, consisting of borrowing money upon tumblers which appeared to contain gold pieces, but which in fact contained only pasteboard or gilt pieces made in representation of gold. Also, that the plaintiff had borrowed other moneys upon the security of a ticket issued by the Collateral Loan Company, reciting that the company held as security one hundred dollars in bank bills, and that, upon the presentation of the ticket, it was found that the only bill deposited by the plaintiff was a ten dollar bill folded so as to resemble a hundred dollar bill. In rebuttal the plaintiff sought to have introduced in evidence the record of a criminal trial in which he had been charged with obtaining money from the Collateral Loan Company under false pretenses, which trial had resulted in his acquittal. This evidence being excluded, the plaintiff excepted. The jury returned a verdict for the defendants.

W. H. Baker and C. H. Welch, for the plaintiff.

R. M. Morse, for the defendants.

²¹² BARKER, J. 1. The first and second exceptions may be disposed of together. The notes given by the plaintiff to the defendants upon the adjustment of the accounts between them in May, 1886, were secured by pléde of the money which the plaintiff sought to recover in this action, and were admissible in evidence for the defense, upon the issue whether, if they took that money, they were entitled to retain it as collateral security for the notes. The record of the former suit, in which the notes had been pleaded in setoff against the plaintiff, showed that the suit was still pending; as it had not gone to judgment, the ²¹³ notes were not extinguished, and the record offered by the plaintiff was immaterial, and rightly excluded. Until the notes were extinguished, the right to retain the collateral pledged as security for their payment remained in the defendants.

2. The next class of exceptions is to the admission of evidence that during the period covered by the transactions upon which the plaintiff's suit is founded, he committed other frauds upon the defendants in other transactions in which they lent him money. This evidence was introduced in support of the defendants' contentions that they took no money from the safety vaults, and that they found in the vaults nothing but worthless

bundles secretly substituted by the plaintiff for the money which he had himself fraudulently removed.

Acts which are part of one general scheme or plan of fraud, designed and put into execution by the same person, are admissible to prove that an act which has been done by someone was in fact done by the person who designed and pursued the plan, if the act in question is a necessary part of the plan: *Commonwealth v. Robinson*, 146 Mass. 571, 577. See, also, *Wiggin v. Day*, 9 Gray, 97; *Lynde v. McGregor*, 13 Allen, 172; *Jordan v. Osgood*, 109 Mass. 457; 12 Am. Rep. 731; *Haskins v. Warren*, 115 Mass. 514; *Horton v. Weiner*, 124 Mass. 92; *Commonwealth v. White*, 145 Mass. 392. And the plan itself, and the acts done in pursuance of it, may all be proved by circumstantial evidence: *Commonwealth v. Robinson*, 146 Mass. 571. The transactions shown in the evidence in the present case were very strange and peculiar. One reasonable explanation of them is that they disclose a plan by which the plaintiff designed to cheat the defendants, after first obtaining their confidence, by showing them that he had money in large amounts, by intrusting his money to their keeping, borrowing from them upon their belief that they had it in their keeping, and, when his borrowing had reached a sufficient extent, by secretly removing his money from their possession by sleight of hand, and substituting in its stead something of no value. All the transactions put in evidence were between the same parties, during the same period of time, and were of the general character of confidence games, carried through by deception and jugglery. They may well have been parts of a single plan, the chief end of which was the abstraction by the ²¹⁴ plaintiff of the money from the safety boxes; and if so, any acts done by him in pursuance of that plan were competent to show that it was he who did the act which was its necessary culmination if successfully carried through.

3. The remaining exception is to the exclusion of evidence that the plaintiff had been acquitted in a criminal prosecution for one of the frauds, evidence of which was admitted against him. But that acquittal was *res inter alios*, like the withdrawal of suits by other parties in *Haskins v. Warren*, 115 Mass. 514, 538. Because the defendants were strangers to the judgment offered, it could not affect them: *Commonwealth v. Waters*, 11 Gray, 81; *Cluff v. Mutual Ben. etc. Ins. Co.*, 99 Mass. 317, 325; *Parker v. Kenyon*, 112 Mass. 264.

Exceptions overruled.

PLEDGE—PLEDGEES' RIGHT OF POSSESSION.—It is the pledgee's right to hold possession of the thing pledged to him, and if the pledgor recover possession wrongfully without the pledgee's consent, the pledge is nevertheless valid: *Extended note to Robinson v. Hurley*, 79 Am. Dec. 500.

EVIDENCE OF OTHER CRIMES.—Testimony tending to show the commission of another offense than the one charged is not as a general rule admissible; but where such offense is intimately connected with the one charged, important proof to establish the latter cannot be excluded because it may tend to prove the former: *State v. Reed*, 53 Kan. 767; 42 Am. St. Rep. 322, and note. See, also, the note to *Barkley v. Copeland*, 5 Am. St. Rep. 418.

A JUDGMENT OF CONVICTION in a criminal prosecution cannot be given in evidence in a civil action: *Steel v. Caveaux*, 8 Mart. (La.) 318; 13 Am. Dec. 288, and especially note.

NASHUA AND LOWELL RAILROAD CORPORATION v. BOSTON AND LOWELL RAILROAD CORPORATION.

[164 MASSACHUSETTS, 222.]

CORPORATIONS—ULTRA VIRES.—If the manager of two railway corporations uses their joint funds for the improvement of the road of one, the latter is liable to an action to recover such part of the funds of the other as was thus expended. This right is not impaired by the fact that the corporations may have entered into an ultra vires traffic contract.

RES JUDICATA.—A DEMAND OR CLAIM IS NOT RES JUDICATA, THOUGH IT WAS INTERPOSED in a prior suit along with other claims and leave to withdraw it was denied by the court, if the final judgment of the court appeared to be upon the other claims, and there is no evidence that the claim, the right to withdraw which was refused, was in fact argued, considered, or determined by the court.

RES JUDICATA.—THE PLAINTIFF HAS NO ABSOLUTE RIGHT TO WITHDRAW one of the claims sued upon, and, if his application for leave to withdraw it is refused by the court, the defendant may treat the claim as still proper for consideration, but it is, nevertheless, not res judicata, if the evidence shows that it was not presented nor considered by the court.

Suit in equity for an accounting under a contract entered into by the plaintiff and defendant for the joint operation of their railroads.

F. A. Brooks, for the plaintiff.

J. H. Benton Jr., for the defendant.

222 ALLEN, J. 1. The iron of the Boston and Lowell Railroad being at the outset in worse relative condition than that of the Nashua and Lowell Railroad and branches, it was agreed that in **223** the final settlement of the contract the iron of the Boston and Lowell road should be left in the same relative worse con-

dition, or otherwise its improved relative condition should be paid for by the Boston and Lowell Railroad Corporation on its separate account. The existing difference at the outset was appraised as equivalent to the cost of replacing three hundred tons of old rails with new. The report finds that, at the termination of the contract, the rails of the Boston and Lowell road were not in a relatively worse condition than those of the Nashua and Lowell road, and that the cost of replacing three hundred tons of old rails with new was agreed by the parties to be nine thousand seven hundred and eleven dollars and eighty-eight cents. The report further finds that whatever was expended upon the roadbed of the Boston and Lowell road during the existence of the contract was from the joint fund. It thus appears that, instead of the Boston and Lowell Railroad Company's paying for the improvement on its separate account, the improvement was paid for out of the joint fund, in which the plaintiff was interested to the extent of thirty-one per cent. The amount, therefore, which the plaintiff could recover for this item is thirty-one per cent of nine thousand seven hundred and eleven dollars and eighty-eight cents, or three thousand and ten dollars and sixty-eight cents: *Nashua etc. R. R. v. Boston etc. R. R.*, 157 Mass. 268.

2. The defendant, however, contends that the traffic contract was *ultra vires*, and that neither corporation had power under its charter to agree with the other to operate their railroads as one road. No authority has been cited in favor of this view, but it would seem to be supported by decisions in New Hampshire: *Burke v. Concord R. R.*, 61 N. H. 160. See, also, *Boston etc. R. R. v. Boston etc. R. R.*, 65 N. H. 393.

We do not, however, need to enter upon this question, because the plaintiff's suit, to the extent above mentioned, may be maintained on an independent ground. The joint manager, without authority either under the contract or otherwise, used the joint fund belonging to the two railroad companies for the improvement of the relative condition of the defendant's road. In this way the defendant has, without right, received the benefit of funds belonging to the plaintiff, and an action may be maintained to recover for the same, even though the traffic contract was *ultra vires*: *Slater Woolen Co. v. Lamb*, 143 Mass. 420; *Nims v. Mount Hermon Boys' School*, 160 Mass. 177; 39 Am. St. Rep. 467; *L'Herbette* ²²⁴ *v. Pittsfield Nat. Bank*, 162 Mass. 137; 44 Am. St. Rep. 354; *Central Trans. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24; *Manchester etc. R. R. v. Concord R. R.* 66 N. H.

100: post, p. 582; *Central Trust C. v. Ohio Cent. R. R.*, 23 Fed. Rep. 306.

3. The defendant further contends that the plaintiff is estopped to maintain this suit by the judgment or decree entered in favor of the plaintiff against the defendant in the circuit court of the United States. No authority is cited in support of this view. It appears that the plaintiff brought a bill in equity in that court against the defendant upon the claim now in suit here, and upon other distinct claims; that after issue was joined therein, the plaintiff moved for leave to amend its bill by striking out the present claim; that after a hearing this motion was denied by the court; that thereupon the plaintiff filed in the circuit court a paper disclaiming and discontinuing its bill as to said claim; that this paper was filed without leave of court, and there was never any order of court upon it; that after various intermediate proceedings a final decree was entered in the circuit court for the plaintiff for one of the claims set forth in its bill, no mention being made therein of the claim now in suit; and that afterwards said decree was performed, and satisfied of record.

The defendant has not in its answer averred, nor by its evidence proved, that the present claim was in fact argued, considered, or determined in the circuit court. The report is silent upon this point. If this had been done in point of fact, of course the present suit could not be maintained. What we have to consider is, whether, upon the case as it is presented to us, we should assume that it was so determined, and whether, looking merely at the record, the legal effect of the former decree is to estop the plaintiff now.

In the first place, it is clear that the plaintiff's attempt to withdraw the present claim from that suit, in spite of the refusal of the court to permit such withdrawal, was nugatory. The case stood thereafter just as if no such attempt had been made. No doubt, as a general, though not universal, proposition, at any time before a hearing the court, on application made, will allow a plaintiff in equity to dismiss his whole bill as of course, upon payment of costs: *Kempton v. Burgess*, 136 Mass. 192. Such ²²⁵ dismissal, however, is not made without an order of court; and there may be facts which would lead the court to refuse to allow it: *Chicago etc. R. R. v. Union Rolling Mill*, 109 U. S. 702, 713; *Electrical Accumulator Co. v. Brush Electric Co.*, 44 Fed. Rep. 602; *Hat-Sweat Mfg. Co. v. Waring*, 46 Fed. Rep. 87, 106; *Hershberger v. Blewett*, 55 Fed. Rep. 170; *Detroit v. Detroit City Ry.*, 55 Fed. Rep. 569; *Stevens v. Railroads*, 4 Fed. Rep. 97; *Badger v. Badger*, 1 Cliff. 237; *Folger v. The Robert G. Shaw*, 2

Woodb. & M. 531; *Wilkinson v. Wilkinson*, 2 R. I. 414; *Cozzens v. Sisson*, 5 R. I. 489. Where a plaintiff wishes to dismiss his bill as to a part of the relief prayed for, the proper way is to apply for leave to amend by striking out: *Camden etc. R. R. v. Stewart*, 4 C. E. Green, 69. This the plaintiff did, and his motion was denied. The defendant was therefore entitled to treat the claim now in suit as still a part of the matter to be heard and determined in that suit.

It does not necessarily follow, however, that the judgment in that case is a bar to the present suit. It has been held elsewhere that if a plaintiff sues in one action for several distinct demands, and obtains a general verdict and judgment, the record of such judgment is not conclusive evidence that all of the demands were included therein, and will not bar a subsequent action for such as in fact were not adjudicated upon: *Seddon v. Tutop*, 6 Term Rep. 607; *Paine v. Schenectady Ins. Co.*, 12 R. I. 440; *Hungerford's Appeal*, 41 Conn. 322; *Supples v. Cannon*, 44 Conn. 424; *Allebaugh v. Coakley*, 75 Va. 628; *Wheeler v. Van Houten*, 12 Johns. 311, dictum. This question was discussed, but not decided, in *Goodrich v. Yale*, 8 Allen, 454, where it was said that the doctrine of *Seldon v. Tutop*, 6 Term Rep. 607, "is not entirely free from objection, inasmuch as it allows a party unnecessarily to subject the other party to a second suit, after the plaintiff has elected to unite two causes of action in one suit, and when he has had full opportunity to obtain judgment for his entire damages." The court, however, was not ready to deny the doctrine of that decision, and, upon consideration, we think it better not to extend the estoppel of a former judgment so far as to assume conclusively that such a distinct demand was determined in favor of the defendant, when the record does not so state, but merely shows that the other demands were determined ²²⁶ in favor of the plaintiff. Such estoppel includes whatever was actually determined, and whatever was necessarily involved in the actual determination; but where the former action included several distinct claims or demands, which were distinct causes of action, a demand or cause of action which in point of fact was not passed upon may be the subject of a subsequent suit. The defendant might have brought such demand to the attention of the court, and might have asked for and obtained an adjudication upon it. But if this was not done, and if there was no such adjudication, then there is no estoppel in respect to it. This limitation of the doctrine of estoppel by former judgment is in accordance with the general tendency of the decisions: *Foye v. Patch*, 132 Mass.

105; Hooker v. Hubbard, 102 Mass. 239, 245; Burlen v. Shannon, 99 Mass. 200; 96 Am. Dec. 733; Russell v. Place, 94 U. S. 606; De Sollar v. Hanscome, 158 U. S. 216, 221; Dunlap v. Glidden, 34 Me. 517; Pray v. Hegeman, 98 N. Y. 351; Doe v. Oliver, 2 Smith's Lead. Cas., 7th Am. ed., 699, and cases cited.

The demand now in suit, therefore, is not barred by the former judgment, unless it was in fact adjudicated upon therein; and the record laid before us is not conclusive evidence that it was so adjudicated upon. If there is any question as to the fact, it will be determined in the superior court.

Unless in point of fact it was so adjudicated, the plaintiff should have a decree for three thousand and ten dollars and sixty-eight cents, and interest.

Ordered accordingly.

HOLMES, J. In my opinion, when the pleadings present three issues, and the final decree is for the plaintiff upon two of them and is silent as to the third, it has the same effect, with regard to that issue, as if it had been expressly for the defendant: Thompson v. McKay, 41 Cal. 221, 227. In either form, it is a bar to a subsequent suit for the same cause of action: Schmidt v. Zahensdorf, 30 Iowa, 498. Decisions as to the effect of the decree as an estoppel in collateral proceedings have no application: See Foye v. Patch, 132 Mass. 105, 110; Bassett v. Connecticut River R. R., 150 Mass. 178; Bradley v. Bradley, 160 Mass. 258; Watts v. Watts, 160 Mass. 464, 465; 39 Am. St. Rep. 509; Cromwell v. County of Sac, 94 U. S. 351, 352; Pray v. Hegeman, 98 N. Y. 351.

Justices Knowlton and Lathrop concur in this view.

JUDGMENTS—RES JUDICATA.—Before a judgment in one action can operate as a bar to another, it must appear by the record, or by extrinsic evidence that the precise question involved in the second action was raised and determined in the first: Kleinschmidt v. Binzel, 14 Mont. 31; 43 Am. St. Rep. 604, and note. See the extended notes to Fahey v. Esterly Machine Co., 44 Am. St. Rep. 562, and Lea v. Lea, 96 Am. Dec. 775.

CORPORATIONS—SAME DIRECTORS ACTING FOR TWO CORPORATIONS—EFFECT OF.—Although some directors in one corporation are also directors in another, this does not prevent the corporations from contracting with each other. If there is no abuse of trust relations, it is no bar to a recovery by one of the corporations for money advanced to and used by the other: Pauly v. Pauly, 107 Cal. 8; 48 Am. St. Rep. 98. If the same persons as directors of two different corporations represent both in a transaction in which their interests are opposed, such transaction may be avoided by either corporation, at the instance of a stockholder of either, without regard to the question of advantage or detriment to either corporation, and no matter how fair and open the transaction: O'Conner Min. etc. Co. v. Coosa Furnace Co., 95 Ala. 614; 36 Am. St. Rep. 251, and note. See, also, the extended note to Beach v. Miller, 17 Am. St. Rep. 302, 303.

ROSS v. PEARSON CORDAGE COMPANY.

[164 MASSACHUSETTS, 257.]

MASTER AND SERVANT.—THE MERE FACT THAT OBTAIN CONTRIVANCES, if on a machine, might have prevented its starting is not enough to charge the master with negligence, though from the sudden starting of such machine while being cleaned the servant is injured, and the placing of such contrivance on the machine would have prevented such injury.

Action to recover for personal injuries suffered by the plaintiff when in the employ of the defendant, from the sudden and voluntary starting of a machine at which she had been at work and which she was at the time cleaning. The case was by the trial judge reported to the supreme court for determination.

H. P. Harriman and F. J. Daggett, for the plaintiff.

C. Reno, for the defendant.

²⁵⁰ **LATHROP, J.** The plaintiff, a girl nineteen years of age, was injured by having her hand caught in the cogs of a machine called a drawing frame, which she was cleaning. We assume in her favor that there was evidence for the jury that the machine started without its having been set in motion by a fellow-servant.

The remaining question is, therefore, whether there was any evidence which would warrant the jury in finding any breach of duty on the part of the defendant. The evidence as to the machine comes from an expert who was a witness for the ²⁶¹ plaintiff. He testified that the machine was started and stopped by what is called a belt shipper, such as is used to throw a belt from a tight to a loose pulley; that the machine was stopped by simply moving the lever by which the belt was thrown from the tight to the loose pulley, and the reverse movement to start the machine; that the shipper was two feet long, with nothing to hold it in its place except that it was pivoted in the center; that in the proper construction of such a machine such levers are not ordinarily locked, or clamped, unless the machine has some special danger; that a machine which required two persons to operate it, one at the end where the shipper is and one at the other end, would make it necessary that there should be something to secure it; that a simple latch would secure it from allowing the belt to run on; that machines sometimes started by means of the belt getting a little twisted and spreading on one side, which is liable to run on the fixed pulley from the loose pulley; that this will be done if a shaft tips, or the belts are

improperly adjusted for height; that this would be prevented by having the shifting bar latched or locked; and that this would also prevent the machine being started by anyone striking against it. He further testified that the shipper was like the ordinary shipper, such as is used on an ordinary machine; that there was nothing unusual about it; that it was made in the ordinary way; and that he did not see any defect in it.

There is certainly nothing in this evidence, with the exception, perhaps, of a single sentence, which tends to show any breach of duty on the part of the defendant. There is nothing in the case to show that there was any special danger in the machine, or that the shaft tipped, or that the belt was improperly adjusted, or that the belt had got twisted and spread on one side. It is true that the expert testified "that a machine which required two persons to operate it, one at the end where the shipper is and one at the other end, would make it necessary that there should be something to secure it." He, however, gave no reason for this opinion, and we can conceive of none, except that the one near the shipper might accidentally strike against it. But we assume that there was no one in the room with the plaintiff at the time.

²⁶² The machine had been stopped before the accident by a fellow-servant; and it is obvious that if the belt had not been entirely removed from the tight pulley to the loose one, there would be danger of the belt working on to the tight pulley and starting the machine: See *Dingley v. Star Knitting Co.*, 134 N. Y. 552. The machine was in the same condition at the time of the accident as it was when the plaintiff entered the defendant's employ. There is no evidence that there was any defect in it, or that it differed from similar machines in use elsewhere. The mere fact that certain contrivances, if on the machine, might have prevented its starting, is not enough to charge the defendant; and we see no evidence to warrant the jury in finding that there was any breach of duty on the part of the defendant.

In *Donahue v. Drown*, 154 Mass. 21, there was evidence that the machine was not put up properly; that the driving pulley upon the main shaft had a convex surface instead of a flat surface, such as it should have had, and was so fixed with reference to the fixed pulley that the tendency was to draw the belt from the loose pulley when the machine was not in motion onto the fixed pulley, and thus to start the machine. There was also evidence that other similar machines in the defendant's factory had previously started without being intentionally set in motion, so that the defendant might, by the exercise of reasonable care,

have known the fact of the starting, and have remedied the defects. The case in these respects differs widely from the one at bar.

In *Mooney v. Connecticut River Lumber Co.*, 154 Mass. 407, the plaintiff was injured by the automatic starting of a carriage connected with a sawing machine. It was undisputed that a machine which would so start was improperly constructed or adjusted. The machine had, three days before the accident, started automatically, and this was known to the defendant's foreman, who told the plaintiff before the accident that it had been repaired. Under these circumstances it was held that the jury were warranted in finding that the defendant was negligent.

In *Connors v. Durite Mfg. Co.*, 156 Mass. 163, the plaintiff was injured by the starting of a stationary engine, caused by a leak in the throttle valve. The engine was an old one when bought ~~and~~ by defendant, and he had caused it to be repaired, but nothing was done to the throttle valve. There was also evidence that the wear and tear which would produce the condition of things which caused the defendant to have the engine repaired would tend to cause a leaky throttle valve. It was held that the question of the defendant's negligence was for the jury.

The two cases last cited differ widely from the one at bar.

Judgment for the defendant.

MASTER AND SERVANT—DUTY OF MASTER AS TO KIND OF APPLIANCES FURNISHED.—A master is bound to furnish machinery and appliances of ordinary kind and reasonable safety: *Kehler v. Schwenk*, 144 Pa. St. 348; 27 Am. St. Rep. 633, and note; but only the kind in common use need be furnished: *Nix v. Texas Pac. Ry. Co.*, 82 Tex. 473; 27 Am. St. Rep. 893, and note. A master is not answerable for injury to his servant resulting from not adopting the best and safest machinery, if that which he did employ was reasonably suitable and proper for the business: *Monmouth Min. etc. Co. v. Erling*, 148 Ill. 521; 39 Am. St. Rep. 187, and note. A railroad is not required to adopt every appliance which even a majority of the well regulated roads have adopted: *Louisville etc. R. R. Co. v. Hall*, 91 Ala. 112; 24 Am. St. Rep. 863.

SCAMMELL v. CHINA MUTUAL INSURANCE COMPANY.

(164 MASSACHUSETTS, 241.)

INSURANCE.—IN ORDER TO BIND THE PARTIES by a contract of insurance, all the essential elements of the contract must ordinarily be agreed upon, but if it is at the time impossible to obtain important facts affecting the subject of their dealing, they may make a general agreement to accomplish their purpose as well as they can.

INSURANCE, CONTRACT FOR WHEN BECOMES COMPLETE.—The fact that the amount of premium is not fixed does not necessarily prove that the contract of insurance had not become operative. Therefore a memorandum stating in general terms the amount of insurance desired on chartered freight of a designated vessel, "Premium, open for particulars," marked "binding" before the signature of the parties, and "Send policy to Walker & Hughes, 63 Wall street, New York," is an obligatory policy of insurance. It is equivalent to an agreement that the insurance shall be upon a reasonable rate of premium until the assured shall have an opportunity to furnish further particulars, and that he will furnish them within a reasonable time. His failure to do so avoids the contract.

INSURANCE, FORFEITURE FOR FAILURE TO FURNISH PARTICULARS.—Where a contract is made in the absence of definite particulars, it is the duty of the assured to furnish them within a reasonable time, and a breach of this duty annuls the contract.

INSURANCE.—TESTIMONY OF EXPERTS will not be received for the purpose of affecting the interpretation which the law gives to a contract of insurance.

Action to recover three thousand dollars for the loss of freight alleged to have been insured by the defendant. The memorandum of insurance, as far as material, was as follows: "About \$3,000 insurance is wanted by Scammell Bros., for account of whom, etc., loss, if any, payable to them or order for \$ of chartered freight per Brig 'Peeress' valued at \$ amount of charter at and from Santa Fe to a port in the U. K. or on the Continent. Priv. of port of call for others. Premium, open for particulars." The word "binding" also appeared before the signature of each party, and at the bottom of the memorandum the words "Send policy to Walker & Hughes, 63 Wall street, New York." At the trial depositions of certain marine insurance brokers and underwriters were offered on the part of the plaintiff, for the purpose of showing when a contract of insurance is understood to be consummated and what is understood to be necessary to insert in such a contract to consummate it, and as to when it becomes binding, and the depositions, so far as these points were involved, were excluded from evidence, and the plaintiff excepted. The jury was directed to return a verdict for the defendant, and the case was reported to the supreme court for its determination.

C. T. Russell, Jr., for the plaintiffs.

L. S. Dabney and J. D. Bryant, for the defendants.

342 KNOWLTON, J. The memorandum relied on by the plaintiffs as a contract is in the form of an application for insurance containing a brief statement of particulars and is marked "binding." At the bottom are the words, "Send policy to Walker & Hughes, 63 Wall street, New York." On its face it purports to be a preliminary and temporary arrangement, which contemplates the making of a full and definite contract in the form of a policy covering the same subject, with additional provisions. The premium which is to be paid as the consideration for the insurance, and which is perhaps the most important of the terms of the contract, is not fixed, but is left to be agreed upon when further information is obtained. At the time of the application the only information which the parties had in regard to the freight which was the subject of the insurance was derived from a very brief telegraphic message. Several of the particulars given in the application are stated in the most general terms, and against the word "Premium" are written the words, "Open for particulars."

It is contended with much force by the defendant that the memorandum lacks the essential features of a contract in its failure to fix exactly the amount of the insurance, or to state the rate of premium, and authorities are cited which go far towards sustaining this contention: *Hartshorn v. Shoe etc. Ins. Co.*, 15 Gray, 240, 244, 247, 249; *Orient etc. Ins. Co. v. Wright*, 23 How. 401, 408, 409; *Piedmont etc. Ins. Co. v. Ewing*, 92 U. S. 377, 381; *Kimball v. Lion Ins. Co.*, 17 Fed. Rep. 625; *Hamilton v. Lycoming etc. Ins. Co.*, 5 Pa. St. 339; *Strohn v. Hartford Ins. Co.*, 37 Wis. 625, 631; 19 Am. Rep. 777.

343 In order to bind the parties by a contract of insurance, all the essential elements of the contract must be agreed upon, but in a case like this, where it is impossible at the time to obtain important facts affecting the subject of their dealings, the parties may make a general agreement to accomplish their purpose as well as they can. The memorandum, applied to the admitted facts in this case, shows plainly that the parties desired to enter into a definite contract of insurance in the form of a policy which should clearly state their rights and obligations. They had not sufficient facts in their possession to enable them to determine what would be a reasonable rate of premium, and the defendant declined to fix the premium until further information could be

obtained. The risk was to commence soon, and the plaintiffs desired to be protected from the inception of it. The defendant was willing to give them this protection on reasonable terms, and both parties doubtless expected that the additional information necessary to enable them to make the final contract for the voyage would soon be obtained. They therefore agreed that the insurance should be binding to the amount of three thousand dollars temporarily, at a rate of premium which should be fair and reasonable, until such time as the rate could be fixed and the contemplated contract entered into. Each doubtless thought the other would act reasonably by agreeing to a fair rate of premium when the time should come for making the final contract, and each was willing to trust the other to that extent. Plainly, neither of them expected this to be anything more than a temporary arrangement to meet the emergency until further particulars could be obtained. We think this was a binding contract for the purpose for which it was made. If the vessel had sailed, and had been lost at sea before the plaintiffs had a reasonable opportunity to furnish the further particulars, the defendant would have been bound to pay the insurance, and the plaintiffs would have been bound to pay a premium at a reasonable rate for the risk as it was when the contract was made. If the plaintiffs, when they received the charter party, had communicated the additional information obtained from it to the defendant, the parties would probably have agreed upon a rate of premium, and have embodied their contract as then made in a policy; but if they had then been unable to agree upon the ³⁴⁴ premium, their temporary contract would have been terminated by its own limitation, the plaintiffs would have been at liberty to seek insurance elsewhere, and would have been liable to pay the defendant at a reasonable rate for the time the insurance had continued. The legal effect of the memorandum is the same as if it stated in terms that the insurance should continue at a reasonable rate of premium until the plaintiffs had an opportunity to furnish the further particulars, that the plaintiffs would furnish them, and that both parties would then endeavor to agree upon a premium and make a contract in the form of a policy. The plaintiffs were bound by their implied agreement to furnish the particulars without unreasonable delay, and, upon their failure to do so, the preliminary contract of insurance came to an end. This is in accordance with the decision in *Baker v. Commercial etc. Assur. Co.*, 162 Mass. 358, although in that case the agents who made the agreement had their offices side by side

in the same building, and it was held, upon the conflicting testimony, that there might have been a finding either that the parol contract was for insurance to continue temporarily for a short time until one of the agents should terminate it, or that it should continue only until the expiration of a reasonable time to enable the plaintiffs to ascertain in what terms they wished to take policies in writing. It was held that there was no evidence which would warrant a finding that there was a contract of insurance for a year.

In the present case all the additional facts necessary to enable the parties to complete their contract and to put it in the form of a policy were known to the plaintiffs as soon as they received the charter party. This was sent them by the master of the vessel, and they received it about September 12, 1890. The memorandum sued on bears date July 30, 1890. The vessel did not sail on the voyage by which the freight was to be earned until September 22, 1890. The two particulars of which the parties were ignorant, which were important in determining the rate of premium to be paid, were the nature of the cargo and the port of destination. The cablegram which furnished their only information on the subject was in these words: "The vessel is fixed to load on the spot. Wood, forty francs. Queenstown, etc. for orders. U. K. or Continent." The charter party shows that the cargo was to ²⁴⁵ be Quebracho wood in logs, and contains stipulations in regard to their length and how they should be loaded. The charter party also shows that the vessel was to proceed to Queenstown, Falmouth, or Plymouth for orders, and was liable to be ordered to any port in the United Kingdom, or on the Continent between Hamburg and Havre, Rouen excepted. It also contains provisions in regard to the mode of giving the orders. There was uncontradicted testimony that this kind of wood was very heavy, and was considered an undesirable risk. There was also evidence, which was not disputed, that the language of the cablegram and of the memorandum, "on the Continent," might include St. Petersburg and ports on the North Sea, for which rates of insurance for a vessel starting at that season of the year would be very high, and that the charter party included only the usual range of ports on the Continent.

The plaintiffs' agent testified, and it was not denied, that he tried to have the defendant's agent fix the rate of premium when the application was presented, but the defendant's agent said he would rather leave it open for particulars of the cargo. There is nothing in the circumstances to show that the rate of

premium was to be kept open for any other particulars than those which were shown by the charter party, and these were in the possession of the plaintiffs at their office in St. John ten days before the vessel sailed. It was the duty of the plaintiffs to communicate these facts to the defendant at once, upon their receipt of them. Instead of doing so, they made no communication to the defendant until February 11, 1891, when they made a claim for a total loss. They broke their implied contract when they neglected to communicate these facts within a reasonable time after the receipt of the charter party. Even if they were justified in waiting for the letter from the master of the vessel, which showed the exact quantity of the cargo, they failed to furnish the particulars to the defendant within a reasonable time, for they received this letter on October 27, 1890. This was almost two months before they got information of the loss of the vessel, which came by telegraph on December 16th. The vessel was abandoned at sea by the captain and crew on November 16th.

There is no ground for the contention that the contract contemplated ³⁴⁶ a delay in fixing the premium until the voyage should be made to Queenstown, Falmouth, or Plymouth, and orders should be received there to proceed to the port of discharge. To wait for the receipt of these orders and the communication of them to the defendant in the ordinary way would be to postpone the making of the contract of insurance until after the termination of the risk.

Upon the conceded facts of the case, the plaintiffs failed to furnish the defendant within a reasonable time with the facts which were to be the foundation of the contemplated substantive contract of insurance, and the incidental and temporary arrangement made at the time of the application expired by the limitation which was one of its implied terms.

The construction which we put upon this preliminary arrangement, in regard to the undertaking of the plaintiffs to furnish additional facts without unnecessary delay, accords with the testimony of all the experts as to the usage in similar cases. This usage almost necessarily results from the fact that the essence of a contract of insurance is to provide indemnity upon the payment of an agreed sum, and not to insure for a price to be determined upon a quantum valebat after the termination of the risk.

We see no error in the exclusion of certain answers in the depositions offered by the plaintiffs. Only one or two of those answers, if received, would have had any tendency to show that

the contract made in this case was to continue after the time when the plaintiffs should have furnished additional particulars to the defendant, and these were statements of the understanding of insurers which were not competent to affect the interpretation which the law gives to such a contract: *Odiorne v. New England Ins. Co.*, 101 Mass. 551, 553; 3 Am. Rep. 410; *Haskins v. Warren*, 115 Mass. 514, 535, 536.

A majority of the court are of the opinion that there should be judgment on the verdict.

INSURANCE—CONTRACT OF, WHEN COMPLETE.—To establish an executory contract of insurance it must appear that a contract to insure has been entered into, and everything essential to complete the contract has been done: Note to *Long v. North British etc. Ins. Co.*, 21 Am. St. Rep. 883.

HARDEN v. MILWAUKEE MECHANICS' INSURANCE CO.

[164 MASSACHUSETTS, 382.]

INSURANCE—"FORTHWITH" STATEMENT OF LOSS, WHEN RENDERED.—Whether a statement of loss is rendered "forthwith" depends on all the circumstances, and is a question of fact for the jury. A failure to render such statement until about two months after the loss occurred is not necessarily a failure to render it "forthwith" within the meaning of the policy, if the delay is accounted for by the ill-health of the assured, the confusion attending the fire, and other obstructions encountered by him.

INSURANCE—PROOFS OF LOSS.—THE DELIVERY OF PROOFS TO A LOCAL AGENT constitutes a delivery to the company, if the commission of such agent gives him "full power to receive proposals for insurance against loss or damage by fire, to receive moneys and countersign, issue, renew, and consent to the transfer of policies, subject to the rules and regulations of the company, and to such other instructions as may, from time to time, be given by its officers." Especially is this true if the agent had apparent authority by custom to receive such proofs.

INSURANCE—PROOFS OF LOSS.—APPARENT AUTHORITY on the part of local agents to receive proofs of loss is implied from a custom among insurance corporations to prepare proofs of loss and send them to the officers.

Action upon a policy of insurance against loss by fire. Verdict for the plaintiff and the defendant excepted.

H. F. Hurlburt and E. T. McCarthy, for the defendant.

W. H. Niles, for the plaintiff.

383 **MORTON, J.** The policy in this case provided that, "in case of any loss or damage under this policy, a statement in writing, signed and sworn to by the insured, shall be forthwith ren-

dered to the company, setting forth the value of the property insured," etc. The fire occurred on the 26th of November, 1889. The first statement under the above provision was rendered in the latter part of January, 1890. It is contended that it was not rendered "forthwith." But we think that it was rightly left to the jury, with instructions to which we see no objection, to say whether under all the circumstances that was or was not done.

The property described in the policy was situated in Lynn, and was destroyed in a great fire which occurred on the date above stated. The fire was so extensive that it fairly may be presumed to have caused confusion, not only in the affairs of the plaintiff, but in those of the entire community. In such a state ³⁸⁴ of things delay would naturally arise in relation to matters affecting insurance losses, and would make it impossible to render a statement forthwith in the sense of at once. Besides these considerations, there was testimony tending to show, amongst other things, that the plaintiff, by reason of impaired health, was unable to enter upon an examination of his affairs for upwards of three weeks; that he could not get at his books for a week; that he had to take an account of stock for three years, and it took two weeks to get at the footings; that it was customary to wait for the committee of adjusters to finish their work; and that after the proofs of loss were prepared they had to be or were printed, and he then swore to them and gave them to the broker through whom the insurance was effected, who testified that he gave them when ready to Pitman and Breed, the defendant's local agents.

Whether the statement was "forthwith rendered" depended on whether, taking all of these circumstances and considerations into account, the plaintiff used due and reasonable diligence. If he did, then it was "forthwith rendered," within the fair meaning of the policy; and whether he did or did not was a question of fact for the jury: *Carpenter v. German American Ins. Co.*, 135 N. Y. 298, 302; *Home Ins. Co. v. Davis*, 98 Pa. St. 280; *Edwards v. Baltimore Ins. Co.*, 3 Gill, 176; *Donahue v. Windsor County Ins. Co.*, 56 Vt. 374. We think that there was testimony which justified the jury in finding, as they must have found, that the statement was "forthwith rendered."

Certain evidence was admitted, subject to the defendant's exception, on the question of the plaintiff's diligence in rendering the statement. Subsequently the defendant, reserving its rights only as to certain rulings which it had requested and which

the court had refused, agreed that, if the first proof of loss was delivered to Breed with a promise on his part that he would forward it, the jury might find for the plaintiff. Since the jury returned a verdict for the plaintiff, they must have found that the first proof of loss was delivered to Breed with a promise by him to forward it; and we think that the effect of this agreement and of the finding was to render immaterial the exceptions which had been taken regarding the admissibility of the evidence. It would seem as though counsel for the defendant did ³⁸⁵ not care to argue that, under the circumstances, due diligence had not been used by the plaintiff in rendering the statement, if one was rendered the last of January, but preferred to rest on the contention that the first proof was not delivered to Breed at all.

The remaining question is whether the delivery of the statement or proof of loss in the latter part of January, 1890, to Pitman and Breed constituted a delivery to the company. Under the instructions, it is possible that, notwithstanding the testimony of Walton, the jury may have found that the proof was not only received by Breed, but was forwarded by him to the company and actually received by it. But the request of the defendant asked for a ruling that delivery of the proof of loss to the local agents, which was not forwarded to the defendant, was not a delivery to the defendant of the statement in writing required by the policy, unless the plaintiff showed that the local agents were authorized by the company to receive the proof. This was refused by the court, and the jury were permitted to find that a delivery to the local agents would constitute a delivery to the company; and it thus becomes necessary to consider the ruling requested by the defendant.

The commission issued to Pitman and Breed by the defendant gave them "full power to receive proposals for insurance against loss or damage by fire in Lynn and vicinity, to receive moneys and countersign, issue, renew, and consent to the transfer of policies, . . . subject to the rules and regulations of said company, and to such instructions as may from time to time be given by its officers." The policy contained no notice of this limitation of authority on the part of Pitman and Breed, and this case is thus distinguishable from many of those relied on by the defendant, some in stock companies, and some in mutual, where the policy on its face gave notice of the scope of the agent's authority. The only reference in this policy to the matter of agency is in the last line, where it is provided that

³⁸⁶ "this policy shall not be valid until countersigned by the duly authorized agent of the company at Lynn, Mass.," which, so far as it signifies anything, implies that the agent at Lynn is a general agent. At any rate, it does not notify the policy holder that he is an agent with limited powers. Neither does the policy contain any provision as to the manner in which the proofs of loss shall be delivered to the company. If, therefore, the local agents had apparent authority, by custom or otherwise, to receive the proofs of loss, we think that a delivery to them would constitute a delivery to the company, even if they had not authority, from the nature of their agency, to receive them, or if, also, in the absence of custom, a delivery to them under the circumstances would not have been a reasonable mode of sending the proofs of loss to the company, neither of which do we pass upon: See *Bishop v. Eaton*, 161 Mass. 496, 500; 42 Am. St. Rep. 437; *Wheeler v. Watertown Ins. Co.*, 131 Mass. 1; *Eastern R. R. Co. v. Relief Fire Ins. Co.*, 105 Mass. 570; *Markey v. Mutual Ben. Ins. Co.*, 103 Mass. 78, 92; *Fogg v. Griffin*, 2 Allen, 1; *Gloucester Mfg. Co. v. Howard Fire Ins. Co.*, 5 Gray, 497; 66 Am. Dec. 376; *Arff v. Star Ins. Co.*, 125 N. Y. 57; 21 Am. St. Rep. 721.

The instruction requested omitted any reference to this element of the case, but rested on the proposition that a delivery to the local agents was not effectual, unless they were actually authorized by the company to receive proofs of loss. There was testimony tending to show that it was the universal custom amongst insurance companies for local agents to prepare proofs of loss and send them to the company when it was not done by the adjusters, which was the case here. Apparent authority on the part of the local agents to receive proofs of loss would be implied from such a custom. A considerable portion of the instructions as reported seem to have been directed to the consideration of the meaning of "forthwith," and to the question whether the proof was delivered to Breed. But we think that it sufficiently appears from the charge, and from the colloquy between the court and the counsel for the defendant, that the effect of custom upon the matter of delivery was called to the attention of the jury. No exception was saved to this portion of the charge for insufficiency or otherwise, counsel for the defendant apparently being content ³⁸⁷ to rest upon the refusal of the court to give the request in the precise form in which it was made.

A majority of the court think that the exceptions should be overruled, and it is so ordered.

Exceptions overruled.

INSURANCE—PROOFS OF LOSS—FORTHWITH STATEMENT.

A condition in a fire insurance policy that notice of loss must be given "forthwith" means that it must be given without unnecessary delay or with reasonable diligence, under the circumstances of each particular case: *Central City Ins. Co. v. Oates*, 86 Ala. 558; 11 Am. St. Rep. 67, and note; *Pennypacker v. Capital Ins. Co.*, 80 Iowa, 56; 20 Am. St. Rep. 395, and note; *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278; 49 Am. Dec. 74. "Forthwith" means immediately in all insurance policies requiring the assured to give notice of loss forthwith; and notice twenty days after is not a compliance with the requirement: *Whitehurst v. North Carolina etc. Ins. Co.*, 7 Jones, 433; 78 Am. Dec. 246, and note; nor is a delay of eleven days a sufficient compliance, where no reasonable excuse is given for such delay: *Trask v. State etc. Ins. Co.*, 29 Pa. St. 198; 72 Am. Dec. 622, and note.

INSURANCE—PROOFS OF LOSS—DELIVERY OF TO AGENT.

Delivery of proofs of loss to the local agent of the insurer in the absence of any provision in the policy to the contrary is delivery to the company for all the purposes of the policy: *Insurance Co. v. Hope*, 58 Ill. 75; 11 Am. Rep. 48.

HICKS v. NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

[164 MASSACHUSETTS, 424.]

NEGLIGENCE IN CROSSING RAILWAYS—QUESTION OF FACT.

—If a person stops as he approaches a railway crossing and looks and listens for a train, but neither hears nor sees any, and knows that the crossing is equipped with electric bells to warn travelers of the approach of trains he cannot be adjudged guilty of contributory negligence as a matter of law, though it does not appear that he looked for a train afterward, and it further appears that he was driving a team, the care of which occupied his attention somewhat, and that he was struck at the crossing by a train running about forty miles an hour.

RAILWAYS—NEGLIGENCE.—THE SPEED at which a train may be run without negligence depends upon the dangers incident to the running of it. In thickly settled towns, where there are frequent grade crossings of streets at which the view of the track on each side is obstructed by houses, it is negligence to run rapidly.

RAILWAYS—NEGLIGENCE.—IF TRAINS ARE TO BE RUN WITH GREAT SPEED through the streets of a thickly settled town, and where the view of the track is obstructed by houses, proper precautions must be taken for the protection of travelers at particularly dangerous crossings.

RAILWAYS—NEGLIGENCE.—THE FAILURE OF THE ELECTRIC BELLS TO RING AT A CROSSING, when they would have rung had they been in proper condition when a train approached, is some evidence of negligence on the part of the corporation and its agents.

RAILWAYS—NEGLIGENCE.—IF A BOY TEN YEARS of age is driving a team close behind an adult, and the circumstances are such

as to warrant the inference that he was expected to be governed to some extent by the management of the team just ahead of him, and that the driver of the latter exercised due care, and the boy was a suitable person to be intrusted with the team just behind the other, the jury is justified in finding that the boy was in the exercise of such care in driving as an ordinarily careful boy of his age was accustomed to exercise under like circumstances.

JURY TRIAL.—INSTRUCTIONS AS TO PARTICULAR PHASES OF THE TESTIMONY may be denied if the judge gives full and sufficient instructions which will enable the jury to understand the law applicable to all branches of the case. He need not take up each fragment of the testimony and state the conclusions applicable to a possible finding upon each.

NEGLIGENCE—DEATH RESULTING THEREFROM.—An administrator cannot maintain an action for the death of his intestate, under the statute of Massachusetts, resulting from the negligence of the defendant or its agents, unless such negligence was gross.

APPELLATE PROCEDURE.—An exception that a declaration in an action to recover for the death of plaintiff's intestate did not show that there was any next of kin for whose benefit there might be a recovery cannot be taken for the first time on appeal.

PRACTICE.—AN ERROR IN THE ADMISSION OF EVIDENCE IS CURED by its withdrawal from the jury, if, when admitted, the court expected it to be followed up by other evidence making it competent, and, upon ascertaining that this expectation was not to be realized, informed both parties that the evidence was withdrawn from the jury, and the arguments were made with the understanding that it was not in the case.

Two actions of tort, in one of which the plaintiff sought to recover for injuries to himself and his property from a collision with the defendant's railway train, and in the other he, as administrator of his wife, sought to recover for her death resulting from the same accident. Verdicts for the plaintiff in both cases, and the defendant excepted.

F. P. Goulding and C. F. Choate, Jr., for the defendant.

W. S. B. Hopkins, W. Thayer, and H. W. Cobb, for the plaintiff.

425 KNOWLTON, J. The presiding justice could not properly direct a verdict for the defendant in either of these cases. There was evidence in favor of the plaintiff upon the question whether he was in the exercise of due care. The evidence tended to show that the crossing on which he was injured was very dangerous. As the highway and the railroad approach each other going northward toward the crossing, they run for a considerable distance almost in the same direction, and a part of the way a house and other objects make it impossible for a traveler on the highway to see a coming train. The civil engineer called by the defendant testified that at a point southerly on the highway, one hundred feet from the nearest rail as

you approach the crossing, you can see down the track to the southward five hundred feet, and that at a point fifty feet farther from the crossing, for a distance of three hundred feet, ⁴²⁶ the view of the track is obstructed by the house and a hill. The plaintiff testified that he stopped about one hundred and fifty feet from the crossing, and looked to see if a train was approaching and saw none, and listened and heard none; that he then drove on and was struck by the locomotive. It appeared that he knew that the crossing was equipped with electric bells to warn travelers of the approach of trains, and he testified that the bells were not ringing. His testimony upon the question whether he looked after starting onward was indefinite and somewhat contradictory. It appeared that, if he had continued looking, he could have seen the train before reaching the crossing. The locomotive engineer testified that the train was then running at the rate of a little more than forty miles an hour. The plaintiff and his wife, sitting on chairs, were riding in a large covered gypsy wagon with a leather top which extended forward to the front of the wagon, and which had in it large windows of clear glass in the sides, right opposite the chairs, and another window in the rear. He testified that he was driving at about four or five miles an hour. Under these circumstances it cannot be said, as matter of law, that the plaintiff was not in the exercise of due care. He was quite near the crossing when he stopped and looked and listened. His conduct after he started forward might properly be affected to some degree by the fact that the electric bells were not ringing. There was more or less difficulty in seeing from his seat in the wagon, as he drove along, whether a train was coming on his left from behind him, and the care of his horses necessarily occupied some of his attention. We think the case was properly left to the jury to determine whether he exercised such care as ordinarily persons are accustomed to exercise under like circumstances.

The speed at which a train may be run without negligence depends upon the dangers attendant upon running it. Upon a good road with proper equipments, over which there are no crossings where persons are liable to be in peril, it may safely be run very fast; but in a thickly settled town where there are frequent grade crossings of streets at which the view of the track on each side is obstructed by houses, it would be negligent to run rapidly. In view of the nature of this crossing and the ⁴²⁷ amount of travel over the highway, of which the jury could

judge somewhat from their view, we cannot say that the circumstances of the accident, the distance which the train went before it was stopped, and the testimony of the engineer, did not furnish evidence from which the jury might have found that the train was running faster than was reasonable at that place. For the same reasons, in view of the evidence indicating the rate of speed at which the defendant was accustomed to run trains there, we are unable to say that there was no evidence from which the jury might have found that it was the duty of the defendant to place a flag, gates, or other guards at the crossing: *Hubbard v. Boston etc. R. R. Co.*, 162 Mass. 132; *Eaton v. Fitchburg R. R. Co.*, 129 Mass. 364. If trains are to be run at great speed, proper precautions must be taken for the protection of travelers at peculiarly dangerous crossings of highways. With such precautions, the rapidity of passing trains will not alone constitute negligence.

It cannot be said that the failure of the electric bells to ring at the approach of the train was not evidence of negligence of the corporation. The request to rule to that effect was made in the case of the plaintiff suing personally, and in that action the defendant was liable for the negligence of its servants, to the same extent as for its own. The evidence tended to show that, if the apparatus had been kept in proper condition, the bells would have rung as the train approached. Their unexplained failure to ring was therefore some evidence of negligence on the part of the corporation or its servants: *White v. Boston etc. R. R. Co.*, 144 Mass. 404; *Mahoney v. New York etc. R. R. Co.*, 160 Mass. 573; *Hennessy v. Boston*, 161 Mass. 502.

The evidence in regard to the care of the boy of ten years of age, who was the plaintiff's grandson and was driving the pony team immediately behind the plaintiff's wagon, is very slight, but we are unable to say that there was nothing to submit to the jury on that point. It appears that he was close behind the plaintiff's wagon, and the circumstances warrant an inference that he was expected to be governed in his conduct to some extent by the management of the team just before him. If the pony had been hitched to the hind part of the plaintiff's wagon, it would not be contended that the boy was to be judged as if he had been driving with no other team in his company. There was evidence that the pony team stopped when the plaintiff stopped. If the jury found that the plaintiff was in the exercise of due care in his management of the team which he was driving, and that the boy ten years old was a suitable person to

be intrusted with the pony team just behind the other, as we think they might, we are of opinion that they might also find that the boy exercised such care in driving as ordinarily careful boys of his age are accustomed to exercise under like circumstances.

All the rest of the defendant's requests for instructions which were refused by the court, so far as they were correct in law, called for specific directions in regard to possible findings from particular parts of the testimony upon a single issue. It is largely a matter of discretion for the presiding judge as to how far he will discuss different phases of the testimony upon a particular subject and give specific instructions, each founded upon only a part of the testimony bearing upon the subject. If he gives full and sufficient instructions, which enable the jury to understand the law applicable to all branches of the case, it is not a ground of objection that he declines to take each fragment of the testimony and to state a conclusion of law applicable to a possible finding founded upon it: *McDonough v. Miller*, 114 Mass. 94; *Tatterson v. Suffolk Mfg. Co.*, 106 Mass. 56; *Gunnison v. Langley*, 3 Allen, 337; *Murray v. Knight*, 156 Mass. 518; *Neff v. Wellesley*, 148 Mass. 487. In this case the instructions upon these subjects were full and clear, and the defendant has no reason to complain of them.

In the action by Hicks as administrator the defendant requested the court to instruct the jury as follows: "There is no allegation in the first count on which a verdict can be rendered for the plaintiff. The count does not allege any carelessness or negligence of the corporation, nor any unfitness or gross carelessness of its servants or agents." The stenographer's report of the charge upon this part of the case leaves us in doubt as to what was said by the judge in regard to it. The exceptions ⁴²⁹ were allowed by another justice after the death of the judge who presided at the trial, and if the report of the charge was imperfect, there was apparently no correction of it. This instruction could not properly be given, for the count charges negligence of the corporation in failing to furnish proper signals or bells at the crossing, and in failing to protect the crossing by proper guards or a flagman. In reference to the other negligence alleged in it, the count was defective in failing to charge that there was unfitness or gross carelessness of the servants or agents of the corporation. We have a report of the whole charge upon the question of liability, and as we understand it, the judge submitted both actions to the jury under the same rules in regard to the liability

of the defendant for the carelessness of its servants. They were permitted in this action, as well as in the other, to find for the plaintiff upon the first count, if there was negligence of the defendant's servants, without proof that the negligence was gross. This was error: Pub. Stats., c. 112, sec. 212. The defendant excepted to this part of the charge, and its exception must be sustained.

It is contended that the declaration in this action is defective in not alleging that the plaintiff's wife left next of kin for whose benefit there might be recovery under the statute: See Commonwealth v. Eastern R. R. Co., 5 Gray, 473. But this exception is not open to the defendant in this court, inasmuch as it was not taken in the court below.

It is also contended that this action must be treated as not brought under the statute, but at the common law, inasmuch as neither count of the declaration contains allegations which ought to be found in an action under the statute. But the common law recognizes no right of action in a case of this kind, and, although the counts are imperfect, we think the action must be deemed to have been brought under the statute.

We are of opinion that the withdrawal from the jury of the evidence of the action of the selectmen in writing a letter to the defendant about seven months before the accident, requesting it to maintain a flagman and lights at the crossing, leaves the defendant without a legal ground of objection to the admission of it. It appears from the charge that at the time of its admission the court expected that it would be followed by other ⁴³⁰evidence which was not subsequently offered, and both parties were informed that it was withdrawn from the jury, and they made their arguments with the understanding that it was not in the case. We do not see that it was so prejudicial to the defendant in its effect as to require us to grant a new trial.

If there was error in the original instructions in regard to gross negligence, the error was corrected, and the jury were properly instructed soon afterwards. In the first case, the exceptions must be overruled, and in the second case, they must be sustained.

So ordered.

RAILROADS—NEGLIGENCE AT CROSSINGS—RATE OF SPEED.—In the absence of statutory regulations as to the rate of speed of trains, greater caution is required of a railroad company in running its trains in the country while passing places where it is known that persons are in the habit of crossing the track, than is required

while running in unfrequented and scantily populated sections: *Schexnadrye v. Texas etc. Ry. Co.*, 46 La. Ann. 248; ante, p. 321, and note. Greater care is required of a railroad company than is otherwise necessary in running its trains in a populous town, and especially when it is running out of time or at an unusual hour: *Troy v. Cape Fear etc. R. R. Co.*, 99 N. C. 298; 6 Am. St. Rep. 521, and note.

RAILROADS—CONTRIBUTORY NEGLIGENCE OF PERSONS AT CROSSINGS.—Persons whose business takes them across a railroad track, must, before attempting to cross, exercise prudence and care and look and listen for approaching trains. If they do this, it is not negligence on their part to go upon the track when no approaching train is in sight: *Schexnadrye v. Texas etc. Ry. Co.*, 46 La. Ann. 248; ante, p. 321, and note. A person approaching a railroad crossing has a right to assume that the company acts with proper care, and that all reasonable and necessary signals of approach will be given by those in charge of the train; but such person must make vigilant use of his senses to ascertain if there is danger in crossing, and if he neither sees nor hears any indications of a moving train, he cannot be charged with negligence in assuming that there is none near enough to make the crossing dangerous: *Atchison etc. R. R. Co. v. Hague*, 54 Kan. 284; 45 Am. St. Rep. 278, and note.

APPEAL—STRIKING OUT INADMISSIBLE EVIDENCE—EFFECT OF.—If a court instructs a jury to disregard evidence which had been received against objection and exception, the exception is thereby vitiated, and the error in admitting the evidence is no longer available on appeal: *Alabama etc. R. R. Co. v. Frazier*, 93 Ala. 45; 30 Am. St. Rep. 28.

INSTRUCTIONS—WHEN MAY BE REFUSED.—It is not error for the court to refuse to give an instruction fully covered in the general charge: *Gibson v. Minneapolis etc. Ry. Co.*, 55 Minn. 177; 43 Am. St. Rep. 432, and note; *Riepe v. Elting*, 80 Iowa, 82; 48 Am. St. Rep. 356.

GRIFFIN v. UNITED ELECTRIC LIGHT COMPANY.

[164 MASSACHUSETTS, 492.]

NEGLIGENCE.—ONE TOUCHING AN ELECTRIC WIRE where the insulating material is worn off cannot be adjudged guilty of negligence as a matter of law, where it appears that he did not know that the wire was damaged nor that it was an electric wire.

NEGLIGENCE IN THE MAINTENANCE OF AN ELECTRIC WIRE MAY BE INFERRED by the jury from the fact that its insulation was gone, and that it had been in this condition so long that the defendant ought to have known of it.

AN ELECTRIC CORPORATION OWES TO EVERY PERSON who lawfully comes for a business purpose upon premises on which it maintains a dangerous electric wire the duty of exercising reasonable diligence in seeing that the wire is kept in a state of repair.

J. B. Carroll, for the plaintiff.

W. H. Brooks and W. Hamilton, for the defendant.

492 **LATHROP, J.** This is an action of tort for personal injuries sustained by the plaintiff by receiving an electrical shock from a wire of the defendant company. The plaintiff was a

tinsmith, and was at work with a fellow-servant placing a galvanized iron conductor on the rear of a building called the American House. He was upon the ground, and his fellow-servant was on a ladder ⁴⁹³ near the roof of the building, which was about twenty-two feet from the ground. The wire from which the plaintiff received the shock ran along the wall of another building until it reached a point about two feet from a corner formed by this building with the American House, and then ran diagonally across the corner to the wall of the American House at a point eight or ten feet from the same corner, where it entered a square iron block attached to the wall of the American House. This wire was about twelve feet from the ground. Six or eight inches higher than this wire, and about eight inches nearer to the building, another wire ran along and went into the same box. The conductor was to be placed in the corner formed by the two buildings for the purpose of carrying off water from a gutter under the eaves of the American House.

We are of opinion that there was evidence for the jury that the plaintiff was in the exercise of due care. The jury might well have found, on the evidence, that the injury was caused by the pipe coming in contact with a place on the wire where the insulating material had become worn off. It cannot be said, as matter of law, that this condition was so apparent to the plaintiff that he must have seen it, or ought to have seen it, although the accident happened in the forenoon. While an expert may consider it dangerous to touch any wire, unless he knows it to be a harmless one, there was evidence that the plaintiff was not an expert, and did not know that an electric light wire would do any hurt, or that electric light wires ran on the sides of buildings. The question of his due care was for the jury: *Illingsworth v. Boston Electric Light Co.*, 161 Mass. 583, 588.

We are of opinion, also, that there was evidence of the defendant's negligence proper to be considered by the jury. There was certainly evidence that the insulation of the wire was gone, and its condition was such that the jury might have found, from the description given of it by the witnesses, that it had been in that condition for such a length of time that the defendant ought to have known of it. The plaintiff was not a trespasser or a mere licensee, who must take the premises of another as he finds them. He was rightfully on the premises for purposes of business. On these premises the defendant had rightly placed, as the case finds, two electric wires. These were ⁴⁹⁴ a source of danger unless properly insulated. This fact was recognized by the defendant

by insulating them. But it was negligent if it failed to use reasonable diligence in seeing that its wires were kept in a state of repair. This duty it owed at least to every person who, for purposes of business, was rightfully upon the premises. What its duty was in this respect as to other persons we have no occasion to inquire: See *Illingsworth v. Boston Electric Light Co.*, 161 Mass. 583.

The ruling of the justice of the superior court in favor of the defendant is stated, in the report upon which the case comes before us, to be based upon the case of *Hector v. Boston Electric Light Co.*, 161 Mass. 558. But that case differs essentially from the one before us. There a lineman of a telegraph and telephone company was sent to attach a wire to a standard owned by the defendant on the roof of a building numbered 45 Temple Place in Boston. Instead of entering this building and going out upon the roof, he went up through the building numbered 29 Temple Place, passed over the roofs of several intervening buildings until he came to the roof of No. 41, which was next to, but higher than, the roof of No. 45. A bunch of wires ran from the standard of No. 45 over a small portion of the roof of No. 41. The plaintiff stooped under these wires to see how he could get on to the roof of No. 45, and was injured by reason of the insulation being worn off from one of these wires. The case was decided in favor of the defendant, upon the ground that the defendant owed no duty to the plaintiff to maintain an effectual insulation of its wires over other buildings than that on which its standard was placed, which was the only place to which the telegraph and telephone company sent the plaintiff, or where he had a right to be. In the case at bar, the plaintiff was rightfully where he was when injured. The question of the defendant's negligence was for the jury.

By the terms of the report, the order must be, case to stand for trial.

NEGLIGENCE—DUTY OF PERSONS MAINTAINING ELECTRIC WIRES.—A company or person using wires to convey electricity is required to use very great care to prevent injury to persons or property: *Giraudi v. Electric Imp. Co.*, 107 Cal. 120; 48 Am. St. Rep. 114, and note.

NEGLIGENCE, CONTRIBUTORY—INJURY FROM ELECTRIC WIRES.—One who has no knowledge of the fact that an electric wire being wet destroys the insulation for the time, is not guilty of contributory negligence in grasping such wire with his hands when he comes in contact with it: *Giraudi v. Electric Imp. Co.*, 107 Cal. 120; 48 Am. St. Rep. 114.

LINCOLN v. GAY

[184 MASSACHUSETTS, 587.]

BAILMENT.—A DRESSMAKER, BEING A BAILEE FOR HIRE, IS HELD TO THAT DEGREE OF SKILL AND CARE which will enable her to do her work in a reasonable and proper manner. Her understanding that it was proper to make a dress up wrong side out cannot relieve her from liability for doing so, if, in the exercise of a proper degree of skill and care, the dress ought not to have been made up in that way.

ESTOPPEL.—One who tries on a dress made up wrong side out by the dressmaker is not estopped from recovering damages therefor by the fact that she tried it on and knew that it was being so made up, unless the misconduct or negligence of the dressmaker was induced by something that her customer said or did or omitted to say or do.

ACCEPTANCE.—A PROPOSITION MUST BE ACCEPTED before it is withdrawn or it becomes inoperative.

Action of contract to recover for injuries suffered by the plaintiff from the making up of a dress pattern on the wrong side of the cloth. The defendant, on her part, testified that the dress was made up on the wrong side of the goods in pursuance of instructions from the plaintiff, and that the plaintiff tried the dress on at different times while it was being made up; also that the plaintiff after receiving the dress came to the defendant's rooms and said that there were two mistakes; that the interlining had been omitted and that the goods had been made up wrong side out; that the defendant then said she was willing to put the interlining in, but could not see how she could be blamed for something that the plaintiff had selected herself, and that plaintiff decided, if defendant would put the interlining in and fix the collar, that she would accept the suit. The testimony upon the part of the plaintiff conflicted with that of the defendant, and was to the effect that no instructions had been given as to the mode of making up the dress, and that the whole matter had been left to the defendant, and that though the plaintiff had tried on the dress, she had made no examination nor taken any special notice of it, and that it was being made up wrong side out escaped the plaintiff's attention until the dress had been sent to her house as finished. The plaintiff also denied that she had said that under certain circumstances the dress would be satisfactory or that she would accept it. The defendant asked for the following instructions: "1. If the plaintiff delivered the dress pattern to the defendant to be made up, without instructions, and the defendant acted in good faith, understanding that the dress should be made up on

the unfinished side, and the plaintiff saw the dress, and fully understood that it was being so made up when the defendant was making it up, she would be estopped to refuse acceptance of the dress, or to refuse to pay for the labor and material put into it by the defendant; 2. If the plaintiff, after the dress was completed, agreed to accept the same upon the changes suggested, as testified to by the defendant, she cannot recover in her action." The request that these instructions be given was refused, and in place thereof the jury was instructed as follows: "Perhaps I can simply illustrate it. If any one of us should take a piece of broadcloth to our tailor and ask him to make it into a coat, and he should undertake to do so and nothing more was said about it, the law would carry on with the contract which we made the stipulation that he should make it into a coat, using due and proper care and skill and proper workmanship, and that would involve putting the cloth in right side out. It is the claim on the part of the defendant that, while this suit was being made, the plaintiff was aware of the fact that it was being made up wrong side out. What is the significance of that fact, if it be a fact? If you should determine that, upon various occasions when it was being fitted, the way it was being worked up came to the knowledge of the plaintiff, then that is a circumstance which you should take into consideration upon the direct question whether the original agreement was that it should be made up wrong side out; and it would also be some evidence, not conclusive, that she agreed to modify the original contract and to accept the work as being made up. If the contract originally was to make it up right side out, whether by express or implied directions, it was entirely competent for the plaintiff at any time to modify that contract by agreeing with the defendant that it might be made up on the wrong side, and if you should find that, upon the several occasions when trying it on, it was called to her attention, and she knew it was being made up wrong, that would be some evidence, not conclusive, but it would be some evidence that she agreed to modify the original contract and to accept the work as being made up. But it may be evidence also upon the proposition, as claimed by the defendant, that the original agreement was that it should be made up wrong side out. Of course, you must be satisfied she knew of the fact when she was trying it on, and that it was being made up in a wrong manner. If you determine that she did not know it was being made up this way, you may take that into consideration on the question whether she modified her original contract, or whether she made the original

contract as claimed by the defendant." Verdict for the plaintiff, and the defendant excepted.

W. A. Gile and C. T. Tatman, for the defendant.

C. M. Thayer, for the plaintiff.

540 MORTON, J. If the dress was delivered to the defendant by the plaintiff without any instructions, the defendant, being a bailee for hire, was held to that degree of skill and care in the particular occupation in which she was engaged, which was that of a dressmaker, which would enable her to do the work intrusted to her in a reasonable and proper manner: *Jackson v. Adams*, 9 Mass. 484; 6 Am. Dec. 94; *Story on Bailments*, sec. 431, and cases cited. Her understanding that it was a proper way to make the dress up wrong side out would be immaterial, therefore, if, in the exercise of a proper degree of skill and care, the dress ought not to have been made up in that way.

So much of the instruction requested as related to the matter of estoppel was also clearly erroneous. It made the plaintiff's knowledge that the dress was being made up wrong side out the sole test. But in order to justify the jury in finding an estoppel, it was necessary that there should be evidence tending to show that the defendant was induced by the plaintiff's conduct to do something different from what she would otherwise have done, and that the plaintiff knew or had reasonable cause to know that the defendant would so act: *Tracy v. Lincoln*, 145 Mass. 357; *Stiff v. Ashton*, 155 Mass. 130. The instructions requested omitted this element. We doubt also whether the evidence would have warranted a finding that there was an estoppel. The jury have negatived the claim of the defendant that the plaintiff gave her instructions to make the dress up wrong side out. The defendant had begun to make the dress before the plaintiff saw the garment, and it does not appear that she was induced to make it up wrong side out in consequence of anything that the plaintiff said or did, or omitted to say or do.

The remaining instruction was also rightly refused. The defendant offered to put the interlining in, and the plaintiff thereupon said that, if she would put the interlining in and fix the collar, she would accept the suit. It does not appear that this proposition was accepted by the defendant before it was withdrawn by the plaintiff.

We discover no error in the instruction as given or in the refusal to rule as requested.

Exceptions overruled.

CONTRACTS—NECESSITY FOR ACCEPTANCE OF.—A promise, to become a binding obligation, must not only be made to, but must be expressly or impliedly accepted by, the party for whose benefit it was meant: *Strasburg R. R. Co. v. Echternacht*, 21 Pa. St. 220; 60 Am. Dec. 49; *Chadwick v. Knox*, 31 N. H. 226; 64 Am. Dec. 329. A party must assent to a proposed contract at the time if he wishes to bind the other party: *Johnston v. Fessler*, 7 Watts, 48; 32 Am. Dec. 738. See, also, the extended note to *Maclay v. Harvey*, 32 Am. Rep. 52.

BAILEMENT FOR HIRE—CARE REQUIRED OF BAILEE.—When one delivers logs at a custom sawmill to be sawed at an agreed price, the owner of the mill must exercise ordinary care in keeping and manufacturing the logs: *Gleason v. Beers*, 59 Vt. 581; 59 Am. Rep. 757. The same rule applies to a cotton-ginner: *Kelton v. Taylor*, 11 Lea, 284; 47 Am. Rep. 284. Public millers are held to a very great degree of care and diligence in safely preserving materials delivered to them to be ground: *Wallace v. Canaday*, 4 Sneed, 364; 70 Am. Dec. 250.

O'CONNOR v. RICH.

[164 MASSACHUSETTS, 560.]

MASTER AND SERVANT.—THE RISK OF AN ACCIDENT FROM THE PREVIOUS NEGLIGENCE OF SERVANTS in their own field is one of the necessary risks which an employee assumes on entering service. If, therefore, when one enters upon a contract of service, an employee has already been guilty of negligence which afterward results in injury to one who must have been regarded as a fellow-servant had he been in the employment when the negligence occurred, he cannot recover of the master therefor.

Tort to recover for personal injuries sustained by the plaintiff in the employment of the defendant. The trial judge instructed the jury to return a verdict for the defendant.

E. Higginson and J. W. Cummings, for the plaintiff.

J. F. Jackson, for the defendant.

See KNOWLTON, J. The plaintiff fell and was injured by reason of the breaking of a plank in a temporary staging on which he was working in the defendant's building. It is not disputed that the staging was of a kind the construction of which is ordinarily left to the servants of the builder, and that the duty of the master concerning it was performed if he furnished a sufficient supply of suitable materials from which to construct it. In this case there was uncontradicted evidence that there were plenty of planks furnished by the defendant from which to build the staging, and the negligence, if there was any, was on the part of the workmen who put the planks in place in taking one which was not adapted to such a use. Upon these facts, if the plaintiff had been in the defendant's service at the

time when the staging was built, it would be very clear that he could not maintain his claim: *Kennedy v. Spring*, 160 Mass. 203.

But it appears that, although he had previously worked for a considerable time upon the building, he was away working for ~~561~~ another person four days before the day of the accident, and this staging was erected a day or two before his last engagement in the defendant's service began. Under these circumstances, the question is whether the defendant is liable to him for the previous negligence of a servant in doing work which may properly be intrusted to servants. We are of opinion that an employer, under such circumstances, owes one who is about to enter his service no duty to inspect all the work which has been done by his servants previously, and which ordinarily may be intrusted to them without liability to their fellow-servants for their negligence. If he owes no such duty, the risk of accident from previous negligence of servants in their own field is one of the ordinary risks of the business which the employee assumes by virtue of his contract on entering the service: See *Moynihan v. Hills Co.*, 146 Mass. 586, 591; 4 Am. St. Rep. 348. This point was expressly decided in *Killea v. Faxon*, 125 Mass. 485, a case very similar to this in its facts: See *Wilson v. Merry*, L. R. 1 H. L. S. 326.

Exceptions overruled.

MASTER AND SERVANT—NEGLIGENCE OF FELLOW-SERVANT—ASSUMPTION OF RISK.—A servant assumes all open and palpable risk of accident in the common course of the business, including the negligence of fellow-servants: *Ell v. Northern Pac. R. R. Co.*, 1 N. Dak. 336; 26 Am. St. Rep. 621; *Western Stone Co. v. Whalen*, 151 Ill. 472; 42 Am. St. Rep. 244, and note; *Daniel v. Chesapeake etc. Ry. Co.*, 36 W. Va. 397; 32 Am. St. Rep. 870. See, also, the note to *Wilson v. Dunreath etc. Quarry Co.*, 14 Am. St. Rep. 307.

NOYES v. INSTITUTION FOR SAVINGS IN NEWBURYPORT.

[164 MASSACHUSETTS, 583.]

TRUSTS.—A DEPOSIT of moneys in the bank by A, and the taking of a pass-book headed "A & B, payable to either or survivor," does not give B any title to such moneys, though A has died, if the book was never in the possession of B and she had no knowledge of the deposit until after the death of A.

Action to recover moneys on deposit. Mary L. Hewett intervened, claiming the moneys because the account-book had been headed in the manner stated in the opinion. Judgment for the plaintiff, and the intervenor excepted.

H. P. Moulton, for the claimant.

A. Noyes, for the plaintiffs.

⁵⁸³ **KNOWLTON, J.** The plaintiffs' testatrix, Annie M. Pike, deposited in the defendant savings bank the money for which this suit is brought, and kept in her possession during her life the deposit-book, which was found by the plaintiffs among her effects after her death. The account in the book was headed, "Annie M. Pike and Mary L. Hewett, Newburyport, payable to either or survivor." It appears that the book was never in the possession of the claimant, and that she had no knowledge of the deposit until after the death of the testatrix. Upon these facts, it was rightly held that the deposit remains the property of the original depositor, and that the plaintiffs are entitled to recover. This is settled by a series of decisions in this commonwealth, ⁵⁸⁴ as well as elsewhere: *Brabrook v. Boston etc. Sav. Bank*, 104 Mass. 228; 6 Am. Rep. 222; *Ide v. Pierce*, 134 Mass. 260; *Sherman v. New Bedford etc. Sav. Bank*, 138 Mass. 581, 582; *Nutt v. Morse*, 142 Mass. 1; *Parkman v. Suffolk Sav. Bank*, 151 Mass. 218; *Booth v. Bristol County Sav. Bank*, 162 Mass. 455, 457.

Judgment on the finding.

GIFTS—SAVINGS BANK DEPOSIT—RETAINING PASS-BOOK. Under what circumstances a deposit of money in a savings bank by the donor, he retaining the pass-book, will or will not be considered a gift or a deposit in trust for the donee: See *Martin v. Funk*, 75 N. Y. 134; 81 Am. Rep. 446, and extended note; *Pope v. Burlington Sav. Bank*, 56 Vt. 284; 46 Am. Rep. 781, and extended note; *Robinson v. Ring*, 72 Me. 140; 39 Am. Rep. 308, and note, and also the extended notes to the following cases: *Crook v. First Nat. Bank*, 35 Am. St. Rep. 26; *Sheedy v. Roach*, 26 Am. Rep. 684, and *Ray v. Simmons*, 23 Am. Rep. 451.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

**JORDAN v. CHICAGO, ST. PAUL, MINNEAPOLIS AND
OMAHA RAILWAY COMPANY.**

[58 MINNESOTA, 8.]

RAILROADS—YARD EMPLOYEES, DUTY OF TO LOOK AND LISTEN.—The rule that one who attempts to cross or who places himself upon a railroad track without looking and listening when, by so doing, he might discover the danger from an approaching train, is guilty of negligence per se, is not to be applied to one who is employed in a railroad yard, and whose duties frequently make it necessary for him to go upon the tracks. His failure to look and listen may be negligence or not according to the circumstances, of which the jury are to judge.

RAILROADS—LICENSE TO USE TRACK.—A custom among the employees in the yard of one railroad company to go upon the track of another company in the same yard when performing their duties creates a license from the latter company to thus use its tracks.

Action to recover for personal injury caused by negligence. John Jordan was a yard switchman employed by, and in making up trains in the yard of, the Wisconsin Central Railroad Company. The defendant company had a parallel track in the same yard, the tracks being about eight feet apart. Jordan stepped upon the track of the defendant company to give signals in making up a train and was struck from behind by the tender of one of defendant's engines backing along the parallel track at unusual speed without ringing a bell or other warning. The injury thus received resulted in his death, and his administrator brought this action. The action was dismissed after plaintiff's evidence had been put in, on the ground that he had failed to show actionable negligence against defendant, and that the de-

ceased had been guilty of contributory negligence. A new trial was granted, on the ground that the question of negligence should have been submitted to the jury. From the order granting a new trial the defendant appealed.

S. L. Perrin, for the appellant.

Stevens, O'Brien, Cole & Albrecht, for the respondent.

* GILFILLAN, C. J. The evidence in the case was such as to make the question of the defendant's negligence one for the jury.

The question of the evidence as to contributory negligence on the part of deceased is not so easily determined, but the majority of the court are of opinion that, upon the evidence, that question was also one for the jury.

It is well settled that, ordinarily, one who attempts to cross or who places himself upon a railway track without looking and listening, when, by so doing, he may discover the danger from an approaching train, is guilty of negligence. The rule has been most frequently applied to the case of persons traveling on a highway at a railroad crossing. The majority of the court are of opinion, in which I do not concur, that this rule is not to be applied to the case of one who is employed in a railroad yard, and whose duties frequently make ¹⁰ it necessary for him to go upon the tracks, and the exigencies of whose duties may call upon him to do so without premeditation or time or opportunity to ascertain if it is dangerous to do so; that the act of such a person in placing himself upon the track, in the discharge of his duty, without looking or listening, is not per se negligence, but may be negligence or not, according to other circumstances in the case, of which the jury are to judge.

The majority of the court are also of opinion that from the evidence the jury might find a license by defendant, to the yard employees of the company for which deceased worked, to go upon its (defendant's) track in the yard, when necessary in the discharge of their duties; i. e. when necessary to signal an engine that cars were coupled, and ready to be moved.

Order affirmed.

Buck, J., did not sit.

RAILROADS—EMPLOYEE ON TRACK—DUTY TO LOOK AND LISTEN.—The case of *McMarshall v. Chicago etc. Ry. Co.*, 80 Iowa, 757, 20 Am. St. Rep. 445, will be found to be almost identical with the principal case. There it was held that where, in an action to recover for injuries to an employee of one railroad company from being struck

by the engine of another, it is shown that the tracks of the two companies were very close to each other; that such employee and the other employees of his company were accustomed to step upon the track of the defendant company to make signals which were necessary to the protection of both companies; that the custom was acquiesced in and not objected to by the defendant company; and that such employee had stepped upon its track for the purpose of signaling at the time of the accident—he was not a trespasser so as to preclude him from recovering, nor did the rule that a person on the track is required to “look and listen” apply in such a case.

DOWNS v. FINNEGAN.

[58 MINNESOTA, 113.]

ASSUMPSIT.—A MERE NAKED TRESPASS, although creating a liability for damages cannot be the basis of an implied assumpsit. Assumpsit does not lie to recover damages for the tort, but to recover the value of that which the wrongdoer has appropriated to his own use, the law implying a promise to pay its reasonable value.

ASSUMPSIT—WAIVER OF TORT TO SUE IN.—The right to waive a tort and sue on an implied assumpsit extends to cases where there has been a wrongful conversion of the property of one person to the use of another, whether sold by the latter or not, and also to cases where a trespasser has severed trees from land in possession of the owner, or has quarried stone thereon, and has afterward taken the trees or stone, converting such property to his own use, so that trover or replevin might be maintained.

ASSUMPSIT AGAINST TRESPASSER—ADVERSE POSSESSION.—If the occupancy of a trespasser, who severs trees or stone from the land of another and converts the property taken to his own use, is such as to create an adverse possession, assumpsit does not lie for the value of such property.

ASSUMPSIT—WAIVER OF TORT TO SUE IN—COUNTERCLAIM.—If a party may sue in tort or in assumpsit, and he elects to waive the tort and sue in assumpsit, his demand may be counter-claimed against a plaintiff's cause of action arising on another contract, or, if itself set up by a plaintiff as arising on contract, it may be opposed by a counterclaim arising out of another contract.

PLEADING—VARIANCE.—If a pleading avers that a party removed certain personal property from the land of another under a license, while the proof shows that he was a mere trespasser, there is a material variance between the pleading and proof.

PLEADING—VARIANCE—WAIVER.—A variance between the pleading and proof is waived by a failure to object to the evidence on that ground.

S. Ladd, for the appellant.

Savage & Purdy, for the respondent.

116 COLLINS, J. The complaint herein was in assumpsit to recover the value of materials furnished and labor and services rendered and performed by plaintiff for defendant. The answer, after putting in issue the value of the materials, labor, and

services, set forth, by way of counterclaim, that defendant was the owner of certain described real property; that, between specified dates, plaintiff bought and received from him, and excavated, quarried, and removed from said premises, a specified quantity of stone, of an alleged value largely in excess of the amount demanded in the complaint. The reply put in issue the averments as to the counterclaim, and thus denied among other things that defendant was the owner of the real estate described in his answer. At the close of defendant's proofs in respect to his counterclaim, the jury were instructed to disregard it, and to return a verdict for plaintiff as demanded in the complaint, which was done. The cause comes before us on a bill of exceptions, an appeal having been taken from an order granting defendant's motion for a new trial.

It appeared from the testimony produced in support of the counterclaim that defendant had the paper title to the land described in his answer; that plaintiff had entered upon it, quarried and removed a large quantity of stone, selling a part and using the balance ¹¹⁷ himself. The defendant made no effort to show an express contract under which plaintiff went upon the land, or quarried or removed the stone. He sought to maintain his counterclaim by waiving the tort, and by relying upon an implied contract, and no objection to this seems to have been made until defendant rested. But we do not think that from the evidence it clearly appeared, before defendant rested his case, that he intended to rely wholly upon a tort and his waiver of it. This being so, plaintiff's counsel did not lose or waive their right to object when defendant rested; and in this respect the case differed from *Brady v. Brennan*, 25 Minn. 210, and *Warner v. Foote*, 40 Minn. 176.

It is defendant's position that assumpsit will lie for the value of property severed by another person from his realty, and then taken away from the freehold by the latter; that the owner of property thus tortiously converted may waive the tort, and elect to sue upon an implied agreement on the part of the wrongdoer to pay what the property is reasonably worth. The action then becomes as upon contract, and is brought within the terms of the statute concerning counterclaims. But, conceding this to be true in a general sense, it does not follow that such a rule is applicable in all cases. The defendant here, when pleading his counterclaim, had alleged ownership of the land on which the trespass was said to have been committed, and this allegation of ownership had been controverted and put in issue by the

reply. Under the allegations of the reply, the plaintiff could show that he, and not defendant, owned the land, so that the case was essentially different from one in which there was no question as to which was the owner of the real property involved. The settled principle is that title to land cannot be tried *ex directo* in transitory actions. *Washburn v. Cutter*, 17 Minn. 361, which was an action in replevin to recover logs which had been severed from the freehold and taken away, is an authority upon this point: See, also, *Nash v. Sullivan*, 32 Minn. 189. So that, in order to maintain *assumpsit* for the value of the stone excavated from the soil and converted by plaintiff, the defendant must have had the actual or constructive possession of the land, in addition to his paper title. If the series of acts in which the excavating and severing of the stone from the soil, the taking away from the freehold, and the conversion have occurred, ¹¹⁸ were sufficient to create an adverse possession in plaintiff, *assumpsit* for their value could not be maintained, for that would directly involve the trial of title to the land, and hence the counterclaim could not stand. Conceding, therefore, that if defendant was in actual or constructive possession of the land, he could waive the tort and recover on his counterclaim upon the implied promise, the inquiry is as to what was disclosed upon the trial in respect to plaintiff's possession. It was simply shown that for five or six years, commencing in 1886, plaintiff had worked the quarry and taken out stone. Nothing further than this was shown. The character of the land, or to what extent it was occupied by plaintiff when taking out the stone, or for what part of each year, or what visible signs there were of his occupancy, was not made to appear. Giving this evidence its full effect, it is apparent that it was not such as to require a verdict that plaintiff was in adverse possession as against defendant. It follows that the court below ruled correctly when granting defendant's motion for a new trial, if his position as to the availability of the counterclaim is sustainable.

There seems to be no difference of opinion upon the proposition that a mere naked trespass, although creating a liability for damages, cannot be the basis of an implied *assumpsit*. Its basis is the benefit which the wrongdoer has received. Therefore, the action of *assumpsit* is not to recover damages for the tort, but to recover the value of that which the wrongdoer has appropriated to his own use, the law implying a promise to pay its reasonable value. And formerly it was universally held—and is still held in many jurisdictions—that the right to waive a tort and to sue on

an implied assumpsit must be limited to cases where goods and chattels have been wrongfully taken and sold by the wrongdoer. The owner might then disaffirm the act, and, treating him as a wrongdoer, sue in trespass, or he might affirm the act, and, treating the wrongdoer as an agent, claim the benefit of the transaction. When we go beyond this proposition, there is a square conflict of opinion, as is stated in an article from the pen of Judge Cooley: 3 Alb. L. J. 141. But certain it is that the rule has been extended to cases where there has been a wrongful conversion of property of one person to the use of another, whether sold or not by the latter, and also to cases where a trespasser has severed trees from land in possession ¹¹⁹ of the owner, or has quarried stone thereon, and has afterward taken the trees or stone away, converting the same to his own use, so that trover or replevin might be maintained. That the doctrine has been greatly developed and extended in application is apparent, and that in cases where property has been severed from real estate by a wrongdoer, carried from the freehold, and converted to his own use, the rightful owner may sue and recover its value as on implied contract, is thoroughly established, although it may not be in harmony with the principles of the reformed system of pleading. No reason exists why, if permissible at all, it should not include cases arising out of trespass, to the extent that the property severed and carried away is beneficial to the trespasser, except where it would involve a trial of title to real estate.

It being established that an injured party may elect between the two forms of remedial proceedings—may sue in tort for the wrong done him, or in assumpsit as upon an implied contract—it follows that by waiving the tort the demand may be counterclaimed against a plaintiff's cause of action arising on another contract, or, where itself set up by a plaintiff as arising on contract, it may be opposed by a counterclaim arising out of another contract: Pomeroy's Remedies and Remedial Rights, sec. 801; 22 Am. & Eng. Ency. of Law, 389, and cases cited in notes.

As has been stated, the answer averred that plaintiff had been licensed to quarry and remove the stone, while from the proof it is apparent that he was simply a trespasser. In view of future proceedings, it is incumbent upon us to say that there was a material variance in proving a trespass instead of a license, but this variance was waived by plaintiff's failure to object to the evidence on that ground. The right to waive the tort and to recover as on implied assumpsit is an exception to the principles

of code pleading, and there must be no extension beyond what is allowed at common law. On this point the case is brought directly within the rule governing in *Hurley v. Lamoreaux*, 29 Minn. 138.

Order affirmed.

Buck, absent, took no part.

ASSUMPSIT—WAIVER OF TORT TO SUE IN.—The owner of personality wrongfully converted into money or its equivalent may waive the tort and sue in assumpsit; but otherwise the action of assumpsit cannot be maintained: *Kidney v. Persons*, 41 Vt. 386; 98 Am. Dec. 595, and note; *Gilmore v. Wilbur*, 12 Pick. 120; 22 Am. Dec. 410; *O'Conley v. Natchez*, 1 Smodes & M. 31; 40 Am. Dec. 87, and note. To the same effect see *Tuttle v. Campbell*, 74 Mich. 652; 16 Am. St. Rep. 652. See, also, the extended note to *Webster v. Drinkwater*, 17 Am. Dec. 242.

HALL v. MAUDLIN.

[58 MINNESOTA, 137.]

USURY—LOAN BY AGENT.—If a money lender intrusts the entire management of his business to a general agent, with unlimited authority to conduct it according to his own discretion, and with the understanding that he is to obtain compensation for his services and expenses as agent by way of commissions or bonuses from borrowers, and the agent exacts usury in making a loan by retaining a commission which, together with the interest reserved, amounts to more than the rate allowed by law, the case stands precisely as if it had been done by the principal personally, and he cannot shield himself behind the pretext that he gave the agent no authority to exact more than legal interest, and that he had no actual knowledge that he was so doing.

A. D. Polk, for the appellants.

C. G. Laybourne, for the respondent.

¹³⁸ MITCHELL, J. The defense to this action was that the note sued on was usurious, and the only question on this appeal is whether the finding to the effect that it was not is justified by the evidence.

There is practically no conflict in the evidence. The note, which was for two hundred and fifty dollars, payable in sixty days, with eight per cent interest, ¹³⁹ was given for a loan of money. The loan was obtained from plaintiff's agent, Evarts, in Minneapolis. Plaintiff lived in Chicago, and some two years previously had placed quite a large sum of money in the hands of Evarts for investment by loan. He appointed Evarts his general agent, with absolute and unlimited authority to transact all

kinds of business, according to his best judgment, as fully as he himself could have done if personally present. He took no part in the business himself, but left everything to the sole discretion of Evarts, who never consulted him, but loaned money when, to whom, and upon such terms as he saw fit, and, when it was repaid, loaned it again as he pleased. Evarts' general mode of doing business was to charge the borrowers, in addition to the interest provided for in the note, a bonus or commission, varying from five to ten per cent on the amount of the loan. The amount of this bonus or commission was not fixed with reference to any services performed, or claimed to have been performed, for the borrower, in the particular transaction, but with reference to Evarts' general expenses in running his business, such as office rent, clerk hire, and the like, so that these bonuses or commissions might pay all his expenses, and leave him "a fair amount of profit in his business." There is no evidence that plaintiff gave Evarts any express authority to charge more than the legal rate of interest, and no direct evidence that he knew that he was doing so; but it does appear that he paid Evarts nothing for his services, and that the understanding between them was that he "would get his commissions out of the charges; that whatever he realized from the business would be from commissions that people would pay him for getting the money for them." Translated into plain English, this meant that Evarts was to get his compensation from the borrowers, and was left to realize what he could out of the business in that way.

When the loan was made to the defendants, Evarts, in accordance with his usual custom, retained, out of the amount loaned, twenty-five dollars, giving the defendants only two hundred and twenty-five dollars. It is idle to claim, from the evidence, that Evarts was, in this transaction, a loan broker, or in any sense the agent of defendants. He was acting solely as the agent of plaintiff, and performed no services beyond what any lender would do in his own behalf. He did nothing that could have formed any sort of basis for any charges against a borrower, unless it was the ¹⁴⁰ trifling matter of drawing up the note for defendants to execute. It is not even pretended that the amount of twenty-five dollars was fixed with reference to any services performed for defendants, but, in accordance with the general practice above explained, with reference to Evarts' expenses in and compensation for conducting the business.

If the business had been conducted by plaintiff personally, no one would question the usurious character of the transaction.

No one would claim that, where a man is lending his own money, he can charge to the borrower, in addition to the maximum legal rate of interest, all the expenses of transacting his own business, including compensation for his own services in attending to it.

But, if he can cast all this burden upon the borrowers by merely turning over the business to a general agent, there would be very little left of the statute against usury.

The "law of usury by an agent" is not in a very satisfactory condition. It would, perhaps, have been more in harmony with the principles of the law of agency, and have more effectually prevented evasions of the usury laws, had the courts, at the start, adopted the views of Comstock, J., in his dissenting opinion in *Condit v. Baldwin*, 21 N. Y. 219, 78 Am. Dec. 137, and held that where an agent exacts more than the legal rate of interest the contract is an entirety, and if the principal adopts it he must adopt it as a whole, with all its vices; that if the agent has exceeded his authority, the principal is not bound by it, but may repudiate the whole, and recover back his money, but that the principal must either disavow the dealing or take all the consequences.

In *Acheson v. Chase*, 28 Minn. 211—followed in some later cases—this court adopted in part the doctrine of the opinion of the court in *Condit v. Baldwin*, 21 N. Y. 219, 78 Am. Dec. 137, and, in so far as we have, it must be adhered to, as having become, in effect, a law of property. But we do not propose to extend the application of the doctrine beyond what has been already decided. As was said in *Lewis v. Willoughby*, 43 Minn. 307, in order to protect honest and innocent lenders from suffering for the secret, unauthorized exactions of their agents, we have gone as far as we can go without opening the door through which anyone can evade the law merely by transacting his business through an agent.

Upon the facts, the present case is more than covered by the decisions ¹⁴¹ of this court, notably by *Avery v. Creigh*, 35 Minn. 456.

Where, as in this case, the lender intrusts the entire management of his business to a general agent, with unlimited authority to conduct it according to his own discretion, and with the understanding that he is to obtain compensation for his services and expenses as agent by way of commissions or bonuses from the borrowers, he cannot be permitted to shield himself behind the pretext that he gave the agent no authority to exact anything

in excess of the legal rate of interest, and that he had no actual knowledge that he was so doing.

Where the lender thus places his business under the exclusive and unlimited control of a general agent, if the agent exacts usury the case stands precisely as if it had been done by the principal personally; and such an agent has no right to exact from the borrower, either for alleged services or otherwise, anything which the principal might not have lawfully exacted had he transacted the business in person. Nor, upon the facts, is it true, except in name, that the plaintiff received no part of this bonus, for he had the benefit of it in defraying the expenses of conducting his own business. Our conclusion is that the findings are not supported by the evidence.

Order reversed.

THE CASE of *Horkann v. Nesbitt*, 58 Minn. 487, is similar in its facts to those in the principal case, and was decided on the authority of the principal case, and *Kemmitt v. Adamson*, 44 Minn. 121. The court said: "Lending money through agents who charge usurious and illegal interest under the guise of pretended services rendered the borrower constitutes a void transaction."

USURY—LOAN BY AGENT.—A loan negotiated by an agent for both parties, and bearing legal interest on its face, is not rendered usurious by the act of the agent in taking a commission note for his services, payable to the lender, thus raising the total interest above the legal rate, provided the lender neither authorizes nor ratifies the act of the agent: *Richards v. Purdy*, 90 Iowa, 502; 48 Am. St. Rep. 458. This subject is thoroughly discussed in the extended notes to *Bank v. Cook*, 46 Am. St. Rep. 196, and *Davis v. Garr*, 55 Am. Dec. 395.

IRWIN v. McKECHNIE.

[58 MINNESOTA, 145.]

RECEIVERS—GARNISHMENT.—A debt due from receivers of a railway company appointed by a federal court may be garnished in a state court, but no executory process can issue on the judgment rendered in the state court; that judgment can be satisfied only by an application to the court appointing the receivers for an order directing its payment in the due order of the settlement of the affairs of the railway company.

Action on a note and garnishment against the appellants as receivers of a railway company. They moved to be discharged from the garnishment on the ground that the state court had no jurisdiction over them or of the money in their hands. Their motion was denied and they appealed.

J. H. Mitchell, Jr., and T. R. Selmes, for the appellants.

A. Tighe, for the respondents.

¹⁴⁷ MITCHELL, J. The garnishees were appointed, by the United States circuit court for this district, receivers of the Northern Pacific Railway Company, and while operating its road under the authority of that court became indebted to the defendant for labor and services. The plaintiff, having a cause of action against the defendant for money due on contract, brought an action for its recovery, and sought therein to garnishee, in the hands of the receivers, the money due from them to the defendant. No question is made, nor could well be, but that, under the "removal act" of March 3, 1887, the receivers are subject to suit in respect to any transaction of theirs in operating the road; the only point made being that the money sought to be reached was in custodia legis, and hence not subject to garnishment.

No one will question the correctness of the proposition that property in the hands of receivers appointed by the court is in custodia legis, and not subject to levy or garnishment. This doctrine receives additional force in this case from the rule of judicial comity ¹⁴⁸ between state and federal courts, by which each will refuse to interfere with property in the custody of the other—a rule which we are always solicitous to observe. But in this case it will be noticed that what is sought to be reached by garnishment is the property, not of the railway company, but of the defendant, viz., a debt due him from the receivers.

Moreover, while garnishment of a debt is often called a mode of attachment, yet it does not effect a specific lien on any property of the garnishee, such as is acquired by the actual seizure of property. The effect of the judgment is merely to determine the existence and amount of the debt, and to substitute the plaintiff for the defendant as the person to whom it is payable. The judgment against the receivers would not be against them personally, but against them officially. No executory process could be issued on it, for that would interfere with the control of the property in the custody of the federal court. The manner in which the judgment so rendered shall be paid must be under the exclusive control of that court. It can only be satisfied as other demands may be satisfied, viz., by an application to the court in which the receivership proceedings are pending for an order directing its payment in the due order of the settlement of the affairs of the insolvent company by that court.

Under the "removal act," the defendant himself could have sued the receivers and recovered judgment, and we are unable to see why the plaintiff may not, through garnishee proceedings,

recover judgment against them for the same claim, or why a judgment in his favor interferes with property in the custody of the federal court, any more than would a judgment in favor of the defendant for the same claim. We understand that the order of the court appointing these receivers is even broader than the statute, and authorizes suit to be brought in any court of competent jurisdiction on claims against the company which accrued before the receivership, as well as those subsequently incurred by the receivers. We only refer to this as showing that the federal court does not consider such suits as at all interfering with its jurisdiction over the receivership or with the property in its custody. In view of the fact that the receivers of railway companies, as ancillary to winding up the insolvent estate for the benefit of creditors, are authorized to operate the ¹⁴⁹ road in lieu of the directors—sometimes for years—any other rule would work great injury, and would often leave the creditors of the employees of the receivers remediless. There is nothing in the point that the indebtedness of the receivers is only contingent. The indebtedness is absolute; the only contingency is as to their ability to pay.

Order affirmed.

Buck, J., absent, sick, took no part.

RECEIVERS—ATTACHMENT.—A fund in the hands of a receiver is not attachable, being subject to the order of the court and in the custody of the law: *Adams v. Haskell*, 6 Cal. 113; 65 Am. Dec. 491, and note. The garnishment of a receiver or other officer of a court is effective when the moneys in his hands have been distributed by the court and directed to be paid in specified sums to the several parties entitled thereto, and the garnishment is of the interest of one of the parties: *Dunsmoor v. Furstenfeldt*, 88 Cal. 522; 22 Am. St. Rep. 331, and note.

IN RE ST. PAUL GERMAN INSURANCE COMPANY.

[56 MINNESOTA, 163.]

INSURANCE—LIMITATION OF ACTION FOR LOSS.—A condition in a fire insurance policy requiring the bringing of an action for a loss within one year after such loss occurs, is waived if the insurer makes an assignment for the benefit of creditors within such year, and the claim is not barred as to the fund in court, although not filed with the assignee until more than a year after the loss.

LIMITATIONS OF ACTIONS—ASSIGNMENTS FOR THE BENEFIT OF CREDITORS are for the benefit of all creditors whose claims are not barred by limitation at the date of the assignment, and, if not then barred, are not afterward barred as to the fund in court during the pendency of the insolvency proceedings.

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A. Tighe, for the appellant.

C. D. & T. D. O'Brien, for the respondent.

¹⁰⁵ CANTY, J. The St. Paul German Insurance Company issued a policy of insurance to appellant, insuring his property against loss by fire for one year from September 22, 1891. Thereafter, on November 17, 1891, a loss occurred. Thereafter, on April 14, 1892, the ¹⁰⁶ company, being insolvent, made an assignment, under the insolvency law of this state, for the benefit of its creditors, to J. F. Franzen.

The policy of insurance contained a provision requiring the insured to commence any suit or proceeding to enforce any claim for loss within one year from the time of the loss. The appellant did not file its claim for such loss with such assignee within one year from the time of the loss, or until November 28, 1892. For this reason the court below held that the claim was barred by the limitation provided in the contract, and that appellant could not recover, and he appeals to this court.

It is urged by respondent that because the statute of limitations continued to run against this claim as a personal liability of the insolvent, and, as against it, was barred before this claim was filed with the assignee, it ceased to be a claim against his assigned estate.

We do not agree with respondent. We are of the opinion that the conditions requiring the bringing of an action on this claim within the year were waived by the insurer by providing a fund for the payment of the claim, to the extent of that fund. We cannot see why such conditions in an insurance policy cannot be waived by the insurer as well as other conditions in it. This provision is intended for the protection of the insurer when he disputes the claim, and can hardly apply when he has provided a fund for its payment, at least to the extent of that fund. If A is indebted to B, and, a short time before the statute of limitations runs on the debt, A transfers property to C, to be by him disposed of, and the proceeds applied on the debt, will this not interrupt the running of the statute, at least as to this fund? On well-settled principles, it will, and B can charge C as trustee after the time the statute would have run were it not for the creation of the trust. Payment of money into court in a suit on a debt takes the debt out of the statute of limitations as to the money so paid into court: *Long v. Greenville*, 3 Barn. & C. 10. Such an assignment for the benefit of creditors is for the benefit of all creditors whose claims are not barred by the statute of

limitations at the date of the assignment, and, if not then barred, are not barred afterwards during the pendency of the proceedings: In re Leiman, 32 Md. 225; 3 Am. Rep. 132. See, also, 167 Minot v. Thacher, 7 Met. 348; 41 Am. Dec. 444; 2 Wood's Limitations of Actions, 2d ed., sec. 202. This rule has also been applied by the federal courts in bankruptcy proceedings, under the United States statutes: Bump on Bankruptcy, 10th ed., 581.

The order appealed from should be reversed. So ordered.

Mitchell and Buck, JJ., took no part.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS' CLAIMS—LIMITATIONS OF ACTIONS.—The statute of limitations does not continue to run against the claims of creditors of an insolvent debtor after his application for the benefit of the insolvent laws, and before an audit and order of the court distributing the insolvent's estate: Matter of Insolvent Estate of Leiman, 32 Md. 225; 3 Am. Rep. 132.

McKIBBIN v. ELLINGSON.

[58 MINNESOTA, 205.]

ASSIGNMENT FOR BENEFIT OF CREDITORS—CONFLICT OF LAWS.—The validity of an assignment for the benefit of creditors, made, so far as signing and delivery is concerned, in one state to a resident thereof by a nonresident debtor, of property wholly within the state of his residence, and finally executed by being recorded in that state, is to be determined by the law of that state.

ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY—CONFLICT OF LAWS.—If the validity of an assignment for the benefit of creditors appointing a nonresident assignee is not determined by the law of the state where it is executed, its validity must be decided by the rules of common law, when questioned in another state.

ASSIGNMENT FOR BENEFIT OF CREDITORS—EVIDENCE OF FRAUD.—By the common law, the appointment of an unfit assignee for the benefit of creditors, as distinguished from one incapacitated by law to take and execute the trust, is a badge of fraud, but does not render the assignment void ipso facto.

FRAUD—PLEADING.—A statement of facts in a pleading tending to show a fraudulent intent is not equivalent to an allegation of such intent.

ASSIGNMENT FOR BENEFIT OF CREDITORS—CONFLICT OF LAWS.—An assignment for the benefit of creditors, valid by the law where the debtor resides and where the property is situated, passes the title to the assignee, and the subsequent removal of the property to another state does not displace such title as to creditors residing therein, and seeking to recover on their claims.

Keith, Evans, Thompson & Fairchild, for the appellant.

B. H. Schriber, for the respondents.

209 GILFILLAN, C. J. Plaintiffs brought an action on promissory notes, in Ramsey county, against Ellingson, and in that suit brought garnishee proceedings against Turner. On the disclosure, the latter claimed title to the money or property sought to be reached. Thereupon the plaintiffs filed a supplemental complaint against the garnishee defendant, and he filed his answer thereto. The plaintiffs demurred to the answer, and from an order sustaining the demurrer the garnishee defendant appeals.

Upon the allegations of the complaint admitted by the answer, and those of the answer, these are the facts: Ellingson resided and did business in, and all his property, consisting of real and personal property, was in, the state of North Dakota; and, being insolvent, on February 3, 1893, he, at Minneapolis, in this state, executed and delivered to Turner, who resided in Minneapolis, an assignment to him for the benefit of his (Ellingson's) creditors. The assignment was never filed in the office of the clerk of any district court of this state, but, as required by the laws of North Dakota, it was recorded in the office of the register of deeds of the county in which Ellingson **210** resided, and all the requirements of the law of North Dakota respecting such assignments were complied with. The assignee took possession of the assigned property, and the money in his hands at Minneapolis, where the garnishee summons was served, was proceeds of sale of such property.

Of course, if the assignment was valid and passed the title to the property, that title would be respected everywhere and wherever the assignee might subsequently carry the property or its proceeds.

It is claimed that it was invalid: 1. Because, having been executed in this state, it was a Minnesota contract, and its validity must be judged by the law of this state, and that, not having been filed as required by our statute, it was void; 2. If, because its subject matter was in North Dakota, and it was intended to take effect and be operative and be carried out there, it was a North Dakota contract, then it was void by the law of that state.

Though we were to deem it executed in this state, still it would not come within our statute regulating assignments. That statute does not assume to regulate assignments executed in this state by nonresidents, who have no property and no place for carrying on business in this state, and the trusts created by which are to be carried out in another state. That is evident from the

requirement (Gen. Stats. 1878, c. 41, sec. 23) that the assignment shall be filed in the office of the clerk of the district court in the county wherein the debtor resides, or wherein the business in reference to which it is made has been principally carried on—a requirement which a nonresident, having no property and no business in the state, could not comply with. The statute does not assume to regulate the business of nonresidents whose sole property and business is out of the jurisdiction of this state; so that if it is to be deemed a contract executed here, to be judged by the law here, inasmuch as the statute does not apply to it, its validity is to be determined by the rules of the common law.

But it is not to be deemed as fully executed in this state. The parties were contracting with reference to the laws of North Dakota, creating a trust to be performed there, and which would be valid there, and they intended to do what the law of that state required to make the trust operative and effectual there; and what they contemplated in the way of executing and making the assignment ²¹¹ effectual was not completed until it was taken to, and, as required by the law of that state, recorded in, the county of the debtor's residence. As soon as it was fully executed, so as to take effect where it was intended to take effect, by doing what the law of that state requires, it became, to all intents and purposes, a North Dakota contract, to be judged by the law of that state. By the law of this state, an assignment for the benefit of creditors is of no effect till it is filed, so as to become the basis of a judicial proceeding. Till filed, the assignment is not completed. Suppose a debtor, resident in this state, having a business and property only in this state, should, in some other state—say, where such assignments are prohibited—sign, seal, and deliver an assignment intended to be filed here, and to be operative only here, and which should be brought here and filed. Would we hesitate to say that the filing was the final act of execution, that the assignment was to be deemed as executed here, and that it was a Minnesota contract, to be judged as to its validity by our law? We think not. No matter where the partial execution, the writing, signing, sealing, and delivering might be done, it would be deemed executed in that state where the final act to make it go into effect was intended to be and was done. This assignment was finally, fully executed in North Dakota.

This makes it unnecessary to go into the large field of inquiry, when a contract is executed in one state, but intended to be per-

formed in another, by the law of which state is its validity and the sufficiency of its execution to be determined?

The objection to its validity as a North Dakota assignment is that it appoints as assignee a nonresident of that state. The statute of that state on the subject of assignment for the benefit of creditors is fully set out in the answer. We are not referred to any decision of the court in that state; and we assume that, except as otherwise provided by the statute, the validity of an assignment is to be determined upon the principles of the common law. We are referred to two provisions of the statute (sec. 4663, subds. 4, 5), but we do not see that they prescribe what effect the appointment of a nonresident assignee shall have on the validity of the assignment. We take it that it is to be determined by the common law. By the common law, the appointment of an unfit assignee, as distinguished from one incapacitated by law to take and execute the trust, was ²¹² a badge of fraud—was evidence of a fraudulent intent on the part of the assignor to secure to himself some control over the disposition of the assigned assets. Thus, the appointment of one incompetent from ignorance of business, from blindness, from inability to read and write, from residence at so great a distance from the place where the trust must be executed as to suggest that he will not attend to it himself, is a badge of fraud. In the same category comes residence of the assignee in another state. But none of these rendered an assignment void ipso facto. It was only as they established a fraudulent intent that avoided it. In the case most relied on to avoid this assignment (*Cram v. Mitchell*, 1 Sand. Ch. 251), there were three assignees—one blind, one unable to read and write, and the other a nonresident of the state. The court, in its opinion, discusses each and all of these as tending to show an intent by the assignor to keep the control in his hands, and hinder and delay creditors, and, as to the nonresidence of one of the assignees, said: "So, if a failing debtor, whose property was all situated in this city [New York], and whose principal creditors resided here, should make an assignment to three merchants residing in Boston, and who, although creditors of the assignor, could not give their personal attention to the management of the trust, without some satisfactory explanation it would be apparent that the assignor had created a necessity for a substitution in the conduct of the estate which would be likely either to give him control of the assets, or to afford him opportunities to retain and appropriate them to his own use."

In *Guerin v. Hunt*, 6 Minn. 375, it was held that the selection of an incompetent assignee (in that case one unable to read or write) from an improper motive will avoid an assignment, but, in the absence of such motive, it will only furnish ground for removing the assignee, and that such incompetency is a badge of fraud. That is in accordance with the tenor of all the decisions.

There is no allegation in either of the pleadings of any fraudulent intent in making the assignment. The statement of evidence tending to prove that intent is not, in pleading, equivalent to an allegation of the intent.

The question, when will a transfer, valid by the law of the owner's domicile, but which would not have been valid if executed here, be ²¹³ held to pass the title to personal property situated here, as to creditors of the owner resident here, and seeking a remedy here against such property, is not in the case, because, by the law of the state where the assignor resided, and where the property was situated, the title passed, and the subsequent removal of the property to this state would not displace such title.

Order reversed.

Buck, J., absent, sick, took no part.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS—CONFLICT OF LAWS.—A voluntary assignment in insolvency for the benefit of creditors, if valid where made, is valid everywhere, unless repugnant to the law of the place where the property is situated and detrimental to the rights of domestic creditors in the latter jurisdiction: *Hayden v. Yale*, 45 La. Ann. 362; 40 Am. St. Rep. 232, and note.

PLEADING FRAUD.—When fraud is sought to be alleged the pleading is insufficient unless the facts constituting the fraud are also averred: *Clough v. Holden*, 115 Mo. 336; 37 Am. St. Rep. 398, and note; *Nichols v. Stevens*, 123 Mo. 96; 45 Am. St. Rep. 514.

WOODWARD-HOLMES COMPANY v. NUDD.

[58 MINNESOTA, 236.]

PARTNERSHIP REAL ESTATE—DOWER IN.—Partnership capital, invested in lands for the benefit of the partnership, is to be treated as personality until it has performed all its functions to the partnership, and thereby ceased to be partnership property, and until then it is not subject to either dower or inheritance, but, after all of the purposes of the partnership have been accomplished, whatever of such land remains in specie is to be regarded as real estate, subject to dower or inheritance.

PARTNERSHIP REAL ESTATE—DOWER IN.—When a partnership is dissolved, and its affairs wound up and completely ended

by judgment or agreement, and partnership land remains in specie unconverted, it is no longer a part of the partnership assets, and then, and not until then, it is subject to the dower rights of the wives of the partners.

PARTNERSHIP REAL ESTATE—DOWER IN.—If, in an action to dissolve a partnership, and wind up its affairs, the partnership land is sold and converted into money, and such money is distributed among the firm creditors and partners according to law, such land in the hands of the purchaser is not subject to any inchoate dower interests of the wives of the partners, although it was not necessary to sell all of the land to pay the firm debts, and its sale brought a price in excess of the amount of such debts.

Hale, Morgan & Montgomery, for the appellant.

Young, Fish & Dickinson, for the respondents.

239 **MITCHELL, J.** The effect of the findings of the trial court is that the real estate which is the subject of this action was formerly the property of a manufacturing copartnership composed of defendant's husband and one Holmes, having been purchased, paid for, and used by the firm as a site for its manufacturing plant, the title being taken in the individual names of the partners; that in an action brought by one partner against his copartner to dissolve the partnership and wind up its affairs, the property was ordered sold as one parcel, the proceeds to be applied in payment of the firm debts, and the surplus, if any, divided between the partners according to their respective rights; that at such sale it was sold to plaintiff's grantor for an amount somewhat in excess of the sum required to pay the debts of the firm; that this surplus was distributed between the partners, no part of it being paid to defendant Laura Nudd; that she was not a party to the action, and has never joined in any conveyance of the property.

She, as wife of William H. Nudd, one of the partners, claimed an inchoate interest in an undivided half of the premises, and this action was brought to determine this adverse claim.

It is well known that the English doctrine was that partnership real estate is considered as personal property for all purposes. The doctrine of the American courts on the subject is more restricted. Some of the earlier decisions in New York and Massachusetts went almost to the length of entirely subverting the equity doctrine prevalent in England; but, as remarked by Chancellor Kent, the other American decisions are not inconsistent with the more correct and improved view of the English law. It is now held with practical unanimity by the American courts that, if partnership capital be invested in land for the

benefit of the company, all the incidents attach to it which belong to any other stock, so far as consistent with the statute of frauds and the technical rules of conveyancing, and that it will be treated as personal estate until it has performed all its functions to the partnership, and thereby ceases to be any longer partnership property, and until then it is not subject to either dower or inheritance, but that, after all the purposes of the partnership have been thus accomplished, whatever land remains in specie will be regarded as real estate. The question is, at what precise moment is it reconverted into real estate, or, to speak more accurately, does ²⁴⁰ it resume all the attributes and incidents of real property? We think the answer is, the moment the partnership is terminated and wound up by judgment or agreement, and it is determined that it no longer forms a part of the partnership stock, and is not required for its purposes. When a partnership is dissolved and its affairs wound up and completely ended, and any land remains in specie, unconverted, this must be deemed a determination that it is no longer a part of the copartnership stock, and an election to hold it thereafter, individually, as real estate.

During the continuance of the partnership the partners can convey or mortgage it, in the course of their business, whenever they see fit, without their wives joining in the conveyance or mortgage, and the wives would have no dower or other interest in it. This is one of the very objects of treating partnership real estate as personal property; for otherwise the business of the firm might be stopped, and the partners unable to realize on the assets of the firm, by reason of the wife of one of them refusing to join in the conveyance or mortgage.

They have the same power of disposition over it for the purposes of a dissolution of the partnership, the payment of its debts, and the distribution or division of the capital among themselves; for until that is done the property has not fulfilled its functions as personalty, or ceased to be partnership property. And what the partners may thus do voluntarily the court may do for them, in an action brought to dissolve the partnership and wind up its affairs. As the defendant Laura Nudd was not a party to the former action, she is, of course, not estopped by it, nor is it evidence against her of anything, except of the fact of its own rendition. But the material fact remains that in the process of the dissolution of the firm, and the winding up of its affairs, in an action for that purpose, the land was sold and con-

verted into money, and the money distributed among the creditors and partners according to law. Upon these facts, under the rules already announced, the land in the hands of the purchaser is not subject to any inchoate interest of the wives of the partners.

The error which lies at the foundation of the whole argument of defendant's counsel is in the assumption that, at the time of the purchase of this property, it became the individual real estate of the husband, and that the inchoate right of the wife under the statute immediately ²⁴¹ attached, subject only to a lien for the payment of partnership debts. This is not correct, and none of the authorities that we have found so hold. The fact is that only so much of it becomes the individual real estate of the partner as remains in specie, unconverted, after all the purposes of the partnership have been entirely fulfilled, and it is only to such of it that any inchoate interest of the wife ever attaches.

If counsel's contention is correct, the partners could never, even during the active life of the copartnership, convey perfect title to partnership land without their wives joining, except to the extent actually necessary to pay existing debts of the firm. This would practically involve, in every case where one of the wives refused to join in a conveyance, the necessity of a suit to which she is made a party, in order to determine whether the sale was necessary to pay debts. Any such rule would hamper the business of the firm to an extent that might practically defeat the purposes of the partnership.

The court below seems to have laid special stress upon the fact that it was not made to appear on the trial that it was necessary to have sold all this property to pay the debts of the firm, but this is immaterial, either under the view of the law which we have taken, or under that urged by counsel. In fact, we understood counsel to frankly concede this on the argument. Upon the facts found, judgment ought to have been ordered in favor of the plaintiff, adjudging that defendant has no interest, inchoate or otherwise, in the land.

Cause remanded, with directions to the court below to render judgment accordingly.

Buck, J., absent, sick, took no part.

PARTNERSHIP REALTY—RIGHT OF DOWER IN.—No dower interest can exist in partnership real estate until the firm debts are paid and its accounts adjusted: *Robinson Bank v. Miller*, 153 Ill. 244: 40 Am. St. Rep. 883, and note. Partnership real estate is regarded in

equity as personality, no matter in whom the legal title is vested. The remainder of it after partnership debts are all discharged, is held in common by the heirs subject to dower, or goes to the devisees: Galbraith v. Tracy, 153 Ill. 54; 46 Am. St. Rep. 867. See, also, the extended notes to Goldthwaite v. Janney, 48 Am. St. Rep. 74, and Page v. Thomas, 54 Am. Rep. 798.

FRANCIS v. WESTERN UNION TELEGRAPH COMPANY

[58 MINNESOTA, 252.]

TELEGRAPH COMPANIES. — CONDITIONS IN BLANKS furnished by a telegraph company, stating that it is not liable for mistakes or delays in the transmission or delivery, or for the non-delivery of a message beyond the sum paid for sending it, unless the message is ordered repeated, and that it is not liable for damages in any case, if the claim is not presented within sixty days after the message is filed with the company for transmission, are unreasonable, and inapplicable when applied to a case in which the company has failed and neglected to transmit the message at all.

DAMAGES CANNOT BE RECOVERED FOR MENTAL SUFFERING caused by the failure of a telegraph company to transmit and deliver a message. This, under the rule that damages cannot be recovered for mental suffering resulting from breach of a contract.

G. H. Fearsons and Ferguson & Kneeland, for the appellant.

H. & R. L. Johns, for the respondent.

255 MITCHELL, J. The allegations of the complaint are that the plaintiff and his wife had been separated for some time "on account of a certain family trouble," she residing in Wyoming, in this state, and he in Indianapolis, Indiana; that he had been endeavoring to effect a reconciliation and a renewal of marital relations with her, and had written her on the subject, requesting her, in case a reconciliation was possible, to wire him to that effect, and to inform him how many physicians there were in a place called Lindstrom, with a view of his taking up his residence there, and engaging in the practice of his profession as a physician; that in response to this letter plaintiff's wife delivered to the defendant at Wyoming, for transmission, the following message, addressed to him: "Only one there. Yes, come," and paid the sum charged for its transmission; that the defendant negligently failed to transmit or deliver the message to plaintiff at all; that, not receiving any message from his wife, he concluded that she was unwilling to renew her marriage relations with him, and feared that all hope of reconciliation with her was at an end; that he was kept in this mental state for more than three weeks before he learned that his wife had sent the message; that during this

time, in consequence of the neglect of the defendant to transmit and deliver the message, "he suffered great mental pain, distress, and anguish, and sustained great damage to his feelings," for which he seeks to recover.

The evidence tended to show that the message was written on one of defendant's blanks, at the foot of which was printed, "Read the notice and agreement on the back." On the back was printed: "All messages taken by this company are subject to the following terms: ²⁵⁹ To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraph back to the originating office for comparison. For this one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery or for the nondelivery of any unrepeatable message beyond the amount received for sending the same." "The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission."

It is conceded that this message was not ordered repeated, and that no claim for damages for its nondelivery was presented to the company within sixty days after it was filed for transmission.

Various questions arose on the trial with reference to these conditions, but this branch of the case can be very briefly disposed of.

The repeating of a message may prevent mistakes in its transmission, but can have no tendency whatever to prevent a failure to transmit it. Hence this condition is not applicable to this case, or, if intended to be so, it is, as to such a case, void, because unreasonable. The same is true of the "sixty day" limitation. It is either inapplicable—at least, as to the addressee of the message—to a case of failure to transmit the message at all, or, if intended to be applicable, unreasonable, for the sixty days might elapse before the addressee ascertained that any message had been delivered for transmission. The company has probably substituted the words, "after the message is filed," for the words, "after sending the message," formerly used, in view of the decisions of the courts that the old form did not apply where the claim was founded upon a failure to send the message at all. But there are some things which cannot be accomplished even by artfully worded "fine print" conditions. Our conclusion that these con-

ditions are either inapplicable or unreasonable, under the facts of this case, is founded on general principles, and without reference to the provisions of the laws of 1885, chapter 208, entitled, "An act to regulate the business of operating telegraph lines, and imposing penalties for misconduct of owners and agents of such lines," the effect of which, upon attempted stipulations for exemption from liability, we have now no occasion to consider.

²⁶⁰ This brings us to the principal question in the case, viz., whether the addressee of a telegraphic message can recover damages for mental suffering caused by the failure of the telegraph company to transmit and deliver the message.

In the consideration of this question it is necessary at the outset to consider two preliminary questions, viz: 1. Has the statute above cited, particularly section 5, changed the common-law rule? 2. What is the nature of such an action as this? Is it an action founded on contract, or is it one purely of tort?

Section 5 of the act provides that if any person or company owning or operating a telegraph line in this state shall fail to transmit a message within a reasonable time, or if it is shown due diligence has not been exercised after reception thereof for that purpose, or shall fail to deliver the same to the party to whom the same is addressed, if known, within a reasonable time after its arrival at the point of destination, they "shall be liable in a civil action, at the suit of the party injured, for all actual damages sustained by reason of such neglect or omission."

The courts were not entirely agreed as to whether an action against the telegraph company could be maintained by the addressee, for whose benefit the message was intended, but who had no immediate contract relations with the company.

Again, assuming to follow the rule in *Hadley v. Baxendale*, 9 Ex. 341, that the damages which one party to a contract ought to recover for a breach of it by the other are such as either arise naturally from the breach itself, or such as may reasonably be supposed to have been contemplated by the parties when making the contract as the probable result of the breach, some courts held that, under the latter clause of this rule, consequential damages could not be recovered against a telegraph company unless the company was informed, either by the contents of the message or otherwise, of the nature of the subject matter to which the message related, and that where it was ignorant of this, only nominal damages, or the amount paid for the transmission of the message, could be recovered.

We are of the opinion that the only object of section 5 was to settle both these questions, and to establish the rule, 1. That the party injured, whether sender or addressee, may maintain an action; and 2. To hold the company liable for all actual damages ²⁶¹ proximately resulting from the breach of its contract, regardless of whether or not it was advised of the nature of the subject matter of the message. In other words, that the company has nothing to do with, and has no right to speculate upon, the extent of the interest of either sender or addressee in the message, or as to its value or importance; that when it receives a message for transmission and delivery, the company has but one duty to perform, viz., to transmit and deliver it correctly, and without unreasonable delay, and if it fails to do so it will be liable for all actual damages, although not of a character such as would be suggested by the message as the probable result of a failure to transmit and deliver it. The statute does not define actual damages, but leaves that to be determined by common-law rules. We are therefore of opinion that the statute has no bearing on the question before us. It is hardly necessary to add that the same is true of the declaration in the bill of rights that every person is entitled to a certain remedy in the law for all injuries or wrongs which he may receive in his person, property, or character. This is but declaratory of a general fundamental principle upon which the courts have always acted, and which would have been the law even if not incorporated in the constitution. It creates no new legal rights or new legal wrongs, and establishes no new rule of damages. It merely declares that for any wrong, recognized as such by law, a person shall have a remedy to obtain the redress to which he is entitled according to the principles of law.

This action is not one of tort, but on contract, its gist and gravamen being the breach of contract, the duties and obligations growing out of which are regulated by the statute, which itself becomes a part of it. The best test of this is the fact that such an action could not be maintained without pleading and proving the contract.

We are therefore left to determine the question here presented according to the rules of the common law applicable to actions for damages for breach of contract. In such actions, can damages be recovered for mental suffering resulting from a breach of the contract?

The law has always been exceedingly cautious in allowing dam-

ages for mental suffering, for the manifest reasons, among others, that such damages are more sentimental than substantial, depending largely upon ²⁶²temperament and physical and nervous condition. The suffering of one under precisely the same circumstances would be no test of the suffering of another, and, there being no possible standard by which such an injury can be even approximately measured, they are subject to many, if not most, of the objections to speculative damages which are universally excluded. In no case will an action for damages lie for mental suffering caused by an act which, however wrongful, infringes no legal right of the party. In actions for a tort resulting in physical injuries, of which mental suffering forms a component part, the latter is permitted to be taken into account in the assessment of damages; and where the tort is willful, and of a character as naturally and necessarily to injure the feelings, damages for such injuries are sometimes allowed, although there was no physical injury or pecuniary loss. *Larson v. Chase*, 47 Minn. 307, 28 Am. St. Rep. 370, perhaps goes as far in that direction as any case to be found in the books. In this latter class of cases, such damages are often but another name for punitive damages. But we are not concerned here with the question when such damages may be recovered in actions of tort. We think we are warranted in asserting that the doctrine that damages for mental suffering resulting from a breach of contract is wholly unknown to and unauthorized by the common law, unless "telegraph cases" are to be made an exception. An action for breach of promise of marriage is sometimes spoken of as an exception; but that action has always been recognized as *sui generis*. It is an action for breach of contract only in form and name, and in many of its essential features has always been considered as one for a willful tort. We have no desire to discuss at length a question which has been so often and so fully considered of late years by the courts in these telegraph cases. The strongest argument we have found in favor of allowing damages for mental suffering resulting from the nondelivery of a telegraph message is the opinion of the court in *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695; 6 Am. St. Rep. 864. It advances all that can be said on that side of the question, and puts it strongly and plausibly. Aside from the dissenting opinion of Linton, J., in the same case, the strongest arguments that we have found against the allowance of such damages are the opinions in *Chapman v. Western Union*

Tel. Co., 88 Ga. 763, 30 Am. St. Rep. 183; *Western Union Tel. Co. v. Rogers*, 68 Miss. 748, 24 Am. St. Rep. 300,²⁶³ and *Connell v. Western Union Tel. Co.*, 116 Mo. 34, 38 Am. St. Rep. 575. These cases contain about all that can be advanced on either side of the question. It is somewhat remarkable that, although telegraphy has now been in use for over fifty years, it never seems to have occurred to any court, or, so far as we can discover, to any lawyer, that damages were recoverable for mental suffering resulting from neglect to transmit or deliver a telegram, until it was so held in 1881 by the supreme court of Texas in *So Relle v. Western Union Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805, citing in support of the doctrine only actions in tort for physical injuries. This decision has, with more or less variations, been followed by the same court in a long line of later cases; but the doctrine seems to have involved that court in some very glaring inconsistencies, compelled, perhaps, by the necessities of the situation in which the court has placed itself. The multitude of cases of this character in that state since the decision of *So Relle v. Western Union Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805, indicates the vast field of speculative litigation opened up by that decision, and how difficult the subject is of control by the courts. In *Rowell v. Western Union Tel. Co.*, 75 Tex. 26, the court, apparently impatient at the amount of "intolerable litigation" to which the doctrine had given rise, seems to have gone back, partially at least, upon their former decisions. In that case the plaintiff had received information of the dangerous illness of his mother in law. A subsequent dispatch was sent, containing information of her improved condition. This dispatch the telegraph company failed to deliver. The court held that for continued mental anxiety caused by the nondelivery of the message, the plaintiff could not recover.

The "Texas doctrine," with more or less modification, has quite recently been adopted by the courts of Alabama, Kentucky, Tennessee, North Carolina, and Indiana. The harvest of "intolerable litigation" which is being reaped in Texas has not yet matured in those states, but certainly will if the doctrine is adhered to.

The "Texas doctrine" has been favorably referred to in many of the more recent text-books, but the bench and bar will understand of how little weight as authority most of these books are, written as they very frequently are, by hired professional book-makers of no special legal ability, and who are usually inclined to

take up with the latest legal novelty for the same reasons that newspaper men are ²⁶⁴ anxious for the latest news. On the other hand, the doctrine has been vigorously repudiated by the courts of Georgia, Mississippi, Florida, Missouri, Kansas, Wisconsin, Dakota territory, Arkansas, and perhaps some other states; also, with practical unanimity, by all the United States circuit courts and circuit courts of appeal which have passed upon the question. The supreme court of the United States has not yet been called on to pass upon the question; but, in view of the general tenor of the decisions of that court on kindred questions, there is every reason to believe that when the question is presented its decision will be that such damages are not recoverable.

No lawyer as yet seems to have had the temerity to present such a case to a court of last resort in any of the eastern or north-eastern states.

Some of the decisions holding that such damages are recoverable proceed upon the assumed but false analogy of torts resulting in physical injury accompanied with mental suffering, or where the tort was willful and calculated and intended to injure the feelings; as, for example, slander, libel, and the like. Others very plausibly argue that such cases are new only in instance, and not in principle, that the principle applicable to all actions on contract is that a party is liable for all damages proximately resulting from its breach; that the reason that in such actions no recovery has usually been allowed for mental suffering is that the contracts were of a business or commercial character, not involving the feelings; that telegraphy is a modern invention; that a telegraph company is a carrier of intelligence often sent for a purpose not pecuniary, but relating wholly to matters of sentiment or feeling; and that therefore the damages resulting from the breach of a contract to transmit such intelligence are not to be, and cannot be, measured by any pecuniary standard, but according to the standard of injury to the feelings. In other words, that damages for which a person is liable for breach of contract depend on the nature of the contract. If it is pecuniary in its nature, only pecuniary damages will be allowed, but if it relates to the feelings, then damages for injury to the feelings will be allowed.

But we deny the correctness of the premise upon which this argument is based. The law looks only to the pecuniary value of a contract, and for its breach awards only pecuniary damages. An ²⁶⁵ action for breach of promise of marriage, as already re-

marked, is only an apparent, and not a real, exception to the rule. We recognize the fact that the common law is not a code of cast-iron rules, but a system of principles capable of being applied to new conditions as they arise; and when a case arises which falls within a recognized legal principle, the fact that it is new in instance will not and ought not to stand in the way of the courts applying the principle. But to allow damages for injury to the feelings resulting from a breach of contract—even one like this—would be, not to apply an old principle to a new instance, but to adopt a new principle entirely unknown to the law. Courts have no more right thus to abrogate the common law than they have to repeal the statutory law. Lord Coke said: “The wisdom of the judges and sages of the law has always suppressed new and subtle inventions in derogation of the common law.” The wise remark of another, peculiarly applicable to the present time, was that “the variety of judgments and novelties of opinions are the two plagues of a commonwealth.” The great lights of the law may take some liberties with the law in the way of new applications of old principles that modesty would forbid to ordinary men; and while we are not disposed to look upon everything ancient with slavish reverence merely because it is ancient, it would certainly be presumptuous in us to lightly discard a doctrine which has been so long approved, and which is so firmly established by authority. The principles of the common law were founded upon practical reasons, and not upon a theoretical logical system; and usually, when these principles have been departed from, the evil consequences of the departure have developed what these reasons were. The Pandora box that has been opened by the “Texas doctrine” proves more forcibly than argument the wisdom of the common-law rule that damages of this kind cannot be recovered in actions on contract. And, if damages of this kind are to be allowed for the breach of a contract of this character, where are we to stop? Upon what legal principle can a court refuse to allow them for the breach of any other contract? The breach of any contract—even the failure of a debtor to pay his debt at maturity—may result in more or less mental anxiety or suffering to the party to whom the obligation is due. Why not allow damages for the mental suffering or disappointment of passengers caused by the delay of trains ²⁰⁸ through the negligence of the carrier? The object of the journeys of travelers is often not pecuniary, but to visit sick relatives or attend the funeral of deceased ones, which are matters affect-

ing the feelings as much and as exclusively as a telegram. If the train is delayed through the negligence of the carrier, so that the passenger does not reach his destination in time to accomplish his desired object, why is he not entitled to damages for his disappointment and mental suffering as much as the sender or addressee of a delayed telegram? See *Wilcox v. Richmond etc. Ry. Co.*, 52 Fed. Rep. 264. The truth is, once depart from the old rule, and we are all at sea, without either rudder or compass. Any other doctrine is unauthorized by any principle of law, and would, we are satisfied, work badly in practice, giving rise to a flood of speculative litigation uncontrolled by any guide as to the measure of damages except the whim of the jury, or the arbitrary standard that may be adopted by the particular judge who tries the cause.

It is suggested that the transmission of intelligence by electricity is a comparatively new thing; that contracts of this kind are unlike any others; that as messages frequently have no pecuniary value, and consequently a failure to transmit them would result in no pecuniary loss, although it might cause great anxiety or disappointment, therefore, unless damages for mental suffering are allowed, none could be recovered that would adequately compensate the party or adequately punish the telegraph company for its neglect of duty. If this be so, it would only go to prove that, in the progress of the world, a new condition of things has arisen for which the existing law is not adequate, and which calls for legislative interposition. This has been done in some jurisdictions by subjecting a telegraph company to a certain penalty to be recovered by, and for the benefit of, the party interested in the message. Whether this is wise or not, it is certainly better than to leave it to the courts or juries to assess the vague, shadowy, and sentimental damages caused by mental anxiety or injured feelings.

Order reversed.

Buck J., absent, sick, took no part.

TELEGRAPH COMPANIES—REGULATION AS TO UNREPEATED MESSAGE.—A stipulation in a message blank of a telegraph company that its liability for any mistake or delay in the transmission or delivery of a message shall not extend beyond the sum received for sending it unless the sender orders the message repeated, is a reasonable regulation, binding on those who assent to it, so as to exempt the company from liability beyond the amount stipulated for any cause except willful misconduct or gross negligence on its part: *Redington v. Pacific Postal Tel. etc. Co.*, 107 Cal. 317; 48 Am. St. Rep. 132. The weight of authority seems to be opposed to this doctrine, and in support of that of

the principal case, as will be seen by consulting the cases collected in the note to *Brown v. Postal Tel. Co.*, 83 Am. St. Rep. 798.

TELEGRAPH COMPANIES—VALIDITY OF CONDITION LIMITING TIME FOR PRESENTING CLAIM.—A stipulation in the blanks of a telegraph company that it "will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message," is void as an attempt to limit its liability when such limitation is in conflict with a statutory provision: *Western Union Tel. Co. v. Kemp*, 44 Neb. 194; 48 Am. St. Rep. 723, and note. The cases discussing this subject showing a conflict of authority are collected in the note to *Mathis v. Western Union Tel. Co.*, 47 Am. St. Rep. 174.

TELEGRAPH COMPANIES—DAMAGES FOR MENTAL SUFFERING.—Unless otherwise provided by statute, mental anguish alone resulting from negligent delay in the delivery of a telegram, does not constitute sufficient basis for the recovery of damages: *Summerfield v. Western Union Tel. Co.*, 87 Wis. 1; 41 Am. St. Rep. 17, and note.

STATE v. PARK AND NELSON LUMBER COMPANY.

[68 MINNESOTA, 330.]

CORPORATIONS—FORFEITURE OF CHARTER.—Independently of statute, it is incumbent upon a private corporation to keep its principal place of business, its books and records, and its principal offices, in the state in which it is incorporated, to an extent necessary to the fullest jurisdiction and visitatorial power of the state and its courts, and the efficient exercise thereof in all proper cases. A forfeiture of its charter may be adjudged for a violation or failure to substantially comply with such obligation.

H. W. Childs, attorney general, A. Johnson, and J. C. Michael, for the relator.

F. M. Wilson and Clapp & McCartney, for the respondent.

331 **COLLINS, J.** This is a proceeding by information in the nature of quo warranto, filed by the attorney general, to annul the respondent's corporate existence, and to have its rights, powers, privileges, and franchises adjudged and declared forfeited. Many of the acts referred to in the information, and concerning which testimony was taken, affect stockholders only, and with these we are not now concerned. The sole object of these proceedings is to protect public interests; and, to warrant a forfeiture of respondent's corporate franchises for misuser, it must have been such as to threaten or to work a substantial injury to the public.

It is shown by the evidence that, although incorporated under the laws of this state, the respondent's business has been that of manufacturing lumber and making boxes at Brasington, Wisconsin. It bought its supplies and shipped its products there. All business correspondence was had, all collections made, and

all bills paid at that point. Prior to the month of March, 1891, an office, in which more or less business was transacted, had been maintained at Red Wing, in this state; but about that time, acting under a motion made and carried at a directors' meeting, the general manager removed that office, with all of its furniture, books, papers, stationery, and other articles, to Brasington. The removal was so complete that, for the purpose of holding a stockholders' meeting in June, office room had to be hired. A box in the postoffice was then rented, but no mail, except a few circulars, has been received at Red Wing, and none deposited. Since December, 1891, respondent claims to have had an office at that place, and to have had a secretary and treasurer there. But of that hereafter. It is claimed that no stockholders' meetings have been held since 1891, but, as we regard the case, this is of no consequence.

The person said to have been the secretary and treasurer since December, 1891, is an attorney at law residing and practicing at Red Wing. He has had nothing to do with the business management of the corporation; has kept no account or other books, except one in which is a record of a few business meetings. He has handled none of the respondent's money, and none has been kept in this state, save a small balance of twenty-three dollars, which has been in one of the Red Wing banks. Of respondent's property, nothing has been in his possession or in its so-called ³³² office, except a corporate seal, a stock certificate book, in which there are two certificates, two record-books, in one of which are recorded the respondent's articles of incorporation and its by-laws, and a number of loose papers, consisting principally of monthly balances and statements of the corporative business, sent him by a person at Brasington, who seems to be respondent's real secretary and treasurer. While it is claimed by its counsel that from these monthly statements or balances the exact condition of its business and financial standing can be readily ascertained, as fully as if all its account-books were produced, we think the Red Wing secretary and treasurer appreciated the situation when, on being asked if these statements or balances would show the financial standing and business condition of respondent at the end of each month, he promptly replied, "Assuming them to be correct, they would."

By the General Statutes of 1878, chapter 34, section 126, it is provided that the secretary and treasurer of every corporation organized under the laws of this state shall reside, have their

place of business, and keep the books of the corporation, within its borders; and it has been held that, independently of a statute, it is incumbent upon a private corporation to keep its principal place of business, its books and records, and its principal offices, in the state in which it is incorporated, to an extent necessary to the fullest jurisdiction and visitatorial power of the state and its courts, and the efficient exercise thereof in all proper cases, and that a forfeiture may be adjudged for a violation of this common-law obligation: *State v. Milwaukee etc. Ry. Co.*, 45 Wis. 579.

The necessity of a substantial compliance with the provisions of section 126 is evident, and a deliberately planned attempt to evade the obligation cannot be overlooked or tolerated. After our statement of the undisputed facts of this case, words need not be wasted in demonstrating that for the past three years the stockholders and officers of respondent corporation have been engaged in evading and violating that part of the statute under which the corporation was organized which requires that the place of business shall be, and the books kept, within this state. This is an abuse and misuser of its corporate rights, powers, privileges, and franchises which justify and demand a forfeiture thereof.

333 Judgment will therefore be entered vacating the charter and annulling the existence of the respondent corporation.

Buck, J., absent, sick, took no part.

CORPORATIONS—DUTY TO KEEP PLACE OF BUSINESS IN STATE.—It is the duty of every corporation formed under the laws of North Carolina to keep its principal place of business, its books, and its principal office within the state, to the extent necessary to the fullest jurisdiction and visitatorial powers of the state and its courts, and the efficient exercise thereof in all proper cases which concern such corporation: *Simmons v. Norfolk etc. Steamboat Co.*, 113 N. O. 147; 37 Am. St. Rep. 614, and note with the cases collected.

Cotter v. Wellford. 102 Am. St. 118

July, 1894.] HEINBOKEL v. NATIONAL S., L., & B. ASSN. 519

HEINBOKEL v. NATIONAL SAVINGS, LOAN, AND BUILDING ASSOCIATION.

[58 MINNESOTA, 340.]

BUILDING AND LOAN ASSOCIATIONS—WITHDRAWAL OF NONBORROWING MEMBER—RIGHT TO RECOVER.—A nonborrowing member of a mutual building association, who has brought himself within the rules by notice of withdrawal, cannot bring an action and take judgment against the association when, by reason of its by-laws and the statute, there is no money in the treasury legally applicable to the payment of his claim. He must abide by the condition of the treasury and take his money when funds properly applicable for the purpose are on hand, and not until then, in the absence of fraud on the part of the association.

Appeal from an order denying a new trial. On July 1, 1889, plaintiff purchased twenty shares of stock in the defendant association of a par value of one hundred dollars each, to mature by monthly payments of sixty cents on each share. He paid all required payments and all dues, fees, and assessments. His share of the profits on the stock was sixty-six dollars and fifty-seven cents on June 19, 1893, when he gave notice of withdrawal. Sixty days thereafter, he tendered his stock and pass-book and demanded payment, but was refused. He then brought suit to recover six hundred and eighteen dollars and seventy-nine cents, with interest. Defendant resisted, on the ground that it had no money which could legally be applied to the payment of plaintiff's demand. Judgment for the defendant, and plaintiff appealed.

Holcombe & O'Reilly, for the appellant.

C. E. Hamilton and J. M. Hawthorne, for the respondent.

341 COLLINS, J. Section 4 of article 2 of defendant's by-laws reads as follows: "A shareholder may withdraw at any time upon giving sixty (60) days' notice in writing to the association, when he shall receive the amount of the installments actually paid in by him on such shares, together with the interest thereon, if any, at the rate fixed by the board of directors, standing to the credit of his shares at last preceding adjustment of profits, less all fines and fees, amount paid in on expense account, and a proportional part of the losses, if any, and other charges accrued subsequent to said last preceding adjustment of profits; provided, however, that at no time shall more than **342** one-half of the funds in the hands of the trustee be applicable to the demands of withdrawing stockholders without the recorded consent of the directors."

See Heinbokel v. National Savings, Loan, and Bldg. Assn. 103 Am. St. 118

Subsequent to the adoption of these by-laws, the same regulation, in substance, was incorporated into the statutes of this state (Laws 1889, c. 236, sec. 27); and by an amendment thereto (Laws 1891, c. 131, sec. 27), it was provided that "not more than one-half of the amount received in payment on stock by" a building association "in any one month shall be used to pay withdrawals without the consent of the board of directors." The plaintiff became a member of the defendant association in July, 1889, and the question now presented for determination is plainly stated thus: Can a nonborrowing member of a mutual building association, who has brought himself within the rules by notice of withdrawal, be permitted to bring an action and take judgment against the association when, by reason of the statute and the by-laws, there is no money in the treasury legally applicable to the payment of his claim? In *United States etc. Assn. v. Silverman*, 85 Pa. St. 394, it was determined that he could, the statute under consideration being almost identical in language with section 27 of chapter 236 of the laws of 1889, and with defendant's by-law. The same conclusion was reached in the Buffalo (New York) superior court: *Englehardt v. Fifth Ward etc. Assn.*, 5 Misc. Rep. 518; 25 N. Y. Supp. 835; the chief justice dissenting; and Mr. Endlich, in his work on Building Associations, sections 141-143, coincides. The reasoning of the court in *United States etc. Assn. v. Silverman*, 85 Pa. St. 394, is that, as the stockholder ceases to be a member of the association after due notice of withdrawal, he may, upon refusal of payment, sue it, and recover judgment, just as any other creditor. The suggestion that the proviso in the statute stands in the way of his becoming a general creditor, and that he must be governed by it, is disposed of by urging that, if this be so, the withdrawing stockholder is in a most unfortunate position, for the association "may never choose to make the necessary provision" for payment of the claim, and therefore he can never have process to compel it so to do. It is asked, when will the association have the money—"in one, six, or ten years, or ever, and will the statute of limitations be suspended in the mean time?" And, finally, it is said that the design of the statute can be better met by giving the plaintiff judgment, and ³⁴³ then, should it seem equitable to the trial court, it may restrain execution, in order that the association may have a reasonable time in which to raise the necessary money.

If a stockholder, upon withdrawal, became a general creditor of the association, there would be force in the position that he

could (because his rights would be those of a general creditor) bring suit immediately, and obtain a judgment. But it is obvious that a stockholder who withdraws from one of these associations cannot properly be regarded as having the rights of the ordinary creditor, and this was admitted by the same learned court in a later case (*Christian's Appeal*, 102 Pa. St. 189), in which it was frankly stated that there was manifest error in *United States etc. Assn. v. Silverman*, 85 Pa. St. 394, in putting withdrawing stockholders in the position of general creditors. The conclusion in the case just mentioned loses potency when we discover that the reasoning is unsound. Again, with respect to the query therein as to the effect of the statute of limitations, it can be observed that in no case can the statute commence to run until the right of action accrues.

In assuming the relation of a member of the association, plaintiff contracted with reference to and was to be governed by its by-laws, in so far as they were reasonable and not opposed to our statutory provisions regulating associations of this character. He agreed to abide by the condition of the treasury in case of a withdrawal, and to take his money when funds properly applicable for the purpose were on hand. He was not to be paid until these funds were in the treasury, and, although he could at any time cease to be a member, and terminate his obligation to make monthly payments, the amount to be returned to him did not then become due or payable except in a certain contingency. If not absolutely and immediately due and payable at withdrawal, it is difficult to see how his cause of action was then maintainable. When the debt is due and payable, the right to sue, the right to obtain a judgment, and the right to have execution to enforce collection in the usual and ordinary course of procedure are his. And the fallacy of the reasoning in *United States etc. Assn. v. Silverman*, 85 Pa. St. 394, is strikingly apparent, when we see that a withdrawing member is first squarely placed in the category of ordinary general creditors, and then—evidently in order to prevent the wreck and ruin of such associations—it is said that he ³⁴⁴ may be deprived of the benefit of immediate process to collect his judgment. The collection of a judgment obtained by an ordinary general creditor cannot be postponed and delayed in that way. Again, we see no force in the remark that the corporation may never make provision for the payment of the claim, and therefore it cannot be compelled to pay. Provision for the liquidation of the claims of withdrawing members is not optional with the association, for, as long as

withdrawals are pending, it is obliged to set aside one-half of its receipts for the purpose of meeting and canceling such claims. Its ability to pay depends upon the fidelity with which remaining members discharge their obligations, and this is what all subscribers agree to when taking shares. Again, when considering the language of the by-law and statute, as well as the rights and remedies of withdrawing stockholders, it must be remembered that if, upon refusal to pay, because not in funds, a suit may be brought at once, and prosecuted to judgment, even if further proceedings could be stayed by the court, such judgment would, as soon as docketed, become a lien upon all real estate, having priority even over a later judgment obtained by a general creditor. In this way a withdrawing member could not only secure superior rights as against other members, but also over a creditor whose judgment was based upon an independent claim. In addition to this, the association would be seriously crippled and embarrassed, for no sale of its real property could be made so long as the lien remained.

The right to withdraw and to receive back what has been paid into the treasury by a member of the association exists solely by virtue of the by-law or the statute. If this right to receive money out of the treasury is made to depend upon its condition, the right is not perfect or absolute until that condition exists. We think the by-law and the statute equally plain, and to mean that, until there is money available for the purpose, no cause of action exists. This is the conclusion of the chief justice, who dissented in *Englehardt v. Fifth Ward etc. Assn.*, 5 Misc. Rep. 518, 25 N. Y. Supp. 835, and also that reached in the supreme court of Texas in May, 1890 (*Texas etc. Assn. v. Kerr*), which we have been unable to find reported except in 13 S. W. Rep. 1020.

It follows that there must be proper allegations in the complaint and proof upon trial as to the existence of funds out of which payment can properly be made.

³⁴⁵ Of course, we have been speaking of a case in which there has been no bad faith upon the part of the association. If it should neglect its duty towards withdrawing members by failing to take proper steps for replenishing its treasury, a proper remedy could be found.

Order affirmed.

Buck, J., did not sit.

BUILDING AND LOAN ASSOCIATIONS—WITHDRAWAL OF MEMBERS—RIGHT OF.—Where it is provided that a stockholder

wishing to withdraw shall have power to do so by giving notice of intention, when he shall be entitled to receive the amount paid in by him, and such proportion of the profits as the by-laws may determine, less all fines and other charges, a proviso that at no time shall more than one-half of the funds in the treasury be applied to the demands of withdrawing stockholders, does not estop a withdrawing member from legal process for the recovery of the money until the treasury has funds sufficient to meet his claims: Extended note to Roberts v. American Homestead Assn., 69 Am. Dec. 156.

KIICHLI v. MINNESOTA BRUSH ELECTRIC COMPANY.

[58 MINNESOTA, 418.]

CONTRACTS.—PRESENT LIABILITY IS INCURRED when a contract is made to be performed in a future series of years.

MUNICIPAL CORPORATIONS—FUTURE INDEBTEDNESS. If a city is prohibited from making any contract whereby liability is incurred exceeding the revenues of any fiscal year, a contract made by it for the lighting of its streets for a term of five years is void, unless the revenue on hand at the time the contract is made is sufficient to cover all the liability incurred under the contract and payable during the five years, together with the current expenses and existing liabilities for the year in which the contract is made.

Hahn & Hawley, for the appellant.

D. F. Simpson, for the respondent.

423 CANTY, J. Plaintiff brought this action against the Brush Electric Light Company and the city of Minneapolis and certain of its officers. He alleges in his complaint that he is a resident and taxpayer of said city; that on August 6, 1892, the city and the electric company entered into a pretended contract, whereby the company agreed to provide certain lamps and electric light service to be used in lighting the streets, and whereby the city agreed to pay for the same at certain specified rates, the contract to continue for the period of five years from and after January 1, 1893; that both parties have since been acting under and performing said contract, and that the city is paying for such service much more than it is worth, and threatens to, and if not restrained will, continue to perform such contract during the balance of said five years, and will pay out for such service during said time at least two hundred thousand dollars more than the reasonable cost and expense thereof, and prays that an injunction issue, restraining the further payment of any public funds upon said contract.

The electric company appeals from an order overruling its demurrer to this complaint, on the ground that it does not state a

cause of action. In overruling the demurrer, the court below held that the city has no power, under its charter, to make a contract for five years for lighting the streets.

The charter (Special Laws 1881, c. 76, subc. 1, sec. 1) provides that the city "shall be capable of contracting and being contracted with, and shall have all the general powers possessed by municipal corporations at common law."

Subchapter 4, section 5, subdivision 11, gives the city power "to erect lamps and provide for lighting the city . . . and to create, alter, and extend lamp districts."

Subchapter 5, section 7, as amended by the Special Laws of 1887, chapter 15, section 16, provides that the fiscal year shall commence on the first day of January in each year.

The general statute provides that the state board of equalization shall meet on the first Tuesday in September of each year to equalize the assessments in the different counties, cities, etc.

⁴²³ Subchapter 5, section 8, of said charter provides that when such board shall have completed its adjustment of the assessment of the taxable property in said city, the city comptroller shall report to the city council a computation of a rate of tax levy which, with the amount of revenue received by the city for the last year reported as aforesaid and applicable to the current expenses of the city, shall be sufficient to defray the current expenses of the city for the next fiscal year.

Section 10 of subchapter 5, as amended by Special Laws of 1887, chapter 15, section 4, reads as follows:

"Sec. 10. After the making of the reports of the city comptroller, provided for in section eight (8) hereof, the city council shall levy such tax on all the taxable property in said city as it shall deem necessary, in addition to the other revenue of the city applicable thereto, to defray the current expenses of the city for the next fiscal year, but no such taxes for such current expenses shall in any year amount to more than six-tenths (6-10) of one per cent of the assessed valuation. Prior to the levying such tax to defray the current expenses of the city for the next fiscal year, said city council shall, by resolution, appropriate a certain sum of money for the expenses of each department of the city government, which is to be paid out of said current expenses fund, and no more money than thus appropriated shall be expended for any fiscal year for any such department of the city government.

Section 11 of subchapter 5, as amended by the Special Laws of 1889, chapter 33, section 4, reads as follows:

"Sec. 11. The city comptroller shall, as soon as may be after the first (1st) Monday in January of each year, make report to the city council of the actual expenses of the city for the first quarter of the then current fiscal year, the amount of taxes collected and outstanding and of the revenues received from other sources, and if, upon the making of such report, it shall appear that the current expenses for such quarter have exceeded the estimates upon which the tax levy therefor was based, or that the revenues of said city are likely to fall short of their estimated amount at the time of making such tax levy, the city council shall forthwith proceed to reduce the current expenses of said city in such manner as may be deemed advisable, and for that purpose may diminish the amount of service for lighting streets, reduce the force or number of men employed in the several departments 424 of the city, except the fire department, but, in the discharge of such employees said city council so far as may be shall provide that such discharge shall be operative only during the summer months of the year. In all future contracts for lighting streets, the right of the city to reduce the amount of the service on account of deficiency of revenue shall be reserved."

Sections 13 and 14 provide for the payment of interest on the bonded indebtedness and the creation of a sinking fund.

Section 15 of this subchapter 5 provides that bonds shall be paid out of this sinking fund as they mature, and, if there is not sufficient of that fund to pay the same, empowers the city council to issue new bonds to such an amount as may be necessary to meet the deficiency. It then provides: "But neither said city council nor any officer or officers of said city shall otherwise, without special authority of law, have authority to issue any bonds, or create any debt or any liabilities against said city in excess of the amount of revenue actually levied and applicable to the payment of such liabilities."

All of said sections, from 7 to 15, in said subchapter 5, relate to the finances of the city, are connected, and to be read together. It seems to be a carefully devised scheme to compel the city to ascertain with reasonable care, in advance of the tax levy, what the income will be, and to live within that income. It clearly prohibits the anticipating of any future revenue, except that for which the tax is actually levied at the time the liability is incurred. It is unnecessary to notice, step by step, the limitations to be found in these sections. They constitute a system of checks and limitations on the creation of debt and the incurring

of liability, which wind up by depriving the city council of the power, "without special authority of law," to "create any debt or any liabilities against said city, in excess of the amount of revenue actually levied and applicable to the payment of such liabilities."

It is urged that making a contract this year, to be performed in part this year, in part next year, and in part the year after, and paid for only as performed, is not incurring liability at the time the contract is made, as the tax will be levied before the debt is created; that is, before the liability matures. To this it may be answered that a liability is incurred when the contract is made. The point here involved is disposed of in the cases of *Johnston v. Board of Commrs.* ⁴²⁵ 27 Minn. 64, and *Rogers v. La Sueur County*, 57 Minn. 434, where the court held that a liability was incurred when the contract was made, though not to be performed, or the performance paid for, until after the taxes of subsequent years would be available to pay it. There the county commissioners were limited in incurring liability to the maximum amount which could be levied in one year according to the tax lists then on file. Here the limitation is more stringent. It limits the city council, in incurring liability, to the amount of the tax "actually levied" at the time the liability is incurred.

It is true that there is at the end of said section 11 the following clause: "In all future contracts for lighting the streets, the right of the city to reduce the amount of the service on account of the deficiency of revenue shall be reserved." If this provision stood alone, it would be entitled to considerable weight, as implying a right to make such time contracts for street lighting; but it does not stand alone, and, in the connection in which it is used, cannot be so interpreted.

Section 10 provides for limiting absolutely, before the tax levy, the expense of each department for the next fiscal year. Section 11 provides for contracting this limit still more, after the first quarter, "if the current expenses for that quarter have exceeded the estimates upon which the tax levy therefor was based," and provides for cutting down expenses in different ways, including the diminishing of the light service. Then follows the clause above quoted. This clause follows a limitation upon a limitation, for the purpose of giving effect to those limitations, and cannot be held, in such a connection, to give by implication the right to make such time contracts. Besides, section 15 prohibits the making of any contract whereby liability is incurred exceed-

ing the revenues of the fiscal year, "without special authority of law." Mere implied authority is not sufficient.

The conclusion arrived at is further strengthened by a consideration of other provisions of the charter. Thus, subchapter 4, section 5, subdivision 44, empowers the city council to make five year contracts for the removal of garbage; and contracts for three years for street sprinkling are permitted by subchapter 8, section 17.

The complaint nowhere alleges what funds were or were not applicable ⁴²⁸ to the payment of the liability incurred by this contract at the time the contract was made. The complaint does not state what funds were then on hand, or what amount of tax was then levied, or what amount of funds would be realized from other sources, or what the total amount of all such funds would be for that fiscal year, applicable to such liability. For this reason it is urged by appellant that the complaint does not state a cause of action. We cannot agree with counsel. The charter specifies a number of purposes for which revenue shall be raised. The only other power given to the city council to raise revenue is to levy such tax as it shall deem necessary, with the other sources of revenue, to meet the current expenses of the next fiscal year. Under these provisions, it would be a violation of the duty of the city authorities to levy a tax this year to be applied to the payment of the current expenses of two, three, or four years to come. Neither would they be justified in setting aside funds now on hand to be applied in payment of such current expenses for such years to come, and then proceeding to levy a tax to meet next year's current expenses, to which the funds on hand should be applied.

It seems to us that we cannot hold this contract valid on its face, unless we can presume that the funds on hand, and the taxes actually levied, when the contract was made, were sufficient to cover all the liability incurred by this contract (payable during the next five years), and also to cover the current expenses and other existing liabilities of the fiscal year for which such taxes were levied. We are of the opinion that under the limitations on raising and accumulating revenue, both express and implied, in this charter, we cannot make this presumption.

The order appealed from should be affirmed. So ordered.

Buck, J., absent, sick, took no part.

MUNICIPAL CORPORATION—POWER TO INCUR FUTURE INDEBTEDNESS.—A constitutional provision that "no city or county

shall incur any indebtedness or liability exceeding in any year the income provided for it for such year" means that each year's income and revenue must pay each year's indebtedness and liability, and that no indebtedness or liability incurred in any one year shall be paid out of the income or revenue of any future year: *Smith v. Broderick*, 107 Cal. 644; 48 Am. St. Rep. 167, and note.

KINNEY v. DULUTH ORE COMPANY.

[58 MINNESOTA, 455.]

MECHANICS' LIENS — RIGHTS OF ASSIGNEE OF CLAIM FOR.—The transfer of a claim enforceable under the provisions of the mechanics' lien law operates as an assignment of the right to a lien, including the right of the transferee to file the lien statement in his own name and to include more than one claim or demand in the same lien statement.

Foreclosure of mechanics' liens. The Duluth Ore Company was the lessee of certain land with the right to remove therefrom iron ore on certain conditions. It contracted with C. J. Anderson to open up and drain the mine and uncover the ore. Anderson employed one Spiek and over one hundred laborers to do this work, which they did, and, not receiving their pay therefor, they assigned their claims to plaintiff Kinney, and others. The plaintiffs then made and verified a statement for a lien on the land for the amount of the assigned claims, and caused it to be recorded. They afterward brought this suit to foreclose such liens. A demurrer to the complaint was sustained by the trial court and plaintiffs appealed.

Draper, Davis & Hollister, for the appellants.

Cotton, Dibell & Reynolds, for the respondents.

457 **COLLINS, J.** The questions here presented for determination are: 1. Does the proper transfer of a claim or demand, the payment of which may be enforced under the provisions of the mechanic's lien law (Laws 1889, c. 200), operate as an assignment of the right to a lien, including the right of the transferee to file the lien statement in his own name? and 2. If the first question be answered in the affirmative, can such transferee or assignee include more than one claim or demand in the same lien statement?

1. There is nothing in our statute, as there is in the statutes of some states, which forbids, directly or by implication, the assignment of such claims and demands; and it was held more than

twenty-five years ago, in *Tuttle v. Howe*, 14 Minn. 145, 100 Am. Dec. 205, that a lien claim was capable of assignment, although in that case the required affidavit for a lien had been filed by the original creditor prior to the assignment. In that opinion, attention was called to the General Statutes of 1866, chapter 90, section 14, the then existing lien law, which gave to executors and administrators, as does the laws of 1889, chapter 200, section 17, the same rights as their testator or intestate would be entitled to, if living, and the well-settled general rule, that whatever rights of action or of property survive to an executor or administrator are assignable, was referred to and relied upon. No one would dispute the right of an executor or an administrator to file the lien statement required by the present statute, and, if such be the case, it logically follows that the assignee of the lien may make and file the lien statement. There is no good ⁴⁵⁸ reason why the right to the lien should not be assignable before as well as after the statement has been filed, and there is an abundance of reasons why, if the right be assigned, the assignee should thereafter take all necessary steps required to preserve and collect his claim. He must not be put at the mercy of his assignor, who might or might not choose to make or file the statement.

It is elementary that the assignment of a debt carries with it all the liens, securities, and remedies which the assignor held or might have employed to enforce its payment, in the absence of a statute to the contrary. There has been some quibbling in the courts to avoid the application of this rule, where the transfer has been of a claim or demand to which the right of lien attached. We are not inclined to follow the cases in which application of the rule has been denied. A summary of the decisions of the various states on the subject of the assignability of this class of debts, and the result of such assignments, may be found in *Phillips on Mechanics' Liens*, third edition, sections 54-56.

2. We are clearly of the opinion that the lien statement may cover and include more than one claim or demand, providing the requirements of the statute are complied with as to each. Expense and trouble is thus saved, the procedure is directly in line with that provision of the statute which compels the bringing of all lien claimants into one action, and the object of the law is fully accomplished. Although the facts are not the same, the case, on this point, is governed by *Benjamin v. Wilson*, 34 Minn. 517.

Order reversed.

Buck, J., absent, sick, took no part.

The Assignment of the Liens of Mechanics and Materialmen.

PERFECTED LIENS.—Although there is a direct conflict in the adjudicated cases on the subject, the great weight of authority, as well as the better reasoning, is in favor of the rule that a perfected mechanic's lien may be assigned, and the assignee may thereafter enforce it in his own name, and in the same method that the assignor might have done: Tuttle v. Howe, 14 Minn. 145; 100 Am. Dec. 205; Iaege v. Bossieux, 15 Gratt. 83; 76 Am. Dec. 189; The Victorian, 26 Or. 194; 46 Am. St. Rep. 616; Davis v. Bilsland, 18 Wall. 659; Goff v. Papin, 34 Mo. 177; Jones v. Hurst, 67 Mo. 568; Busfield v. Wheeler, 14 Allen, 139; Oliver v. Fowler, 22 S. C. 534; Major v. Collins, 11 Ill. App. 658; Sherrick v. Roderick, 20 Ill. App. 622; Austin etc. Ry. Co. v. Daniels, 62 Tex. 70; Texas etc. R. R. Co. v. McCaughey, 62 Tex. 271; Rogers v. Omaha Hotel Co., 4 Neb. 54; Hoagland v. Van Etten, 31 Neb. 292; Skyrme v. Occidental Mill etc. Co., 8 Nev. 220; Kline v. Comstock, 67 Wis. 473; Brown v. Harper, 4 Or. 90; Brown v. School Dist., 48 Kan. 709-712; Kerr v. Moore, 54 Miss. 286; Murphy v. Adams, 71 Me. 113; 36 Am. Rep. 299; German Bank v. Schloth, 59 Iowa, 316; Merchant v. Ottumwa Power Co., 54 Iowa, 451; Midland Ry. Co. v. Wilcox, 122 Ind. 84; Dudley v. Toledo etc. Ry. Co., 65 Mich. 655; The Champion, Brown & L. 520, 535.

In Tuttle v. Howe, 14 Minn. 113, 100 Am. Dec. 205, it was said: "We can conceive of no reason, in the nature of things, why an assignment of the debt or account and the lien should not be valid, so that the assignee can enforce the lien in his own name. The claim of the materialman and the lien are certainly the property of the materialman, and why should he not have the right to dispose of both? There is nothing in the lien right of the nature of a personal trust. The lienholder is not intrusted with the possession of the property bound by the lien. His lien is a security. What difference can it make to the lienor who holds the lien? His duty is to pay the debt. If he pays it his property is discharged. If he fails to pay it, and so loses the property, of what moment is it to him whether the lien is enforced by the materialman or his assignee? So far as considerations of this kind are concerned, we are unable to see why the quality of assignability should not be attributed to a mechanic's lien, as well as to a judgment lien, a lien by mortgage, or the special property of a pawnee. The lien law is designed for the protection of the materialman, the mechanic, and other persons performing labor upon buildings. As an assignment is not prohibited, and there is nothing in the nature of a lien which would render its transfer improper or injurious, and as the lien is wholly a creature of statute, the statute should be so construed as to make the protection which it designs to afford as valuable and effectual as possible. And upon these grounds, we think the assignability of mechanics' liens ought to be sustained if fair construction will permit it, for it is apparent that the right to dispose of his lien—to realize from it without waiting for the slower process of the law—may be of real advantage to the lienholder, and cannot possibly injure the lienor."

The court in Iaege v. Bossieux, 15 Gratt. 98, 76 Am. Dec. 189, in speaking of the assignability of a mechanic's lien, said: "No reason is shown why it may not be regarded as assignable for value in equity. It is said, and authorities have been cited to show, that such a statute is to be construed strictly, and it is contended that it is intended conclusively for the benefit of the builder and materialman. No case has been cited affirming that a contract under such a statute cannot be assigned. There is nothing in public policy or in the language or the policy of our act to forbid it, and if the statute be exclusively for the benefit of the builder and materialman, it would certainly impair the

value of his lien to declare it nonassignable. It might prejudice him by depriving him of credit which he might otherwise obtain to prosecute his undertaking, and thus also operate a disadvantage to the owner. Whilst the latter can in no respect be injured by the assignment, because the assignee takes the obligation subject to the same equity to which it was subject in the hands of the obligee, and must allow all just discounts, not only against himself, but against the assignor before notice of the assignment."

In *Murphy v. Adams*, 71 Me. 113-118, 36 Am. Rep. 299, the court said: "The object of the statute giving the lien is to make certain the payment for the labor which has gone to increase the value of the timber, and it would detract much from the benefit designed to be conferred to hold that the laborer must necessarily personally incur all the delay and expense that not infrequently arise from the tedious litigation which follows an effort to enforce a lien of this sort at the peril of losing it altogether. We think it would be laying an unnecessary burden upon the laborer, for whose benefit the statute was designed, to say that he should not avail himself of the security which the statute gives him in the way most beneficial to himself, and if he can better himself by giving to an assignee the right to proceed, instead of waiting for the slow process of the law, we see no reason why he may not do it without forfeiting the lien from which he derives that advantage."

In *Midland Ry. Co. v. Wilcox*, 122 Ind. 85-92, the court used the following forcible and logical reasoning: "We cannot regard the reasoning of some of the courts, which hold that the right to a lien is a purely personal privilege, as either valid or forcible. Statutes giving a lien always intend to give a security for a debt, and this they generally accomplish. If the debtor gets what he contracted for, it cannot, in justice, make any difference to him to whom he pays what he owes, nor to whom the security created by law is assigned. It is often of great importance to a contractor to be able to raise money to prosecute the work under contract, and, in order to do this, to assign a claim secured by a lien. The denial of the right to assign may often seriously cripple and hamper a contractor, and yet do no good to the debtor. If the one may be benefited without the slightest injury to the other, there is no conceivable reason why the law should not permit him to receive that benefit by assigning his claim and lien. It is a sacrifice of justice to a bald technical rule of the common law, little respected anywhere now, to deny the right to assign the debt and with it the security the law provides."

No particular form of words is necessary to constitute an assignment of a mechanic's lien; it is sufficient if the intent of the parties to effect an assignment is clearly established: *Skyrme v. Occidental Mill etc. Co.*, 8 Nev. 219. A number of liens may be assigned to one person, who may maintain a suit as such assignee on all of the liens in his own name: *Skyrme v. Occidental Mill etc. Co.*, 8 Nev. 219; *Hoagland v. Van Etten*, 31 Neb. 292. Quite a number of cases hold that the lien of a mechanic is a personal right which cannot be assigned or transferred: *Fitzgerald v. Trustees*, 1 Mich. N. P. 243; *Bradley v. Spofford*, 23 N. H. 444; 55 Am. Dec. 205; *Horton v. Sparkman*, 2 Wash. 165; *Rollin v. Cross*, 45 N. Y. 766; *Ruggles v. Walker*, 34 Vt. 468. On the other hand are a few cases declaring that the lien of a mechanic for work and materials, though fully perfected, is a personal right, and cannot be transferred or assigned so as to enable the assignee to prosecute a suit thereon in his own name, or otherwise avail himself of the benefit of the lien: *Caldwell v. Lawrence*, 10 Wis. 331; *Pearsons v. Tincker*, 36 Me. 384; *Tewksbury v. Bronson*, 48 Wis. 581.

ASSIGNMENT OF RIGHT TO LIEN.—On this topic also there is a conflict of authority, but the great majority of the cases maintain the proposition that the assignee of a claim for work and labor or material furnished cannot file the notice required by law and thereby create a lien. The right to create and perfect such lien is personal to the me-

chanic and cannot be assigned. Even in most of those jurisdictions where the perfected lien is capable of assignment, the mere inchoate right to a mechanic's lien before the lien has been perfected by the filing of the claim, is not assignable: *Roberts v. Fowler*, 4 Abb. Pr. 263; *Rollin v. Cross*, 45 N. Y. 766; *O'Connor v. Current River R. R.*, 111 Mo. 185; *Griswold v. Carthage etc. Ry. Co.*, 18 Mo. App. 52; *Brown v. Chicago etc. Ry. Co.*, 36 Mo. App. 453; *Merchant v. Ottumwa Water Power Co.*, 54 Iowa, 451; *Brown v. Smith*, 55 Iowa, 31; *Langan v. Sankey*, 55 Iowa, 52; *Goodman v. Pence*, 21 Neb. 459; *Noll v. Kenneally*, 37 Neb. 879; *Brown v. Harper*, 4 Or. 90; *McCrea v. Johnson*, 104 Cal. 224; *Mills v. La Verne Land Co.*, 97 Cal. 254; 33 Am. St. Rep. 168. The following reason has also been given for the rule: "If the mere assignment of the debt gave the assignee the right to assert the claim, then, in cases where portions of the debt were assigned to different persons, each must file a lien for the amount due to himself, and thus, instead of one lien against the property, there might be fifty, or an indefinite number, which would render the proceeding cumbersome and oppressive. Before the assignment of the debt, therefore, will carry the right to a mechanic's lien, it must be perfected by properly filing the same in the office of the county clerk before the assignment is made"; *Goodman v. Pence*, 21 Neb. 459-462. "The lien is, in general, a personal right given to the mechanic, materialman, and laborer for his own protection, and the right to create it cannot be assigned or transferred to another, unless the assignment is made for the benefit of the assignor, and to be held as his agent, so that the lien may be preserved": *Rollin v. Cross*, 45 N. Y. 667-771. The transfer by a person entitled to a mechanic's lien, to another, of his account for materials furnished, before he has filed his claim for a lien, destroys the right to a lien, and confers no authority upon the assignee to file such claim and perfect and enforce the lien: *Noll v. Kenneally*, 37 Neb. 879. If one entitled to a mechanic's lien assigns the sum due him to another, as collateral security for the payment of a debt, he still has sufficient interest to entitle him to file a lien statement afterward within the statutory time, which will secure his equitable rights in the claim assigned, and also inure to the benefit of his assignee; but if he makes an absolute assignment, a lien statement filed by him on his own account thereafter is void, and does not inure to the benefit of his assignee: *Davis v. Crookston Water Works Co.*, 57 Minn. 402; 47 Am. St. Rep. 622.

A few cases maintain the rule announced in the principal case, namely, that an assignee of the claim of a person entitled to a mechanic's lien may make and file the lien statement and enforce the lien. The transfer of the claim operates to assign the inchoate right to a lien which may be perfected by the assignee: *McDonald v. Kelly*, 14 R. I. 335; *Mason v. Germaine*, 1 Mont. 263. If a builder has assigned all his interest in a building contract to another, and the owner of the premises has notice of the assignment, the assignee becomes the equitable owner of the avails of the building contract and of the lien arising therefrom: *Major v. Collins*, 11 Ill. App. 658. A member of a partnership has a right to use the firm name in perfecting a mechanic's lien to which the firm is entitled, but of which he has become the sole owner by assignment, before the lien is perfected: *Jones v. Hurst*, 67 Mo. 568. A mechanic's lien accruing to a partnership is not lost by the retirement of one of the partners and the taking a new member into the firm, and the statement for such lien may be filed within the statutory time by the new firm: *Brown v. School Dist.*, 43 Kan. 709.

THOMPSON v. DODGE.

[56 MINNESOTA, 555.]

BICYCLES—RIGHTS OF RIDERS IN HIGHWAY.—A person riding a bicycle upon the public highway has the same rights in so doing as persons on horseback or using other vehicles thereon.

BICYCLES—RIGHTS ON HIGHWAY.—A bicycle is a vehicle, and the riding of one upon the public highway, in the ordinary manner, is neither unlawful nor prohibited by any principle of law.

BICYCLES—RIGHTS ON HIGHWAY.—It is not the duty of a person lawfully traveling upon a public highway on a bicycle, when he sees a horse and carriage approaching, to stop and inquire whether the horse is likely to be frightened, nor to anticipate that such horse will be frightened, in the absence of any apparent reason for so doing.

BICYCLES—NEGLIGENCE—LIABILITY FOR.—A person cannot be held liable for his acts, unless done in such manner and at such time as to show that he is acting in disregard of the rights of others. This rule applies to a bicycle rider lawfully traveling upon a public highway.

C. P. Carpenter, for the appellant.

Hodgson & Schaller, for the respondent.

555 BUCK, J. This action was commenced in justice's court to recover damages for injury to the plaintiff's carriage, which plaintiff alleges was caused by the carelessness and negligence of the defendant in riding and using a bicycle in the public highway, whereby plaintiff's horse was frightened, and became wholly unmanageable and shied, precipitating the plaintiff, horse, and carriage off from the grade and road into a swamp, and damaging the carriage of plaintiff to the amount of fifteen dollars.

The plaintiff recovered judgment for fifteen dollars and costs, but, upon appeal to the district court of Dakota county, the judgment was reversed, upon the ground that, conceding all of the testimony introduced by the plaintiff to be true, the defendant was not negligent. The decision of the district court was right. It is true that upon a controverted question of negligence, where different deductions or reasonable inferences might be drawn by the jury from the conflicting evidence, the general rule is that the finding of the jury should not be disturbed. But upon the undisputed facts, or assuming the testimony of the plaintiff to be true, it does not show a cause of action against the defendant. A person riding a bicycle upon the public highway has the same rights in so doing as persons using other vehicles thereon. A highway is intended for public use, and a person riding or driv-

ing a horse has no rights superior to those of a person riding a bicycle. In the use of a public highway there are certain rights of the road which must be observed by all persons, and a ⁵⁵⁷ violation of those rights constitutes actionable negligence. Bicycles are vehicles used now very extensively for convenience, recreation, pleasure, and business, and the riding of one upon the public highway in the ordinary manner as is now done is neither unlawful nor prohibited, and they cannot be banished because they were not ancient vehicles, and used in the Garden of Eden by Adam and Eve. Because the plaintiff chose to drive a horse hitched to a carriage does not give to him the right to dictate to others their mode of conveyance upon a public highway, where the rights of each are equal. The traveled grade where the parties met was from ten to twelve feet wide, giving ample room for the parties to have passed each other. General Statutes of 1878, chapter 14, section 1, provides that when persons meet each other on any bridge or road, traveling with carriages, wagons, sleds, sleighs, or other vehicles, each shall seasonably drive his carriage or other vehicle to the right of the middle of the traveled part of the road, so that the respective carriages may pass each other without interference. This law appears to have been complied with on the part of the defendant. If there was not room to pass, it was as much the duty of the plaintiff to stop as of the defendant, especially in view of the fact that he testified that, when he discovered defendant riding toward him he anticipated that his horse would be frightened.

In his complaint, the grounds of negligence charged are that defendant did not stop riding toward plaintiff, and ascertain whether plaintiff's horse was likely to be frightened, and by riding upon the road grade before plaintiff had time to drive off the same. As the defendant had the legal right to be in the highway, and as there is no allegation in the complaint that the defendant knew, or had any reason to believe or anticipate, that plaintiff's horse would be frightened at defendant's bicycle, or the manner in which he was riding the same, it does not charge actionable negligence. It is not the duty of a party lawfully traveling upon a public highway upon a bicycle, when he sees a horse and carriage approaching, to stop and inquire whether the horse is likely to be frightened, nor to anticipate that such horse will be frightened, especially in the absence of any apparent reason for so doing; and it appears from the evidence that defendant was within five to ten feet of plaintiff's horse when he

noticed that the horse was frightened. When he first saw plaintiff, he was about seventy or one hundred feet away from him, and riding at the rate of ⁵⁵⁸ eight miles an hour; but, to use his expression, he slowed up, and turned out to the edge of the road next to the grass on the right side of the road, and only went the length of the plaintiff's horse before he dismounted, and went to the assistance of plaintiff, and rendered him such assistance as he was able. There is not a single word of evidence going to show any willful act of tort on the part of defendant, or that he was riding his vehicle in any other than the ordinary way and reasonable manner, or that he apprehended or anticipated any fright on the part of plaintiff's horse. Simply because the plaintiff's carriage was injured by reason of his horse becoming frightened at defendant's riding his vehicle does not impute negligence to defendant. If defendant's act was not wrongful, the resulting injury was not actionable. The plaintiff cannot be made to pay or suffer for his acts, unless the acts done by him were done in such manner and at such a time as to show that he was acting in disregard of the rights of other persons. This is not such a case.

The pleading and proof of a custom as to parties approaching each other on the grade where this injury resulted are so wanting in stating and proving all the essential elements necessary that we need not discuss this question.

The judgment appealed from is affirmed.

Gilfillan, C. J., absent, took no part.

BICYCLES—RIGHTS OF RIDERS IN HIGHWAYS.—A bicycle is a vehicle within the meaning of the law, and may be lawfully ridden upon the public highway for convenience, recreation, pleasure, or business: Extended note to *Rispe v. Elting*, 48 Am. St. Rep. 377, 378, in which the principal case is cited.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

**DOUGHERTY v. KANSAS CITY AND INDEPENDENCE
RAPID TRANSIT RAILWAY.**

[128 MISSOURI, 32.]

RAILWAYS—NEGLIGENCE.—An instruction that, if the platform steps used by a railway at its station to enable passengers to alight were such as are ordinarily provided for similar cars by similar roads, the corporation has satisfied the requirements of the law, is erroneous. It cannot excuse itself, unless the appliances used by it were reasonably safe, though they were such as had been adopted and used by other railways.

Karnes, Holmes & Krauthoff, for the appellant.

Robert Adams and J. N. Southern, for the respondent.

³⁵ **ROBINSON, J.** This case is here on an appeal by defendant from the order of the trial court setting aside a verdict and judgment, and granting to plaintiff a new trial, for alleged errors against the right of plaintiff in the giving of instructions.

³⁶ The action was brought by plaintiff to recover damages from defendant for negligence which resulted to his injury while a passenger on one of its trains, in alighting at the town of Independence. The alleged negligence consisted in not providing necessary lights at said town, and in not providing "safe steps or platform for egress from its trains and from the car on which plaintiff was transported as defendant's passenger as aforesaid, and in not giving plaintiff notice of the dangerous condition of said landing place, and in not providing suitable steps for plaintiff's exit from the car on which he rode, or such as he had been led to expect of defendant, and did not assist, or offer to assist, him in any way to alight from said train, and in letting him grope

his way out of said car in dense darkness and ignorance of the danger it had subjected him to by reason" of such carelessness and negligence of defendant.

After a protracted trial, the issues were submitted to a jury, and a finding for defendant was made. Plaintiff moved for a new trial, especially assigning as error the giving defendant's third instruction. The motion was sustained, from which action defendant appealed to this court. The instruction is as follows:

"If the jury believe, from the evidence, that the light, if any, in use at the station at Independence at the time of the accident, whether provided by the defendant or from any other sources, was sufficient to enable passengers exercising ordinary care and prudence to alight with safety, then the requirements of the law were satisfied in that respect, and *the jury are further instructed that if the defendant provided and used such platform steps to enable the passengers to alight as were ordinarily provided for similar cars on similar roads, then, in that respect, it has satisfied the requirements of the law.*"

²⁷ The italicized portion of the instruction is that of which complaint is made. We think justly so. The first paragraph is well enough, certainly in view of the tender of a similar declaration by defendant.

The faulty portion of the instruction cannot be justified upon any theory of law; it practically declares that if the platform steps used by defendant at the place and time in question were such as "were ordinarily provided for similar cars on similar roads," without regard to the question as to whether the appliance was reasonably safe, dangerous, or otherwise, then plaintiff cannot recover. The action of the lower court in promptly repudiating its error is highly commendable.

It is not necessary to set out the evidence nor consider the other points made. This error alone justified the court's action. The issue was not what platform steps are ordinarily provided for similar cars on similar roads, but whether the platform steps of this particular road at the time when plaintiff was injured were in a safe condition. The defendant cannot excuse itself from the obligation to furnish its passengers with reasonably safe appliances for getting in or out of its cars by showing that the appliances it had adopted had been adopted and used by other railroads engaged in a similar work. No amount of elaboration would make the matter any plainer or the error in giving the instruction any less: *Hill v. Portland etc. R. R. Co.*, 55 Me.

438; 92 Am. Dec. 601; Cleveland v. New Jersey Steamboat Co., 5 Hun, 523; Humbird v. Union Street Ry. Co., 110 Mo. 76. The action of the lower court in granting a new trial was correct and the judgment is affirmed.

All concur.

RAILROADS AS CARRIERS OF PASSENGERS—LIABILITY FOR DEFECTS IN CARS.—It is the duty of carriers of passengers to exercise a high degree of care in providing all appliances necessary for the safe carriage of those whom they undertake to carry. If injuries happen to their passengers from the failure to perform this duty, the carrier is liable therefor: Extended note to *Ingalls v. Bills*, 43 Am. Dec. 362.

DE BERRY v. WHEELER.

[123 MISSOURI, 84.]

HUSBAND AND WIFE.—A CONVEYANCE BY A HUSBAND to his wife is not fraudulent, as against his creditors, if the property so conveyed was purchased with her separate estate, and she then intended to take title in her own name, though the deed, through inadvertence and mistake, was taken in the name of her husband. In subsequently making the conveyance to her he but performed his duty.

ESTOPPEL.—A WIFE IS NOT, AS AGAINST CREDITORS OF HER HUSBAND, estopped from claiming that lands standing in his name were purchased with her separate estate, and with the intention of then vesting the title in her, and that the conveyance to him was made by inadvertence or mistake, if he was not engaged in any hazardous undertakings or in any business prosecuted on credit.

EQUITABLE ESTOPPEL ARISES ONLY when one, by his words or conduct, willfully causes another to believe in the existence of a certain state of facts, and induces him to act upon that belief so as to alter his previous position to his prejudice.

Joel Funkhouser, for the appellant.

Hiram Smith and William Henry, for the respondents.

87 MACFARLANE, J. This is an action in the nature of a creditor's bill, the object of which is to reach certain real estate, the title of which was in defendant Caroline T. Wheeler, wife of defendant William H. Wheeler, and subject the same to the payment of a judgment in favor of plaintiff and against the said William H. Wheeler and others.

The evidence in brief disclosed these facts: Defendants, the said William H. and Caroline T. Wheeler, were married about the year 1884. The wife was then possessed of real and personal property. The husband owned nothing. About the 12th of

March, 1888, the said defendants sold a tract of land belonging to the wife, and with proceeds of the sale bought the land in controversy, the title to which, without the knowledge of either, and through mistake or inadvertence, was taken in the name of the husband. The fact that the title was so taken first came to the knowledge of the wife five or six months after the date of the deed. She at the time objected and insisted on a correction. There was at the time a deed of trust on the land, held by eastern capitalists, and it was agreed between the husband and wife that as soon as that was satisfied the correction should be made.

On August 20, 1890, one T. R. Sheldon, as principal, and Sarah E. Sheldon and defendant William H. Wheeler, as sureties, executed and delivered to plaintiff a note for three hundred and seventeen dollars and fifty cents. Before taking the note plaintiff was informed that defendant William H. Wheeler was the owner of this land, and was good for the amount of the note, and upon this information he loaned the money. Plaintiff demanded payment of said defendant on the fourteenth day of February, 1893.

On the 15th or 16th of the same month, in order to place the title to said land in the wife, she and her husband executed a deed to defendant Oliver Adams, and, on the same day, Oliver Adams and wife by proper deed conveyed the land to defendant Caroline T. Wheeler.

Plaintiff afterwards, in May, 1893, obtained a judgment on said note, in the circuit court of Clinton county, for four hundred and five dollars and seventy-five cents, against all the makers of said note. Upon this judgment execution was issued and returned nulla bona.

This suit was then commenced to set aside the conveyances from Wheeler and wife to Adams, and from Adams and wife to said defendant Caroline T. Wheeler, as obstructions to enforcement of the judgment under execution. The court found for defendant and dismissed plaintiff's petition, and he appealed.

1. This record shows no intended fraud on the part of either William H. Wheeler or his wife in transferring the title of the property from the former to the latter. The evidence leaves no doubt whatever that the property was paid for by money belonging to the wife, and that the purchase was made by her husband under her direction and for her benefit. It is equally clear that she intended, when the purchase was made, that the

title should be vested in herself and not in her husband. There is also doubt whether the husband ^{so} directed that the deed should be made to himself. However that may be, the property belonged in equity to the wife, and it was the duty of the husband to restore it to her. No consideration, other than the mere execution of the trust, was necessary. There was no more fraud on the face of this transaction than would be found in preferring the wife as a creditor to other of his creditors, which we have held that the husband had the undoubted right to do: *Hart v. Leete*, 104 Mo. 335; *Riley v. Vaughan*, 116 Mo. 176; 38 Am. St. Rep. 586.

The statute on the subject of fraudulent conveyances only applies to the fraudulent transfer of the estate and interest of the debtor in the property, and has no application to a conveyance made solely for the purpose of transferring to the rightful owner property held in trust for him.

2. But it is said that, as plaintiff loaned the money on the faith of the credit the apparent ownership of the land gave the husband, the wife is now estopped to deny that the absolute title was in him. On this proposition plaintiff chiefly relies for a reversal.

The evidence does not show that at any time from the purchase of the land to the conveyance to the wife, the husband was engaged in any hazardous business, or indeed in any business transacted in whole or in part on a credit. The evidence only shows that during one year of that time he was engaged in partnership with Sheldon, the principal in the note, in keeping and breeding horses and jacks, but it does not appear that credit was at any time asked or given in that business, nor does it appear that the business itself was unprofitable. The wife had no information that her husband was in the habit of indorsing notes for others, nor did she know that he had been asked to sign this note as surety or that he had signed it until ^{so} long afterward. The question then is, whether the wife by permitting the husband to hold the title to her land, by recorded deed, in his own name, would, without other act or representation on her part, be estopped to deny the title as against plaintiff, who, without her knowledge, gave credit to the husband upon the faith of his ownership as it appeared of record.

Equitable estoppel arises "where one, by his words or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter

his own previous position"; in such case "the former is concluded from averring against the latter a different state of things as existing at the same time." To make this estoppel complete, it is said three things must combine, "namely, fraudulent representation, or withholding of truth when duty requires one to speak, reliance on the expressed or implied representation by the party defrauded, and the consequent act taken by the defrauded person": 2 Bishop on Married Women, sec. 487.

Again, it is said by another author: "It must appear that there was fraud or gross neglect; that the party making the admission, by his declaration or conduct, was apprised of the true state of his own title and that others were acting in ignorance of it; that he intended to deceive, or was culpably negligent in the non-assertion of his rights; that the other party had no knowledge, or means of acquiring knowledge, of the true state of the title, and that he relied upon such admission to his injury": 2 Hermann on Estoppel, sec. 987.

It must be conceded that Mrs. Wheeler, by permitting the record title to the land to remain in her husband, represented to the public that her husband ⁹¹ was the owner of it. Yet in this alone no one could be defrauded. The fraud and consequent estoppel would only exist when she knew, or from all the circumstances ought to have known, that others, relying upon what she permitted the record to tell them, were dealing or might deal with the husband in such a manner as to cause them to alter their previous condition, to their injury. As a matter of fact, Mrs. Wheeler did not know that her husband was being taken as surety on the faith of his ownership of the land. This transaction was, moreover, entirely out of the course of any business in which he was engaged, and no inference can, therefore, be drawn that she had such knowledge. We consequently do not think that the doctrine of estoppel applies under the circumstances of this case.

It is unnecessary to decide, nor do we decide, how far, under the statutes of 1889, the doctrine of estoppel can be applied to married women.

Judgment affirmed.

All concur in the result.

HUSBAND AND WIFE—CONVEYANCE FROM HUSBAND TO WIFE, WHEN NOT FRAUDULENT.—When a husband pays his wife one hundred dollars a year for services rendered by her, and, in consideration of the loan by her to him of the sum so paid, and of other

property given to her by relatives, makes to her a conveyance of property, such conveyance is valid as against a subsequent creditor: *Daggett etc. Co. v. Bulfer*, 82 Iowa, 101; 31 Am. St. Rep. 464, and note. See the notes to *Steele v. Coon*, 20 Am. St. Rep. 715; *Warren v. Brown*, 67 Am. Dec. 196; *Cooke v. Bremond*, 86 Am. Dec. 642, and *Wilder v. Brooks*, 88 Am. Dec. 54.

ESTOPPEL—EQUITABLE—WHEN ARISES GENERALLY.—Where one, by words and actions intentionally, causes another to believe in the existence of a certain state of things, and thereby induces him to act on that belief so as to injuriously affect his previous position, he is concluded from averring a different state of things as existing at the time: *Cowles v. Bacon*, 21 Conn. 451; 56 Am. Dec. 371; *Caldwell v. Auger*, 4 Minn. 217; 77 Am. Dec. 515, and note; *Drew v. Kimball*, 43 N. H. 282; 80 Am. Dec. 163, and note; *New York Rubber Co. v. Rothery*, 107 N. Y. 310; 1 Am. St. Rep. 822, and note; *Wheaton v. North British etc. Ins. Co.*, 76 Cal. 415; 9 Am. St. Rep. 216.

RUSSIE v. BRAZZELL.

[128 MISSOURI, 93.]

RELIGIOUS ASSOCIATIONS AND SOCIETIES.—Though a constitution formed for a religious society was not submitted to, nor ratified by, the people to be governed by it, and its force was never fully recognized by the entire body of the church, yet, if it was accepted and remained unchanged for forty years, and every person who joined the society accepted its provisions, and was entitled to demand all the rights it guaranteed, it should be held to constitute the permanent law of the society so long as it continues unchanged and unrepealed.

RELIGIOUS ASSOCIATIONS—CONSTITUTION OF, HOW MAY BE CHANGED.—A constitution which declares that it shall not be altered, except by the request of two-thirds of the whole society, merely requires that no alteration shall be made without the consent of two-thirds of the members. Therefore, such a constitution may be changed by the formulation, by a committee appointed for that purpose, of a new constitution, its submission to the members for their approval, and the casting in favor thereof of the votes of the requisite number of members.

ELECTIONS.—VOTERS WHO DO NOT CHOOSE TO PARTICIPATE in an election are not to be taken into consideration in declaring the result. Hence, if the law requires a question to be decided, or an officer to be elected, by the votes of the majority of the voters of the county, this does not require that the majority of all the persons in the county entitled to vote shall actually vote affirmatively, but only that the result shall be decided by a majority of the votes cast.

RELIGIOUS ASSOCIATIONS—CONSTITUTION, NUMBER OF VOTES REQUIRED TO CHANGE.—If the constitution of a religious association declares that it shall not be altered, unless by the request of two-thirds of the whole society, yet, if amendments are submitted and voted upon, and more than two-thirds of the votes cast are in favor of such amendments, they are adopted by a sufficient vote, though the persons so voting for the alteration are less than two-thirds of all the members of the society, if the rules and customs of the society accord with this construction of its constitutional law.

RELIGIOUS ASSOCIATIONS.—THE MODE OF SUBMITTING PROPOSED AMENDMENTS to the constitution of a religious association may be devised and proclaimed by its general officers, if not contrary to the laws of the land nor to the provisions of the old constitution.

RELIGIOUS ASSOCIATIONS—FAITH, CHANGE OF CONFESSION OF.—If a revised confession of faith is proposed and adopted by a religious association, and the question is one of doctrine alone, the courts are inclined to treat the decision of the general conference of the association as final, in so far as it determines that the revised confession does not so change the distinguishing doctrine of the church as to destroy its identity or operate as a perversion of the trust under which its property is held.

RELIGIOUS ASSOCIATION—FAITH, CHANGE OF CONFESSION OF.—Though the constitution of a church provides that no rule or ordinance shall be passed at any time to change, or do away with, the confession of faith, it does not prohibit changes in such confession in the interest of clearness of expression or fullness of statement of the established doctrines of the church.

RELIGIOUS ASSOCIATIONS.—A CHANGE IN THE CONFESSION OF FAITH of a religious association does not amount to a misuse or perversion of the trust upon which its property is held, if the substantial theological doctrine and general polity are retained, though there is a change in the church policy, or an alteration in the expressed form of faith.

RELIGIOUS ASSOCIATION—ELECTION—UNFAIRNESS OF BALLOTS.—Though, on submitting amendments to the constitution of a religious association, the ballots are all printed in favor of the amendments, and persons desiring to vote against them must strike out the word "yes" and insert "no," and the votes are received and counted by the tellers, and the result declared by the general conference, such result will not be set aside by the courts in a collateral attack.

Wanamaker & Barlow, for the plaintiffs in error.

A. F. Woodruff, D. J. Heaston, and L. B. Gunckel, for the defendants in error.

⁹⁸ MACFARLANE, J. This suit is ejectment to recover possession of certain lots at Eagleville, Harrison county. The title to the lots is vested in trustees for the use of the "United Brethren in Christ," by deed dated February 10, 1873. The property was used by the congregation ⁹⁹ of said church as a parsonage. The controversy grows out of a division in the church and said congregation, which occurred in 1889. The plaintiffs are the trustees of the branch known as liberals, and defendants are trustees of the branch known as radicals. Each claims the property as trustees of the church.

"The United Brethren in Christ" is a voluntary unincorporated religious denomination. At its first organization, something over a century ago, it had neither a constitution nor a confession of faith. It looked to the Bible alone for doctrine and government.

In 1815, the general conference, which was the highest legislative and judicial body of the church, adopted a confession of faith which contained the fundamental doctrines of the church, and which was recognized and adhered to until 1889. The general conference in 1841 formulated and adopted a constitution as the organic law of the church. This constitution recognized the confession of faith adopted in 1815, and provided, among other things, that "no rule or ordinance shall at any time be passed to change or do away with the confession of faith as it now stands." It also provided: "There shall be no connection with secret combinations." Article 4 provided: "There shall be no alteration of the foregoing constitution, unless by request of two-thirds of the whole society." There was no submission of this constitution to a vote of the members of the society, and the regularity of its adoption is, and from its date has been, questioned.

In May, 1885, the general conference adopted the following resolutions, by a vote of 78 to 42:

"Whereas, our confession of faith is silent or ambiguous upon some of the cardinal doctrines of the Bible, as held and believed by our church; and

"Whereas, It is desirable and needful to so amend and improve our present constitution as to adapt its ¹⁰⁰ provisions more fully to the wants and conditions of the church in this and future time, therefore,

"Resolved, by the delegates of the annual conferences of the church of the United Brethren in Christ, in general conference assembled, that a church commission, composed of twenty-seven persons, and consisting of the bishops of the church, and ministers and laymen appointed and elected by this body, an equal number from each bishop's district—provided that the Pacific district shall have two members besides its bishop—be and is hereby authorized and established.

"The duties and powers of this commission shall be to consider our present confession of faith and constitution, and prepare such a form of belief and such amended fundamental rules for the government of this church in the future as will, in their judgment, be best adapted to secure its growth and efficiency in the work of evangelizing the world.

"Provided, that this commission, shall preserve unchanged in substance the present confession of faith, so far as it is clear; 2. That it shall also retain the present itinerant plan; 3. It shall

keep sacred the general usages and distinctive principles of the church on all great moral reforms, as sustained by the word of God, in so far as the province of their work may touch them.

"Provided, further, that in the final adoption, as a whole, of a confession of faith and constitution for submission to the church by the commission, a majority vote of all the members composing the commission shall be necessary.

"Resolved, that this commission shall meet at such time and place as the board of bishops may appoint, and is expected to complete its work by January 1, 1886.

¹⁰¹ "The commission shall also adopt and cause to be executed a plan by which the proposed confession of faith and constitution may receive the largest possible attention and expression of approval or disapproval by our people, including all necessary regulations for taking, counting, and reporting the vote.

"Resolved, that when, according to the foregoing provisions, the result of the vote of the church shows that two-thirds of all the votes cast have been given in approval of the proposed confession of faith and constitution, it shall be the duty of the bishops to publish and proclaim said result through the official organs of the church. Whereupon, the confession of faith and constitution thus ratified and adopted shall become the fundamental belief and organic law of this church.

"Provided, further, that the adoption of the constitution as aforesaid shall in no wise affect any legislation of this general conference for the coming quadrennium."

A recommendation that the following law in relation to secret combinations was also adopted.

"A secret combination, in the sense of the constitution, is a secret league or confederation of persons holding principles and laws at variance with the word of God, and infringing upon the natural, social, political, or religious rights of those outside its pale.

"Any member or minister of our church found in connection with such combination shall be dealt with as in other cases of disobedience to the order and discipline of the church in case of members, as found on page 23 of discipline in answer to the third question of section 3, chapter IV, and in case of ministers, as found in chapter VI, section 13, page 65."

Pursuant to these resolutions a commission provided therein was duly appointed. The commission so appointed prepared a revised confession of faith and an ¹⁰² amended constitution.

These were submitted to a vote of the members of the society under methods adopted by the commission. The vote was taken in November, 1888, after all reasonable endeavors to enlighten the membership through official organs, and by pamphlets, and by pulpit announcements. The vote as taken was as follows:

For the confession of faith.....	51,070
Against	3,310
For the amended constitution	50,685
Against	3,659
For lay delegation	48,825
Against	5,634
For section on secret combinations.....	46,994
Against	7,298

At the time this vote was taken the membership exceeded two hundred thousand.

The revised confession of faith and amended constitution were reported to the general conference in 1889 and adopted by a vote of one hundred and ten to twenty, and were proclaimed by the presiding bishop to be the confession of faith and the constitution of the Church of the United Brethren in Christ.

After the proclamation of the bishop, fifteen members of the conference, including one bishop, withdrew to another room, elected a secretary, and passed a resolution declaring that by their action the other members had vacated their seats. Each body thereafter acted independently as the general conference, and since then there have existed two separate and distinct bodies, each having a complete general and local organization, and each asserting that it is the Church of the United Brethren in Christ.

The plaintiffs are trustees of the majority, or liberals, as they are called, and defendants are trustees elected by the minority, or radical party. Each claims the property as the trustees of the true church.

¹⁰³ The revised or new confession contains thirteen articles. The changes made are given below. The words in parentheses were in the old confession, but are not contained in the new. The words in italics were not in the old, but have been added to the new:

"Article 2. We believe that this triune God created the heavens and the earth, and all that in them is, visible and invisible (and, furthermore, sustains, governs, protects and supports the same); that *He sustains, protects, and governs these with gracious regard for the welfare of man, to the glory of His name.*

"Art. 3. We believe in Jesus Christ; that **He is very God and man**; that he became incarnate by power of the Holy Ghost (in the Virgin Mary), and was born of (her) *the Virgin Mary*; that he is the Savior and Mediator of the whole human race, if they, with full faith (in Him), accept the grace proffered in Jesus; that this Jesus suffered and died, . . . and will come again at the last day, to judge the (quick) *living* and the dead.

"Art. 4. We believe in the Holy Ghost; that **He is equal in being with the Father and the Son**; that *He convinces the world of sin, of righteousness, and of judgment*; that he comforts the faithful, and guides them into all truth.

"Art. 5. We believe that the Holy Bible, Old and New Testaments, is the word of God; that it (contains) *reveals* the only true way to our salvation; that every true Christian is bound to acknowledge and receive it (with the influence), *by the help* of the spirit of God, as the only rule and guide *in faith and practice* (and that, without faith in Jesus Christ, true repentance, forgiveness of sins, and following after Christ, no one can be a true Christian. We also believe that what is contained in the Holy Scriptures, to wit, the fall in ¹⁰⁴ Adam and redemption through Jesus Christ, shall be preached throughout the world.)

"Art 6. We believe in a holy Christian church (the communion of saints, the resurrection of the body, and life everlasting) *composed of true believers, in which the Word of God is preached by men divinely called, and the ordinances are duly administered*; that *this divine institution is for the maintenance of worship, for the edification of believers, and the conversion of the world to Christ.*

"Art. 7. We believe that the (ordinances) *sacraments*, baptism and (the remembrance of the sufferings and death of our Lord Jesus Christ) *the Lord's Supper*, are to be in *use in the church*, and *should be practiced by all (Christian societies) Christians* (and that it is incumbent on all the children of God particularly, to practice them); but the (manner in which ought) *mode of baptism, and the manner of observing the Lord's Supper*, are always to be left to the judgment and understanding of every individual. *Also, the baptism of children shall be left to the judgment of believing parents.* The example of the washing of feet is to be left to the judgment of each one, to practice or not; (but it is not becoming of any of our preachers or members to traduce any of their brethren whose judgment and understanding in these respects is different from their own,

either in public or in private. Whosoever shall make himself guilty in this respect shall be considered a traducer of his brethren, and shall be answerable for the same.)

"Art. 8. We believe that man is fallen from original righteousness, and, apart from the grace of our Lord Jesus Christ, is not only entirely destitute of holiness, but is inclined to evil, and only evil, and that continually; and that, except a man be born again, he cannot see the kingdom of heaven.

¹⁰⁵ *"Art. 9. We believe that penitent sinners are justified before God only by faith in our Lord Jesus Christ, and not by works; yet that good works in Christ are acceptable to God, and spring out of a true and living faith.*

"Art. 10. We believe that regeneration is the renewal of the heart of man after the image of God, through the Word, by the act of the Holy Ghost, by which the believer receives the spirit of adoption, and is enabled to serve God with the will and the affections.

"Art. 11. We believe that sanctification is the work of God's grace, through the Word and the Spirit, by which those who have been born again are separated in their acts, words, and thought from sin, and are enabled to live unto God, and to follow holiness without which no man shall see the Lord.

"Art. 12. We believe that the Christian Sabbath is divinely appointed; that it is commemorative of our Lord's resurrection from the grave, and is an emblem of our eternal rest, that it is essential to the welfare of the civil community and to the permanence and growth of the Christian church; and that it should be reverently observed as a day of holy rest, and of social and public worship.

"Art. 13. We believe in the resurrection of the dead, the future general judgment, and an eternal state of rewards, in which the righteous dwell in endless life, and the wicked in endless punishment."

This arrangement is adopted from *Bear v. Heasley*, 98 Mich. 300, 301.

The old constitution provided that the general conference "shall consist of elders, elected by members of every conference district throughout the society." The new provides that the general conference shall consist of elders and laymen, elected in each annual conference district throughout the church. The number ¹⁰⁶ and ratio of laymen and the mode of their election shall be determined by the general conference." It provides further that: "The ministerial and lay delegates shall deliberate and vote together as one body; but the general conference shall

have power to provide for a vote by separate orders whenever it deems it best to do so; and in such cases the concurrent vote of both orders shall be necessary to complete an action."

Section 10, article 1, provides that: "The general conference may—two-thirds of the members elected thereto concurring—propose changes in, or additions to, the confession of faith; provided, that the concurrence of three-fourths of the annual conference shall be necessary to their ratification." On the subject of secret combinations, it declares: "We declare that all secret combinations which infringe upon the rights of those outside their organization, and whose principles and practices are injurious to the Christian character of their members, are contrary to the Word of God, and that Christians ought to have no connection with them. The general conference shall have power to enact such rules of discipline with respect to such combinations as, in its judgment, it may deem proper."

Section 1, article 5, is as follows: "Amendments to this constitution may be proposed by any general conference—two-thirds of the members elected thereto concurring—which amendments shall be submitted to a vote of the membership throughout the church, under regulations authorized by said conference. A majority of all the votes cast upon any submitted amendment shall be necessary to its final ratification."

These constitute the material changes in the constitution.

The question presented by this record is, which party represents the true church of the United Brethren in Christ, defendants, who adhere to the old constitution ¹⁰⁷ and confession of faith, or the plaintiffs, who have accepted and are governed by the revised confession and new constitution. Defendants insist that the distinguishing doctrines of the church and its fundamental law have been so changed by the revision and amendments that the identity of the church has been entirely lost, and also that the proceedings under which the changes were effected were unauthorized, irregular, and void, and the constitution and confession adopted thereunder have no binding force or validity. The issues thus present two principal questions: 1. Were the amendments and revision legally made? 2. Were the changes in the confession of faith such as to destroy the distinctive theological character of the church?

1. Plaintiffs insist, in the first place, that the constitution of 1841, adopted, as it was, by the general conference, and not having received the sanction and approval of the people, the source

from which all constitutions emanate, had only the force and effect of a legislative enactment, and was subject to change or repeal by the legislative body which gave it life.

While it is true that this constitution was not submitted to, or ratified by, the people to be governed by it, and its force was never fully recognized by the entire body of the church, yet it was certainly a compact which was accepted and unchanged for some forty years. Every person who joined the society accepted its provisions and was entitled to demand all the rights it guaranteed. It should, therefore, be held to constitute the paramount law of the society, so long as it remained unchanged and unrepealed.

It is well settled that a constitution adopted by the people can only be changed, modified, or amended in the manner provided by the instrument itself. No valid reason can be found why this voluntary compact ¹⁰⁸ should be susceptible of change in any manner, other than that required of constitutions regularly adopted. It was in effect, and will be treated as, the constitution of the church.

2. The question then is, Was this constitution of 1841 amended in the manner therein prescribed? That instrument declares that "there shall be no alteration of the foregoing constitution, unless by request of two-thirds of the whole society." The committee appointed by the general conference of 1885, to which was referred this question of amendment of the constitution, in speaking of this provision, truly said: "Its language and apparent meaning is so far reaching as to render it extraordinary and impracticable as an article of constitutional law."

Since 1841 the membership has increased from a few thousand to over two hundred thousand and the society itself has been extended from a mere local organization, until its congregations and conferences are found in many of the states. What might have been practicable in requesting changes when the members of a voluntary organization were all in one locality would be wholly impracticable when the membership was scattered from Maryland and Pennsylvania to Oregon and California. In the latter condition it is evident that the members could only be effectively reached, and their wishes ascertained, through the means afforded by the organization itself. The right to make changes in the constitution is clearly recognized. In order to effect them, action on the part of both the members and the general

conference is required. Such construction should be given as will make the provisions of the constitution practicable.

"No construction of the given power is to be allowed which plainly defeats or impairs its avowed objects. If, therefore, the words are plainly susceptible of two ¹⁰⁹ interpretations, according to their common sense and use, the one of which would defeat one or all of the objects for which it was obviously given, and the other of which would preserve and promote all, the former interpretation ought to be rejected and the latter be held the true interpretation": *Story on the Constitution (Abridged)*, sec. 194.

"Narrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves, for themselves, and designed as a chart upon which every man, learned and unlearned, may be able to trace the leading principles of government": *Cooley's Constitutional Limitations*, 73; *Gibbons v. Ogden*, 9 Wheat. 188.

The intention of the conference in ordaining this provision of the constitution was only that changes should not be made without the consent of two-thirds of the members. No method of ascertaining that consent or of proposing amendments was provided in the constitution. It seems to us that the only practical method was that adopted by the conference, and no valid objection can be urged against it. A vote of the members to proposed amendments is the usual, common sense, and practical way of ascertaining their will.

3. The general conference of 1885, by its resolution providing for submission of the amendment, declared that if two-thirds of those voting on the proposition vote in favor of the change, such vote should be taken as a request of two-thirds of the members. There is no doubt that those voting in favor of the amendments greatly exceeded two-thirds of the entire vote cast. But it is insisted that there could be no valid and binding request, unless made by an affirmative vote of two-thirds of all the members of the society, and that the resolution, making sufficient a ¹¹⁰ request of two-thirds of those voting, is contrary to the express mandate of the constitution.

There is no doubt of the general rule as given by McCrary in his work on Elections, section 173: "Where a statute requires a question to be decided, or an officer to be chosen, by the votes of 'a majority of the voters of a county,' this does not require that a majority of all persons in the county entitled to vote shall

actually vote affirmatively, but only that the result shall be decided by the majority of the votes cast, provided, always, that there is a fair election, and an equal opportunity for all to participate. In such a case the only proper test of the number of persons entitled to vote is the result of the election as determined by the ballot-box, and the courts will not go outside of that to inquire whether there were other persons entitled to vote, who did not do so. . . . This doctrine is well settled by the authorities."

The question of the sufficiency of this vote to express a request of two-thirds of all the members came before the supreme court of Pennsylvania in a recent case, where it was said: "It is said that some refrained from voting because of objection to the proposed revision, or the mode of proceeding to ascertain the wish of the society. If so, it was an ineffectual kind of opposition. In all elections the nonvoting must be counted as willing to be bound by the action of the majority of those who vote. Any other rule would lead to interminable trouble and uncertainty: *Craig v. First Presbyterian Church*, 88 Pa. St. 42; 32 Am. Rep. 417. In elections under the laws of the states or the United States, this has never been doubted": *Schlichter v. Keiter*, 156 Pa. St. 145, 146. This ruling was followed by the supreme court of Illinois in *Kuns v. Robertson*, 154 Ill. 394.

¹¹¹ On the same question it was said by the supreme court of Indiana: "But we are of the opinion that the number of votes cast at the election is to be considered, for the purposes of this case, as constituting the number of the legal voters belonging to the church. Any other rule would be impracticable, and would lead to endless confusion and contention": *Lamb v. Cain*, 129 Ind. 516.

This general rule has been followed and approved by this court: *State v. Binder*, 38 Mo. 450; *State v. Renick*, 37 Mo. 270. See, also, to same purport, cases from other states cited in brief of counsel.

But defendants insist that there are exceptions to the general rule, within which this case falls, and cite cases decided by this court, in which it was held that the general rule does not apply, under similar constitutional or legislative provisions, in case the entire number is known from recent registrations, or from the number of votes cast at the same election, or where there is no difficulty in ascertaining the total number of voters:

State v. Sutterfield, 54 Mo. 391; State v. Brassfield, 67 Mo. 331; State v. Harris, 96 Mo. 29; State v. Winkelmeier, 35 Mo. 103.

Now it appears, from the year-books of the church, that the total membership, at the time the vote was taken, was over two hundred thousand. It was also shown that, under the customs and rules of the church, all members in good standing were entitled to vote at all elections, except, perhaps, children under a certain age. It is argued from this that the total number of voters was fairly ascertainable, and an affirmative vote of two-thirds of the entire membership was necessary to effect a valid change in the constitution.

But the question, we think, is whether the rule promulgated by the general conference for ascertaining the vote necessary was valid and binding upon the civil ¹¹² courts. It was general and was intended to bind the members in whatever state they might have their membership. As has been seen, it was not in contravention of the general laws of the land.

It was said in the recent case of Prickett v. Wells, 117 Mo. 502: "The people of that society [which was a Congregational church], in the exercise of their religious liberty, had the undoubted right to adopt rules for their own church government, if not inconsistent with the laws of the land. In adjusting their respective claims to the use of church property, as between themselves, the civil courts will give effect to those rules, subject to the qualification just adverted to."

In another case it was agreed "that, according to the rules governing the church, a majority of those present and voting at a regular meeting should govern, and its action is binding upon the whole body." It was accordingly held that a majority vote, taken according to the customs and rules of the church, authorized an incorporation of the body, and the transfer of the property of the congregation to the corporation, though a majority of all the members did not vote in favor of the proposition: North St. Louis Christian Church v. McGowan, 62 Mo. 279.

The general conference of the United Brethren, being the highest legislative and judicial body of the church, declared that an affirmative vote of two-thirds of those voting on the amendments should be taken as a request of two-thirds of all the members. This resolution must be taken, not only as expressive of the rules and customs of the church, but as also declaring what vote should be required on the questions submitted. The civil courts should take this action of the conference as conclusive.

¹¹³ It seems that notice of the election, the manner in which the vote should be taken, as well as the effect of a failure to vote, was given through the church papers, by plaintiffs, and from the pulpits. The questions to be voted upon were thoroughly discussed throughout the various local conferences, and every member had ample opportunity to vote intelligently, and to know that a failure to vote would be counted as a vote in favor of the amendments. We are, therefore, of the opinion that the general conference had the power to prescribe the rules for submitting the proposed amendments to the vote of the members, and that the method adopted was not contrary to the laws of the land or the provisions of the old constitution.

4. Section 4, article 2, of the constitution of 1841, provided that "no rule or ordinance shall, at any time, be passed to change or do away with the confession of faith as it now stands, nor the itinerant plan." Under the resolutions providing for a commission to propose amendments, it was also expressly provided "that this commission shall preserve, unchanged, the present confession of faith, so far as it is clear." The provision for taking the vote of the members on revision of the confession was the same as that providing for amending the constitution, and need not be further considered. The question on this branch of the case is, Did the revised confession, as requested by the members and adopted by the general conference, so change the distinctive doctrines of the church as to destroy its identity, and operate as a perversion of the trust under which the property in question was held? However embarrassing it may be, it becomes our duty to determine this question. The action was one at law. The question thus raised is one of fact, which was passed upon by the circuit court without declarations ¹¹⁴ of law, and the conclusion reached is binding upon this court, unless the finding was clearly erroneous: *Mead v. Spalding*, 94 Mo. 47, and cases cited.

On this question the opinion of the Pennsylvania court so clearly expresses the conclusions we have reached that we content ourselves with quoting at large from it:

"We have attentively considered the suggestions made to us on this subject by the appellant; we have examined the old and the revised confessions; we have read the testimony of the distinguished theological experts who were called to testify as to the alleged doctrinal differences, and we are satisfied that the master and the court were right in denying the sixth proposition. There has been no substantial departure from the ancient beliefs of the

church. The revision is simply a clear and ample statement of the great doctrines that are to be found in the creed of 1815, or that logically result from them. The 'general usages and distinctive principles of the church' are preserved. Identity in both polity and creed are undisturbed. We feel the more satisfaction with this conclusion, since it is in harmony with that reached by the court of last resort in matters of faith and discipline, within the church itself, viz., the general conference, and with the conclusion reached by a clear majority of the entire membership. If the question was one of doctrine alone, we should feel inclined to treat the decision of the general conference as final, in accordance with the rule laid down in several cases, among which are *App v. Lutheran Congregation*, 6 Pa. St. 201; *German Reformed Church v. Seibert*, 3 Pa. St. 282; *McGinnis v. Watson*, 41 Pa. St. 9.

"Two of the questions raised by the defendants' propositions remain to be briefly considered: 1. Was the confession of faith absolutely unchangeable ¹¹⁵ under the constitution of 1841? 2. If not, was the change made in 1889 so made as to have a binding force upon the church? The appellants' argument upon the first of these questions rests on section 4 of article 2 of the constitution of 1841. It is as follows: 'Sec. 4. No rule or ordinance shall, at any time, be passed to change or do away with the confession of faith as it now stands, nor to destroy the itinerant plan.' This provision is not to receive a technical interpretation, but is to be construed in the light which the whole instrument throws upon it, and so as to advance the interests of the church and promote its objects: *Monongahela Nav. Co. v. Coons*, 6 Watts & S. 114; *Commonwealth v. Clark*, 7 Watts & S. 127; *Commonwealth v. Hartman*, 17 Pa. St. 119; *Commonwealth v. Maxwell*, 27 Pa. St. 444. The purpose and effect of section 4, when so construed, is not to prohibit changes in the confession of faith that are in the interest of clearness of expression, or fullness of statement, of the accepted doctrines of the church, but to prevent changes in the doctrines to which the church was committed. The provision was not intended as an impassable barrier thrown in the way of improvement of all sorts, but as a protection against the introduction of heretical doctrine, destructive of the distinctive theological character of the church. It follows that the changes made in 1889 were not within the prohibition of this section, since they are shown to be changes in statement in the interest of clearness and complete-

ness of declaration of belief in the doctrines actually held by the church, and which are found less fully stated in the confession prepared in 1845.

"The contention of the appellant upon this subject fails, therefore, for this reason: the confession of faith was not 'absolutely unchangeable' in its manner of expressing the doctrines held by the church. It was ¹¹⁶ unchangeable so far as relates to the distinctive doctrines or principles actually embodied in it": *Schlichter v. Keiter*, 156 Pa. St. 145.

The supreme court of Illinois, in *Kuns v. Robertson*, 154 Ill. 415, says: "There must be a real and substantial departure from the purposes of the trust—such a one as amounts to a perversion of it to authorize the exercise of equitable jurisdiction in granting relief": *Happy v. Morton*, 33 Ill. 398. It therefore follows that, though there be a change in church policy—or alteration in the expressed form of faith, if the substantive theological doctrine and the general polity be retained—there is no such departure as would amount to a misuse or perversion of the trust. In this case, not only the denominational name, but the cardinal doctrines of faith, the general usages and distinctive principles of the church, were preserved. The revised confession of faith expresses with greater clearness, exactness, and perspicuity of statement the belief of the church, while the amended constitution, retaining the general policy of the church, was more logical, more in keeping with the present age, more explicit and definite. No change whatever was made in the belief, teachings, or practice of the church in anywise affecting its fundamental doctrine or policy. The substance was retained, and the form and manner of expressing it was altered and improved."

The same conclusion was reached in *Lamb v. Cain*, 129 Ind. 517, though by a different course of reasoning, holding that the judgment of the general conference, that the revised confession and amended constitution was in fact the fundamental belief and constitution of the church, was conclusive upon the civil courts.

5. Objection is made to the unfairness of the ballots prepared and furnished the members by the ¹¹⁷ committee on revision. These ballots were in the following form:

"BALLOT ON AMENDMENTS TO THE CONSTITUTION.

Members wishing to vote *No* on either proposition must erase the word YES and insert *No*.

Confession of faith,

Yes.

Amended Constitution,
Lay delegation,
Section on Secret Combinations,

Yea.
Yea.
Yea."

It may be readily seen that this ballot insured the greatest possible vote in favor of the proposition submitted. Indeed, the method adopted has the appearance of unfairness, notwithstanding the instruction placed upon the ballot itself. But it is only necessary to say that the votes as deposited were received and counted by the tellers, and the vote thus taken and reported to the general conference was approved and acted upon by it. This is not a contest over that election, but is collateral to it. The vote, as accepted and counted by the proper tribunal, must be taken in this proceeding as regular and lawful.

Judgment affirmed.

All concur.

RELIGIOUS SOCIETIES—CHANGE OF DOCTRINE.—Whether chancery can interfere to prevent changes in the doctrines or modes of worship from those as originally established by a religious society is doubtful: *First Baptist Church v. Witherell*, 3 Paige, 296; 24 Am. Dec. 223. The civil courts never take up matters of religious doctrines for the purpose of determining the abstract truth or falsity thereof, and they never consider them at all, except where civil rights, rights of property or contract respecting the holding, use, control, or enjoyment of property are dependent on them: *Extended note to Connelly v. Mason's etc. Assn.*, 18 Am. St. Rep. 302.

EX PARTE ARNOLD.

[126 MISSOURI, 256.]

HABEAS CORPUS.—ONE IMPRISONED FOR VIOLATING an order or judgment in excess of the jurisdiction of the court rendering it can be discharged by writ of habeas corpus.

ELECTIONS—BALLOTS AND BALLOT-BOXES, AUTHORITY TO COMPEL PRODUCTION OF.—The courts cannot compel the production of ballot-boxes before a grand jury for the purpose of there allowing an inspection of ballots, where the constitution of the state declares that all elections by the people shall be by ballot, that the election officers shall be sworn not to disclose how any voter shall have voted, unless required to do so as a witness in a judicial proceeding, provided, that in all cases of contested elections, the ballots cast may be counted, compared with the list of voters, and examined under such safeguards and regulations as may be prescribed by law. The right to examine and open ballot-boxes is restricted to proceedings in election contests.

ELECTIONS—SECRECY OF BALLOTS.—If the constitution of the state declares that all elections by the people shall be by ballot, it means a secret ballot.

William T. Jamison, prosecuting attorney, James S. Botsford, George A. Neal, and R. E. Ball, for the respondent.

²⁵⁷ GANTT, J. The petitioner is the recorder of voters of Kansas City. The law creating his office and defining ²⁵⁸ his duties requires him at each election in said city, under the laws of this state and the charter of said city, to receive the ballot-boxes containing the ballots cast at such election from the judges of each precinct. In his application for the writ of habeas corpus he represents that on the thirteenth day of March, 1895, the criminal court of Jackson county made the following order:

"Now at this day comes the grand jury in a body into open court and presents to the court a petition for an order on the recorder of voters of Kansas City, Missouri, to furnish for inspection certain ballot-boxes used in the general election of November 6, 1894, which said petition, being duly seen and heard and considered by the court, is by the court granted; and it is hereby ordered that the recorder of voters within and for the city of Kansas City, Missouri, produce the ballot-boxes in the said precincts 2, 3, 4, 5, 6, 7, 22, 25, 26, 27, 28, 29, 48, 49, 52, 53 and 58, before the grand jury, and that he allow the grand jurors to inspect said ballots in the presence of the said recorder; and, when the same shall have been examined by the said grand jurors, that the said recorder shall safely return the said ballots and ballot-boxes, in the condition in which they were when presented to the said grand jurors, to the office of said recorder and to his custody, and that the boxes and ballots for said precincts be produced to said grand jurors by taking before them the boxes of one precinct at one time, and that the same be returned to the custody of the recorder before the boxes and ballots of another precinct shall be produced before the said grand jurors; and that all diligence and care be had that said ballots and boxes be not injured, mutilated, or destroyed."

Said order was duly served upon the petitioner, and, under the advice of competent counsel, he declined to obey said order, because he was advised it was a violation ²⁵⁹ of his official oath and duty, and because said court, nor any other tribunal in this state, could lawfully require him to permit said ballot-boxes to be opened and the ballots therein inspected, except in a case of a contested election, and then only under the regulations and restrictions prescribed by the laws of this state. And, as a further reason for declining to obey said order, he represented to said

court that, prior to the making of said order by the criminal court, various contests for county offices in Jackson county, dependent upon the general election of 1894, had been inaugurated in the circuit court of Jackson county, and said circuit court had ordered a recount of said ballots, and said count was then proceeding, and the petitioner was required by the circuit court to proceed with said work of counting and inspecting said ballots, continuously until completed; and without the presence of the recorder and the ballot-boxes, such recount in said contested elections could not proceed. That he was advised by his counsel that said circuit court having obtained jurisdiction over the person of petitioner and possession of said ballot-boxes, he was not subject to the order of any court of co-ordinate jurisdiction until discharged by said circuit court.

Upon this return to its order, the criminal court adjudged petitioner to be in contempt and issued its writ to the marshal of Jackson county commanding said officer to arrest and commit to his custody the petitioner. He was arrested by said marshal, and is now under arrest and restrained of his liberty. From this imprisonment he seeks to be discharged by the judgment of this court.

It is a settled law in this state that one imprisoned for the violation of an order or judgment in excess of the jurisdiction of the court rendering it can be discharged by writ of habeas corpus.

260 1. Did the criminal court of Jackson county have authority to require the recorder of voters to produce before the grand jury of that county the ballot-boxes and break the seals thereon, and permit that body to examine and inspect the ballots therein? If it had, it must flow from the common-law principle that all courts have the power to compel the production of the best evidence within the reach of their process, and it must logically follow that if the said criminal court may, by its order, break the seal upon said boxes and remove the veil of secrecy with which the constitution and laws of this state have invested the elector's ballot, then any other court may do the same thing.

As was said by Chief Justice Beatty in *Ex parte Brown*, 97 Cal. 83: "A judge of the superior court acting in that capacity [as a committing magistrate] has no authority over the registrar of voters or the county clerk which is not fully shared by every police judge and justice of the peace in the state. If he can order a sealed package of ballots to be opened for the purpose of

obtaining evidence supposed to be material in the preliminary investigation of a criminal charge, so may any one of them. There is indeed no middle course between holding that the ballots must be kept as the law directs them to be kept, i. e., sealed, and in the exclusive possession of the registrar or county clerk, or that any judicial officer of any grade may, in any judicial proceeding, civil or criminal, take them out of the possession and control of the officer charged with their custody, open them, and keep them during such time and subject to such precautions as he may deem necessary for the purposes of his investigation and the preservation of their integrity."

The constitution of Missouri ordains that "all elections by the people shall be by ballot." There can be no doubt that these words, without qualification, were ²⁰¹ understood, both by the people and the courts at the time of the adoption of the constitution to mean a secret ballot. When the constitution was submitted for ratification, every state in the Union, with the possible exception of Kentucky, had adopted that method of voting at elections by the people. The expression "election by ballots" had been expounded and construed by the various courts of last resort, and, with entire unanimity, they had declared it meant a secret ballot, and that the essential principle of this manner of voting was that the elector might conceal from every person the name of the candidate for whom he voted, or the character of his vote upon any question submitted to the electors at an election; that the manifest and obvious purpose was to protect the secrecy of the ballot, in order to guard and protect the voter against intimidation and secure him entire freedom in the exercise of the elective franchise and reduce to a minimum the incentive to bribe the voter: Cooley's Constitutional Limitations, 6th ed., 760, 762, 763; McCrary on Elections, 3d ed., sec. 454; Williams v. Stein, 38 Ind. 89; 10 Am. Rep. 97; Brisbin v. Cleary, 26 Minn. 107; People v. Cicott, 16 Mich. 283; 97 Am. Dec. 141; Jones v. Glidewell, 53 Ark. 161.

Under constitutions containing simply the provisions that "elections shall be by ballot," the supreme courts of Indiana and Minnesota held statutes which provided for numbering the ballot unconstitutional: Williams v. Stein, 38 Ind. 89; 10 Am. Rep. 97; Brisbin v. Cleary, 26 Minn. 107.

Section 3, article 8, of the constitution of this state is in these words:

"Sec. 3. Elections, how conducted and contested.—All elections by the people shall be by ballot; every ballot voted shall be numbered in the order in which it shall be received, and the number recorded by the election officers on the list of voters, opposite the name of the voter who presents the ballot. The election officers shall be sworn or affirmed not to ²⁰² disclose how any voter shall have voted, unless required to do so as witnesses in a judicial proceeding; provided, that in all cases of contested elections the ballots cast may be counted, compared with the list of voters, and examined, under such safeguards and regulations as may be prescribed by law."

At the time of the adoption of the constitution, a statutory method of contesting elections had been in force in this state for many years, and the term "contested elections" had a well-defined and well-understood meaning, as contradistinguished from other remedies for determining the title to offices in this state.

This article of the constitution has been twice construed by this court. In *State v. Francis*, 88 Mo. 557, the proceeding was by quo warranto, and it was held by this court that the courts had no power to open the ballot-boxes in such a proceeding; that the right to count the ballots was confined to cases of contested elections, and then only after the legislature had prescribed safeguards and regulations for the secrecy of the ballots; and that the state was as much bound by the organic law in this respect as any other suitor. That case was followed in *State v. Board etc. of Public Schools*, 112 Mo. 213, in which the second division of this court held an election of the school board in St. Louis was an election by the people, and that a proceeding by said school board, under its power to judge of the qualification and election of its members, was not a contested election within the meaning of the law.

But it is now urged that while, in the opinion of counsel, those cases were correctly decided upon the facts of each, so much of each of these decisions as ruled that the ballot-boxes could only be opened and the ballots examined in a contested election case was obiter, and we are asked again to consider the question ²⁰³ upon principle. This we have endeavored to do, and are firmly convinced that the criminal court had no power to require the ballot-boxes opened for the inspection of the grand jury.

The provision as to numbering ballots, of course, removes the veil of secrecy, to a limited extent, from the ballot in the one case

specified by the constitution, but in no other. Construed as a whole, section 3 of article 8 secures to the voter the right to vote without disclosing his choice to anyone, save in the one proceeding pointed out in the section itself. Without the proviso, the prohibition against disclosing the contents of the ballot would have been absolute in all cases and under all circumstances. It is clear, we think, from the whole text of the article that the convention thoroughly canvassed the propriety of permitting the ballots to be opened and the choice of the voter made public, and concluded that the protection afforded the elector by a secret ballot would be wholly inadequate and misleading, if it extended no further than the occasion of depositing it in the box. In the language of Chief Justice Denio, in *People v. Pease*, 27 N. Y. 81, 84 Am. Dec. 242, "the spirit of the system requires that the elector should be secured then, and at all times thereafter, against reproach or animadversion, or any other prejudice, on account of having voted according to his own unbiased judgment; and that security is made to consist in shutting up within the privacy of his own mind all knowledge of the manner in which he has bestowed his suffrage."

Not only is this conclusion deduced from the words "elections of the people shall be by ballot," which, by universal acceptance and judicial construction, mean and import a "secret ballot," but the use of the proviso that they might, under certain safeguards, be again counted and examined in a contested election, indicate ²⁶⁴ most clearly that, in the opinion of the convention, without this proviso and exception, the ballot-boxes could not be opened, even in such a case, and, being limited to this one case, the canon of construction "*expressio unius, exclusio alterius*," is peculiarly applicable. That this maxim applies with as much force in the construction of constitutions as of statutes was pointed out in the dissenting opinion of Sherwood, judge, in *State v. Seibert*, 123 Mo. 434, and the authorities by him there collated.

Judge Cooley, in his *Constitutional Limitations*, says: "We are not, therefore, to expect to find in a constitution provisions which the people, in adopting it, have not regarded as of high importance, and worthy to be embraced in an instrument which for a time, at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power which can be exercised as well by the delegate as by the sovereign people themselves. If directions are given respecting

the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument, when we infer that such directions are given to any other end. Especially when, as has been already said, it is but fair to presume that the people in their constitution have expressed themselves in careful and measured terms, corresponding with the immense importance of the power delegated, and with a view to leave as little as possible to implication": Cooley's Constitutional Limitations, 6th ed., 78, 79, 93, 94; Commonwealth v. Williams, 79 Ky. 42; 42 Am. Rep. 204; Page v. Allen, 58 Pa. St. 338; 98 Am. Dec. 272; People v. Draper, 15 N. Y. 532.

²⁰⁵ The idea and purpose of maintaining the secrecy of the ballot in elections by the people is sharply accentuated, and, indeed, demonstrated, by another section of the constitution in the same article, to wit, section 6, which declares that "all elections by persons in a representative capacity shall be viva voce."

While election officers are permitted to testify as to the individual ballot of any voter in a judicial proceeding, the secrecy of the ballot itself is protected, save in the one proceeding named in the constitution. Nor is it difficult to assign a reason for this discrimination. Bearing in mind the policy of the people in adopting the system, the convention might well determine, as it did, that the courts should hear the evidence of the election officer, limited by appropriate rules of evidence, but it was evident that, if once the ballot-box was invaded by one court, then, upon the flimsiest pretexts, these boxes could be opened in all cases, and in all courts, and their secrets spread before the curious public, and the whole scheme of a secret ballot would become utterly discredited. The convention and the people understood all this at the time, and they must have considered that, while it was possible to commit frauds in elections, the legislature, by wise and stringent election laws, could prevent or greatly mitigate these wrongs, but, at all events, the mischiefs to ensue from fraudulent voting were not thought sufficient to outweigh the benefit of a secret ballot, and hence the constitution was written as it is.

The considerations which induced the states of this Union to adopt the secret ballot not only continue to exist, but others have been added. The timid voter to-day is not only protected from

his opulent employer but from the aggressive spirit of his own fellows and the domination of brotherhoods and societies. It is a most significant fact that in the reports of adjudicated ²⁰⁶ cases in the courts of last resort of this country no case has been, nor can be, found where the courts have asserted the power to open a ballot-box and use the ballots as evidence, save in contested elections.

The legislature of this state, in 1883, passed an act providing for counting ballots in contested elections: Laws 1883, p. 91. By that enactment the policy of preserving the secrecy of the ballot is made manifest. The act provides that the county clerk shall exclude all persons from his office, except the contestant and contestee and their respective attorneys, and these are required to be sworn not to disclose any fact discovered from such ballots, except such as may be contained in the clerk's certificate. After the parties have examined the ballots, the clerk is required to make a certificate, under his hand and seal, of all the facts, which either of said parties may require, which may appear from the ballot affecting or relating to the election for the office in contest. By the next section the clerk is then required to again securely seal up the ballots as they were, and preserve and destroy them as provided by law in the same manner as if they had never been opened: Acts 1883, p. 91; Rev. Stats. 1889, secs. 4725, 4726. The certificate of the clerk made under the provisions of this act shall be prima facie evidence of the facts stated therein; but the persons present at the examination of the ballots may be heard as witnesses to contradict the certificate.

It is clearly apparent that the legislature, by the foregoing provisions, scrupulously provided against the production of the ballots themselves in evidence, and substituted secondary evidence of their contents in lieu thereof. This act of 1883 negatives any presumption that the ballots were to be subject to the command of any court, or to be used as primary evidence therein, by the express provision that the certificate of the clerk ²⁰⁷ should be prima facie evidence of the facts, and limiting the rebuttal to those witnesses who had been permitted to be present at the recount.

But this is not all. If the policy of the law had favored or permitted the production of these ballots as evidence, most certainly it would be contrary to every principle of justice to require evidence deemed essential to a recovery in any action to be destroyed without reference to the pendency of the action or

the rights of the parties; and yet the act of 1883 requires the county clerk or recorder of voters to destroy the ballots at the end of a year from the election. On no other principle can the destruction of the ballots be justified than that they were preserved in the first instance for the sole purpose of permitting the result of the canvass to be verified or disproved, and that one year would be accorded for that purpose, and after that they should be destroyed. Surely the law cannot be so inconsistent with itself as to authorize a judicial inquiry upon a particular subject, and, at the same time, industriously provide for the concealment of material evidence which would establish the fact sought after.

But it is asked how can this conclusion be reconciled with the laws enacted to punish fraud by judges and clerks of election, as provided by section 3748 of the Revised Statutes of 1889, and with the general powers of a grand jury? We answer that it is upon precisely the same principle which prevents the disclosure of confidential and privileged communications. There are doubtless many instances in which the evidence of a husband would convict the wife, or the wife's would settle the guilt of her husband, and yet the law, in its wisdom, seals his or her mouth. Likewise the testimony of attorney, priest, or physician might establish beyond all doubt the guilt of the client, penitent, or patient in a given case, and yet it is excluded. These exceptions are based upon ²⁶⁸ the peace of society, but, in the estimation of the people of Missouri, good government itself is dependent upon the absolute inviolability of the ballot, except in a "contested election," and then only under such safeguards as would insure both the secrecy of the ballot and absolute verification of the election as held by the people. These two considerations governed the convention in framing, and the people in adopting, the constitution.

Confirmatory of our construction, that the ballots are preserved solely for evidence in contested elections, it is to be observed that election contests are intended to be summary, and hence a year was deemed ample time within which a recount should be made.

Now, it is universally agreed that the admission of the ballots in evidence depends upon the primary proof that they have remained in the same condition in which they were cast; that they have remained in the custody of the officer charged with their keeping, and that no opportunity has been afforded whereby they

might have been changed or tampered with: McCrary on Elections, 2d ed., sec. 277; Coglean v. Beard, 67 Cal. 303; Ex parte Brown, 97 Cal. 83. As well stated by the petitioner in his return to the court, if the ballot-boxes may be opened and the ballots themselves handled and examined by twelve grand jurors, the prima facie case for the parties to the contested election is destroyed, or at least rendered exceedingly difficult to establish; and we may add that if one grand jury may demand the ballots, all grand juries, and all examining magistrates, and all courts, may do so and thus the evident and sole purpose of preserving the ballots be entirely frustrated. So long as the recorder of voters or county clerk permits no one but the contesting candidates to inspect the boxes under the safeguards of the law, they have every assurance and presumption that they have not ²⁶⁹ been tampered with; but if they must, under this sweeping order, be turned over to a grand jury, for twelve men to handle and scan, great difficulty must result in making even the preliminary proof necessary to admit them in the further steps of the contests.

There is another consideration mentioned by the supreme court of Michigan which deserves noting. Says Judge Campbell, in *People v. Cicott*, 16 Mich. 302, 97 Am. Dec. 141: "When we consider that for very many years legislation has been often modified for the very purpose of suppressing illegal voting, and when we know that hundreds of elections must have been turned by the ballots of unqualified voters, the absence of any body of decisions upon the subject is very strong proof that inquiry into private ballots is felt to be a violation of the constitutional safeguard on which we pride ourselves, as distinguishing our elections from those which we are wont to regard as conducted on unsafe principles."

Again, it is perfectly evident that the county clerks and recorders of voters cannot comply with the law, if they can be compelled by the courts to permit these boxes to be opened by any and every court that may demand them, and, on the other hand, if the grand jury or a committing magistrate may take charge of the ballot-boxes and discover how each elector votes, and the judges or clerks are indicted but not tried before the expiration of the year, must the clerk or recorder of voters again violate the law and refuse to destroy the ballots, or, if he does destroy them in obedience to the statute, will he be in contempt of the court?

The conclusion, it seems to us, is inevitable that, however necessary it is to punish crime, the courts must be careful that they do not override the organic and statute laws of the state.

²⁷⁰ The case of *Lee v. Birrell*, 3 Camp. 337, is cited to show that there is an implied exception of the evidence to be given in a court of justice where a witness had taken an oath of secrecy. The meager report of that case does not disclose that the oath of secrecy was even lawful. If it was a mere voluntary oath not to disclose a matter not otherwise privileged as it would seem to have been, then no doubt Lord Ellenborough expressed the correct rule. But here the official oath of the recorder of voters is in harmony with the organic and statute law.

We are cited to the decision in *Ex parte Brown*, 72 Mo. 83, 37 Am. Rep. 426, in which the agent of a telegraph company was subpoenaed to produce certain private dispatches, and it was held they were not privileged communications, but the reasoning of that case only strengthens the view that, where the paper sought is not only privileged but that privilege the result of the enlightened opinion of the people as expressed in their fundamental laws, it will be sustained.

There is no question of the cogency of the argument which urges the importance of punishing election officers for making false returns. We recognize its full force, and yet we are not prepared to agree that, because now and then an official violates his oath of office and escapes punishment through some technical rule of evidence, our system of government is a failure. We deem it far more essential to maintain the integrity of the constitution than to punish any one man or set of men. If a criminal cannot be punished, save by the infringement of the constitution, then he should go acquit, and the people can amend their constitution and laws, if they see fit.

The tyranny of giant corporations and concentrated wealth on the one hand, and the combinations of laborers and workmen upon the other, to say nothing of the ²⁷¹ influence of parties, make it exceedingly difficult for any, save a bold and courageous man, to vote an open ticket, and the courts should be exceedingly careful, therefore, in discrediting the secret ballot. The people, through their representatives, can prescribe more drastic remedies for wrongs that experience has demonstrated will occur under any system of laws, but the remedy is not in courts disregarding the constitution, and laws made to perpetuate it.

Accordingly, we hold that the petitioner properly refused to

open the ballot-boxes, and the order of the criminal court was in excess of its jurisdiction, and the petitioner is discharged from further custody of the marshal.

Macfarlane, Burgess and Sherwood, JJ., concur.

Barclay, J., concurs in discharging petitioner for reasons stated in his separate opinion.

Brace, C. J., and Robinson, J., dissent.

BARCLAY, J., concurring. The record in this case shows that before the order was made by the criminal court for production of ballots cast at the last November election, the recorder of voters, under direction of the circuit court, had entered upon an examination or recount of the same ballots, and that that examination was not finished. Such examination is authorized by the constitution and laws of this state, in election contests: Const. 1875, art. 8, sec. 3; Rev. Stats. 1889, secs. 4721-4723; State v. Slover (1895), 126 Mo. 652. While such an examination is in progress, under the order of a competent court, it seems to me that the recorder of voters should not be compelled to immediately produced before some other court the ballots required to complete that examination.

There is no suggestion that the examination in the contested election case has been unreasonably prolonged. Nor is there an intimation of any abuse of the ²⁷² circuit court's order to avoid compliance with the order of the criminal court. There is nothing before us showing any bad faith on the recorder's part in reference to the execution of the order in the election case. The short time which has elapsed since the beginning of the contest excludes any such inference.

Under our positive law, the sufficiency of the facts upon which a court is proceeding to punish for contempt may be inquired into by means of the writ of habeas corpus: Rev. Stats. 1889, sec. 5378. Hence it is proper for us to consider whether the facts before the judge of the criminal court warranted the punishment of imprisonment for contempt, which he imposed upon relator. In my opinion, they did not warrant such imprisonment.

The relator should be discharged from custody.

It seems to me unnecessary in the circumstances, to go into the general question of the secrecy of the ballot, or to ascertain the extent of the immunity of ballot-boxes, or their contents, from examination in judicial proceedings.

HABEAS CORPUS—WHO ENTITLED TO BE DISCHARGED ON.—In criminal, as in civil, cases a judgment is void if rendered by a court having no jurisdiction either of the subject matter of the proceeding or of the person of the defendant, and if this want of jurisdiction appears, he must be released upon habeas corpus: Extended note to *Morrill v. Morrill*, 23 Am. St. Rep. 110. The jurisdiction of the tribunal whose judgment is involved over the person detained and the subject matter may be inquired into at all times on habeas corpus: *State v. Kinmore*, 54 Minn. 135; 40 Am. St. Rep. 305, and note. See, also, the extended note to *Mullin v. People*, 22 Am. St. Rep. 422.

ELECTIONS—SECRECY OF BALLOT.—A ballot implies absolute secrecy: *Williams v. Stein*, 38 Ind. 89; 10 Am. Rep. 97.

STATE v. BISHOP.

[128 MISSOURI, 578.]

TRADEMARKS.—THE LABEL OF THE INTERNATIONAL UNION OF CIGARMAKERS, which does not indicate that the cigars are owned or manufactured by the union as an organization, or that it has any interest or property therein, or by what particular person or firm the cigars to which it may be attached were manufactured, is not a valid common-law trademark.

TRADEMARK OF A UNION OR ASSOCIATION.—The state may authorize a union or association of workmen to adopt any term or device as their trademark to distinguish goods prepared by persons who are members of such union or association, and may prohibit other persons from using such trademark or device, and impose a penalty upon persons who do not respect such prohibition.

TRADE NAMES OR MARKS.—THE LABEL OF THE CIGAR-MAKERS' INTERNATIONAL UNION is protected from use by persons who are not members of that union by the statutes of Missouri, and the use of a counterfeit label is punishable thereunder.

CONSTITUTIONAL LAW—CLASS LEGISLATION.—A statute authorizing a union or association of workmen to adopt a trademark or label to be used only on goods prepared by members of that association does not conflict with the provisions of the state constitution inhibiting the granting to any corporation, association, or individual of any special or exclusive right, privilege, or immunity.

TRADEMARK OR NAME, GUILTY KNOWLEDGE OF PERSON UNLAWFULLY USING.—To sustain a conviction for selling cigars upon which are a counterfeit label of the Cigarmakers' International Union, it is necessary to produce evidence tending to show that the person making such sale had guilty knowledge that the label was counterfeit.

Eugene McQuillin, for the appellant.

R. F. Walker, attorney general, for the state.

377 BURGESS, J. Defendant was convicted and fined one hundred dollars in the St. Louis court of criminal correction, under an information filed against him in said court by the assistant prosecuting attorney, charging him with having sold a box of cigars to one David Kreyling, on June 26, 1894, upon which there was a counterfeit label of the Cigar Makers' Inter

national Union of America, contrary to, and in violation of, an act of the general assembly of the state of Missouri, entitled, An act to repeal sections 8569, 8570, 8571, 8572, 8573, 8574, 8575, 8576 and 8577 of the Revised Statutes of 1889, entitled "Trademarks" and to enact eight new sections in lieu thereof: Laws 1893, p. 260. The case is in this court on defendant's appeal.

Sections 1 and 4 of the act under consideration are as follows:

"Section 1 (sec. 8569). Any person may adopt a trademark—To be recorded.—If any mechanic, manufacturer, association or union of workingmen, or other person, shall wish to adopt any particular name, term, design, or device as his or their trademark, to designate, make known, or distinguish any goods, wares, or merchandise by him or them manufactured or prepared, he or they may write out a description of such name, term, design, or device, describing the same accurately, and sign and acknowledge the same before some officer competent to take the acknowledgment of deeds, and file the same for record in the office of the secretary of state, by leaving two copies, counterparts or facsimiles thereof, with the secretary of state; said secretary shall deliver to such mechanic, manufacturer, ³⁷⁸ association or union of workingmen, or other person, so filing the same, a duly attested certificate of the record of the same, for which he shall receive a fee of one dollar; such certificate shall in all suits and prosecutions under this act, be sufficient proof of the adoption of such label, trademark, or form of advertisement, and of the right of such mechanic, manufacturer, association or union of workingmen, or other person, to adopt the same. No label, trademark, or form of advertisement shall be recorded that in any way resembles or would probably be mistaken for a label or trademark already of record."

"Sec. 4 (sec. 8572). Penalty for keeping or selling goods with false brand.—Any person, persons, association or union of workingmen, or body corporate or politic, who shall vend or keep for sale any goods, wares, merchandise, compounds, or preparations upon which or in connection with which any forged, imitation, or counterfeit label, brand, stamp, wrapper, imprint, engraving, bottle, or trademark shall be placed, affixed, or used, and intended to represent the said goods, wares, implements, merchandise, compounds, or preparations, as the genuine goods, wares, implements, merchandise, compound, or preparation of any other person or persons, association or union of work-

ingmen, or body corporate or politic, knowing the same to be imitation or counterfeit, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than five thousand dollars, or by imprisonment in the county jail not less than one month nor more than twelve months, or both, and shall also be liable in a civil action to the person or persons, association or union of workingmen, or body corporate or politic, whose goods, wares, implements, merchandise, compounds, or preparations, is imitated or counterfeited, or ³⁷⁰ whose label, stamp, wrapper, engraving, imprint, bottle, or trademark is imitated, forged, or counterfeited, placed, affixed, or used, for all damages such person or persons, associations or union of workingmen, or body corporate or politic, may or shall sustain, both by virtue of the loss of profits and the damage done to the reputation of the said genuine article, goods, wares, implements, merchandise, compound, or preparation, by reason of any of the acts in any section of this chapter mentioned, and may be restrained or enjoined by any court of competent jurisdiction from doing or performing any of the acts herein mentioned."

The only objection to the information is that it does not aver exclusive ownership of the label in question in the cigar maker's union.

Defendant was a dealer in cigars in the city of St. Louis, and on the twenty-sixth day of June sold to one David Kreyling a box of cigars upon which there was a counterfeit label of the Cigar Makers' International Union of America, which is as follows, to wit:

SEPT., 1880.

ISSUED BY AUTHORITY OF THE
CIGAR MAKERS' INTERNATIONAL UNION
OF AMERICA.

UNION-MADE CIGARS.

DEVICE.

THIS CERTIFIES, That the Cigars contained in this box have been made by a First-class workman, a member of the Cigar Makers' International Union of America, an organization opposed to inferior, rat-shop, coolie, prison or filthy tenement-house workmanship. Therefore, we recommend these cigars to all smokers throughout the world.

All infringements upon this label will be punished according to law.

G. W. PERKINS, President,
C. M. I. U. of America.

LOCAL

STAMP.

²⁸⁰ The label, of which the one introduced in evidence was a counterfeit, was duly registered. Said union was a voluntary, unincorporated association of cigar makers, having members and lodges or branches in the various states of the Union and Canada; was not a dealer or manufacturer in cigars; nor was its object trade or commerce, but merely for the purpose of promoting the intellectual, moral, and social qualities of its members. A member of the union has the right to use the label, but no other person has, except those who, or firms which, employ members of the union in the capacity of cigar makers or packers, who are also permitted to use the label so long as they employ members of the union. The label is not the exclusive property of citizens of the state of Missouri, but the right to use it is shared alike by all persons, members of the union, and by them who employ union men. At the time of the sale of the box of cigars, defendant stated that the label thereon was the genuine label of the union, and there was no evidence tending to show that he knew to the contrary.

The first contention is that the label of the Cigar Makers' International Union of America is not a trademark, and is, therefore, not entitled to protection under the law quoted. It may be conceded that the label is not what is generally understood by law-writers to be a technical trademark, because it does not pretend or intimate that the cigars are owned, prepared, or manufactured by the union as an organization, or that, as such union, it has any interest or property therein, nor by what particular firm or person the cigars to which it may be attached were manufactured, the only right conferred on members of the organization and firms which employ members of the union in the capacity of cigar makers or packers being to use the same, the object and purpose being to designate the cigars thus labeled from cigars manufactured by persons other ²⁸¹ than members of the union. The same label was held not to be a valid common-law trademark in *McVey v. Brendel*, 144 Pa. St. 235; 27 Am. St. Rep. 625; *Weener v. Brayton*, 152 Mass. 101, and by a divided court in *Cigars Makers' etc. Union v. Conhaim*, 40 Minn. 243; 12 Am. St. Rep. 726.

In *Weener v. Brayton*, 152 Mass. 103, it was said: "The right to a trademark cannot exist as a mere abstract right, independent of and disconnected from a business. It is not property as distinct from, but only as incident to, the business. It cannot be transferred, except with the business, may be sold with it, and ordinarily passed with it."

The law not only protects the owner in the use of a technical trademark, but it protects him in the use of other insignia, by label, symbol, or otherwise, which he may attach to merchandise to distinguish it from all other articles of merchandise in the market, and this protection may be had by injunctive proceedings, at the instance of a member of an unincorporated association which has adopted a label, purporting to be issued by the association to be placed on boxes of merchandise made by members of the association, who have the sole legal right under their articles of association to use the same, against any person not authorized to make use thereof, and who is making fraudulent use of such label: *Carson v. Ury*, 39 Fed. Rep. 777, and authorities cited.

If, then, the unlawful use of the label under consideration could be restrained by injunctive proceedings, instituted by a member of the union against a competitor in business using the label without authority, it would seem to follow as a sequence that the state, by appropriate legislation, might protect the use of such label, and prohibit its use by persons other than members of the union or persons who employ members thereof in the manufacture and sale of cigars. Certainly ³⁵² no personal rights or principles of public policy are violated by such legislation, and this is true, even though the legislature may have used the word "trademark," in the sense that it is ordinarily understood and used by text-writers and defined by judicial decisions.

In *People v. Fisher*, 50 Hun, 552, the defendant was convicted, under a statute of the state of New York, of counterfeiting and imitating a trademark, and affixing the same to an article of merchandise in violation of the statute. The trademark was devised by the Cigar Makers' International Union of America, and is the same one involved in this controversy. In that case it was held, "that the members of the organization might lawfully devise, as they had done, a trademark label to designate the products of their labor, and that a person counterfeiting and imitating such trademark, and affixing the same to an article of merchandise, not the product of the labor of members of the union, was properly convicted of the offense of counterfeiting and imitating a trademark." In course of the opinion it is said: "The only recognized indication of a trademark is the source, origin, or ownership of the article of merchandise on which it is placed: *Caswell v. Davis*, 58 N. Y. 223; 17 Am. Rep. 233. This means that the

mark is calculated to distinguish the articles which bear it from those of other makers or vendors. It need not indicate any particular person as maker, manufacturer, or vendor, or give the name or address of either. When the mark has become recognized by purchasers as a distinctive designation of a particular maker, manufacturer, or seller of a certain quality of goods, it will be sufficient indication of the origin or ownership within the rule requisite to its protection as such, although purchasers may not, from the work or otherwise, be able to tell who is the particular maker or seller of the ³⁸³ article: *Godillot v. Harris*, 81 N. Y. 263; *Insurance Oil Tank Co. v. Scott*, 33 La. Ann. 946; 39 Am. Rep. 286. Abstractly and apart from its application and use, a trademark has no recognized ownership. Its value is in its employment in making the goods upon which it is placed. This gives to it the character of property. It is, then, a symbol of reputation or goodwill: *Derringer v. Plate*, 29 Cal. 292; 87 Am. Dec. 170; *Bradley v. Norton*, 33 Conn. 157; 87 Am. Dec. 200."

In *Cohn v. People*, 149 Ill. 486, 41 Am. St. Rep. 304, defendant was convicted, under the statute of Illinois, for using on boxes of cigars sold by him a counterfeit of the label of the "Cigar Makers' International Union of America," and it was held that punishment of imitators or counterfeiters of trademarks was properly provided for under the laws of that state under which the conviction was had: See, also, *State v. Hagen* (Ind. App. 1893), 33 N. E. Rep. 223.

The question then recurs, was the defendant guilty of a misdemeanor under the statute, if he knowingly placed a counterfeit label of the Cigar Makers' International Union of America on the box of cigars sold by him to the witness Kreyling?

In a recent decision by the St. Louis court of appeals in the case of *State v. Berlinsheimer*, 62 Mo. App. 168, it was held that the label in question was not protected by the act of 1893, and that a conviction thereunder for knowingly placing a counterfeit of the label upon a box of cigars and then selling the cigars could not be upheld. The decision is predicated upon the fact that prior to 1893 the statute was designed alone for the protection of foreign and domestic trademarks, and that nothing was added thereto by the repeal of certain sections and the enactment in lieu thereof of sections 1 and 4, *supra*. In other words, that the law was not so amended as to include a label like the one in question. Prior to that time ³⁸⁴ the statute law was only intended for the

protection of foreign and domestic trademarks: *State v. Gibbs*, 56 Mo. 133.

While all statutes pertaining to crimes and their punishments should be strictly construed, and nothing left to intentment, they should not be so construed as to thwart the evident will and intention of those who enacted them, when that intention is plainly and fairly deducible from the law itself. When that is done in this case, we can but conclude that the purpose and intent of the legislature was to amend the law so as to protect, and that it does protect, labels as trademarks, when adopted by associations or union of workingmen to make known and distinguish goods, wares, and merchandise, manufactured or prepared by them, from those manufactured or prepared by other persons, unions, or associations. Wherever the law was amended, it was so as to include "associations or union of workingmen," which is very persuasive at least that the purpose was to protect them in any label, advertisement, or symbol that they might adopt as their trademark. Moreover, under the law of 1889, a trademark was required to be recorded in the office of the recorder of deeds of the county where the goods, wares, and merchandise were manufactured, while, by the act of 1893, it is required to be recorded in the office of secretary of state, whose certificate is made proof of the adoption of such label, trademark, or form of advertisement, and of the right of such association or union of workingmen to adopt the same. The law as amended expressly conferred upon any association or union of workingmen a right that they did not possess under the statute before, that is, the right to adopt as a trademark a label such as the one in question.

Our conclusion is that the act not only embraces technical trademarks, but that it includes any label, ³⁸⁵ symbol, or advertisement which may be or has been adopted by any "association or union of workingmen" as a trademark, in accordance with its provisions; hence our disapproval of the case last cited.

It is next contended that the act of 1893 is unconstitutional, is class legislation, and in violation of section 53, article 4, of the state constitution, which inhibits the legislature from "granting to any corporation, association, or individual any special or exclusive right, privilege, or immunity." We are unable to see the force of this contention. It is well-settled law, in this state at least, that a statute relating to persons or things as a class is a general law: *State v. Herrmann*, 75 Mo. 340; *State v. Tolle*, 71

Mo. 645; *Lynch v. Murphy*, 119 Mo. 163. The law does not relate to particular persons or things of a class, but embraces within its provisions all associations or unions of workingmen, and clearly does not fall within the inhibition of the constitution: *Cohn v. People*, 149 Ill. 486; 41 Am. St. Rep. 304.

A further contention is that the information is insufficient, because it fails to aver exclusive ownership of the label in question in the organization known as the "Cigar Makers' International Union of America." No such averment seems to be required under the law, which makes it a misdemeanor for any person, persons, association or union of workingmen, or body corporate or politic, who shall vend or keep for sale any goods, wares, merchandise, compounds, or preparations upon which or in connection with which any forged, imitation or counterfeit label shall be placed, affixed, or used, and intended to represent the said goods, wares, merchandise as the genuine goods, wares, implements, merchandise of any other person or association or union of workingmen. The information is in the language of the statute, and is well enough.

³⁸⁶ A final contention is that the state failed to prove guilty knowledge upon the part of the defendant, that is, that at the time he sold the box of cigars containing a counterfeit label, he knew the label to be counterfeit. This contention is not without merit. The record before us is barren of proof as to guilty knowledge on the part of defendant, in the absence of which he was not guilty of any offense under the law, which expressly provides that the label must have been used knowing it to be an imitation or counterfeit. For failure of proof in this regard the judgment is reversed and the cause remanded.

All of this division concur.

TRADEMARKS—LABEL OF TRADE UNION AS.—An unincorporated association known as the "Cigarmakers' International Union," formed for promoting "the mental, moral, and physical welfare of its members," but which is not a manufacturer or dealer in cigars, cannot acquire a trademark in a label adopted by it discriminating and distinguishing between the work of union and nonunion workmen: *McVey v. Bendel*, 144 Pa. St. 235; 27 Am. St. Rep. 625. The same doctrine was maintained in *Cigarmakers' etc. Union v. Conhaim*, 40 Minn. 243; 12 Am. St. Rep. 726. A cigar label reading as follows: "This certifies that the cigars contained in this box have been made by a first-class workman, a member of the Cigarmakers' International Union of America, an organization opposed to inferior, rat-shop, coolie, prison, or filthy tenement-house workmanship," is not unlawful and may be adopted: *Cohn v. People*, 149 Ill. 486; 41 Am. St. Rep. 304.

CONSTITUTIONAL LAW—CLASS LEGISLATION.—A statute entitled "An act to protect associations, unions of workmen, and per-

cons in their labels, trademarks, and forms of advertising" does not violate a constitutional provision prohibiting the passage of local or special laws and the granting of special privileges: *Cohn v. People*, 149 Ill. 486; 41 Am. St. Rep. 305.

ST. JOSEPH v. LEVIN.

[128 MISSOURI, 568.]

CRIMINAL LAW.—A COMPLAINT FOR VIOLATING A MUNICIPAL ORDINANCE need not state the facts upon which it is founded with the same strictness required in an indictment. Hence, a complaint charging defendant with refusing to exhibit books kept by him as a pawnbroker is sufficient, though it shows the keeping of such book inferentially, rather than directly.

CONSTITUTIONAL LAW.—THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, providing that no person shall be compelled to be a witness against himself in any criminal case, was not intended to limit the powers of the states in respect to their own people.

CONSTITUTIONAL LAW — PAWNBROKERS.—A statute requiring all pawnbrokers to keep a book in which shall be entered a description of all property pawned to, or purchased by, them, with the names and residences of the persons by whom they were left, the amount of the purchase money or the loan, the interest charged, and the time when the loan falls due, is constitutional. It does not violate the provisions of the state constitution prohibiting the compelling of any person to bear witness against himself.

MUNICIPAL CORPORATIONS — PAWNBROKERS, RIGHT TO REGULATE.—Under a charter giving a city power to license, regulate, tax, or suppress hawkers, peddlers, and pawnbrokers, no one has the right to pursue such an occupation within the limits of such city without first obtaining a license. The business is a privilege, not a right, and he who avails himself of it, and derives its benefits, must bear its burdens by conforming to the laws in force regulating the occupation. Pawnbrokers may, therefore, by ordinance, be required to keep books showing the details of their business, and to exhibit them, when demanded, to the inspection of the mayor or any police officer of the municipality.

Vories & Vories and Ben J. Woodson, for the appellant.

Huston & Parrish, for the respondent.

⁵⁹⁰ **BURGESS, J.** The defendant was charged, in the police court of the city of St. Joseph, with violating sections 76 and 77 of general ordinance number 361 of said city, by failing and refusing to submit for the inspection of one T. J. Allie, a duly commissioned police officer of said city, the book required to be kept by him as a pawnbroker, for the purpose of registering and entering a minute description of any and all personal property, bonds, notes, or other securities received by him on deposit or purchase as such pawnbroker, as provided by section 76 of said general

ordinance, he, the said Levin, being licensed as a pawnbroker in said city.

The trial resulted in his conviction by the police court and the imposition of a fine of fifty dollars. He then appealed to the criminal court of Buchanan county, and he was again tried and convicted and the same fine imposed. The case is now in this court on his appeal.

The sections of the ordinance referred to in the complaint and which were read in evidence at the trial over the objections of defendant are as follows:

"Sec. 76. Pawnbrokers to keep books, etc.—Every person so licensed as aforesaid shall keep at his place of business a substantial and well-bound book, in which he shall enter in writing a minute description of all personal property, bonds, notes, or other securities received on deposit or purchase as aforesaid, the time when they were so received, and particularly mentioning any prominent or description marks that may be on such property, bonds, notes, or other securities, together with the name, residence of the person or persons by whom they were left, the amount of purchase money, ⁵⁹¹ the amount loaned, the interest charged, and the time when the loan falls due; which said book shall be kept clean and legible, and no entry therein shall be defaced, erased, or obliterated, and all the entries therein shall be made with ink. He shall give to the person leaving the property in the pawn a plainly written or printed ticket or receipt, showing the transaction. Every such licensed person failing to comply with any of the provisions of this section shall forfeit to said city the sum of twenty dollars.

"Sec. 77. Every person so licensed as a pawnbroker shall, during the ordinary hours of business, when requested by the mayor or any police officer of the city, submit and exhibit such book in the next preceding section provided for, to the inspection of the said mayor or any police officer, and shall also exhibit any goods, personal property, bonds, notes or other securities that may be so left with the licensed person, to the inspection of the mayor or police officer. Any and every such person who shall refuse to submit such book, goods, personal property, bonds, notes, or other securities as aforesaid, shall be deemed guilty of a misdemeanor and, on conviction, shall be fined not less than fifty dollars."

The evidence showed that defendant was a pawnbroker; that he refused to submit his book kept in connection with his business as such to one of the regular police officers of said city for

examination on demand, and that he was guilty as charged in the complaint. The only questions, therefore, worthy of consideration are with respect to the sufficiency of the complaint and the validity of the ordinance.

Defendant contends that the complaint is bad, in that it fails to state that he kept a book such as the officer requested to see, or that the officer was on duty, or an acting officer, at the time, or that defendant was ⁵⁹² a pawnbroker. While it is conceded that a complaint for the violation of a city ordinance need not state the facts upon which it is founded with the same strictness required in an indictment, it is claimed that it should state all necessary facts to show defendant's liability.

While the complaint does not directly allege that defendant kept the book required by the ordinance to be kept by him as a pawnbroker, the only inference to be drawn therefrom is that he did. In other words, such is the logical effect of the allegation, and when the complaint is accorded the same liberal construction to which similar papers in courts of inferior jurisdiction, such as justices of the peace and police courts, are accorded, we are inclined to hold it to be sufficient. There is no merit in the other objections to the complaint, which are exceedingly technical.

A further contention is that the ordinance is unconstitutional and in conflict with the fifth amendment to the constitution of the United States, which provides that no person "shall be compelled, in any criminal case, to be a witness against himself," and with section 11, article 2, of the constitution of the state of Missouri, which provides: "That the people shall be secure in their persons, papers, homes, and effects, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause, supported by oath or affirmation reduced to writing."

That amendment has no application to this case, but was intended to act on the national government only, and was not intended to limit the powers of the states in respect of their own people. It was so held by the supreme court of the United States in *Spies v. Illinois*, 123 U. S. 131; *Presser v. Illinois*, 116 U. S. 252.

⁵⁹³ It has been repeatedly held that a person, when testifying as a witness, could not be required to answer questions incrimi-

nating himself, that is, connecting himself with the commission of any crime for which he might be criminally prosecuted: *Boyd v. United States*, 116 U. S. 616; *Counselman v. Hitchcock*, 142 U. S. 547.

So it was held in *State v. Simmons Hardware Co.*, 109 Mo. 118, which was a quo warranto proceeding, at the relation of the attorney general, against the defendant, charging it with an unlawful exercise of its corporate franchises, that an act of the legislature, "for the punishment of pools, trusts, and conspiracies, requiring some officer of every corporation to inform, under oath, the secretary of state (under penalty of fine, imprisonment, etc.) whether such company has violated said act," was in conflict with the constitution.

There is, however, a clear distinction between the cases cited and the one in hand. The ordinance is a mere police regulation which the city, by virtue of its charter powers, had the right to pass, to aid in the prevention and detection of larcenies of personal property which is frequently sold or pledged to pawnbrokers by thieves, and not for the purpose of preserving evidence to be used against any other person. The defendant was not charged with any crime, nor was there any pretense that he was guilty of crime, and because of the fact that the book might tend to show that he was in the possession of property which had been stolen; that he might possibly be prosecuted at some future time for receiving it, knowing that it had been stolen, and the information acquired by the police officer from an inspection thereof used against him, was no reason why he should not have complied with the ordinance, and submitted the book to the inspection of the police officer. In a criminal proceeding ⁵⁹⁴ against the defendant, he could not, of course, be required to produce the book to be used as evidence against him, or to permit an examination of it for that purpose, because to do so would be an invasion of his constitutional right. In this case, however, no right guaranteed to him by the constitution is violated by the ordinance.

The next question for consideration is as to whether the ordinance is in conflict with, or violative of, the section of the constitution of the state of Missouri quoted. By its charter the city is given power to "license, regulate, tax, or suppress ordinaries, hawkers, peddlers, pawnbrokers." The city may not only regulate, but suppress, pawnbrokers, or refuse to license such occupation altogether. No person has the right to follow such occupation within the limits of said city without first obtaining a license

from its authorities for that purpose, which may be granted or withheld at pleasure. The business is a privilege, not a right, and he who avails himself of it and derives its benefits must bear its burdens, and conform to the laws in force regulating the occupation, if not illegal.

In *Launder v. Chicago*, 111 Ill. 291, 53 Am. Rep. 625, in passing upon a similar ordinance, it was said: "We do not regard the ordinance as being 'unjust, unreasonable, tyrannical, and oppressive.' The requirements objected to are but reasonable means to keep the pawnbrokers' business free from great abuse by thieves disposing of stolen goods in their shops. They are all made in the interest of the public, and are intended for the detection and prevention of crime. The ordinance is not tyrannical and oppressive, as the appellant was not bound to bring himself within its provisions. Before taking out license, appellant knew he had to keep a book containing an account and description of goods pawned, amount of money loaned thereon, the time of pledge, ⁶⁹⁵ rate of interest, and the names of pledgors, and that such book must be kept open for the inspection of the mayor and any member of the police, and no objection seems to have been urged to these requirements, and it appears that appellant has always complied with them."

In conclusion, it is only necessary to say that we do not regard the ordinance as unconstitutional, unreasonable, or unjust; but that its adoption was a wise, prudential measure as tending to prevent and aid in the detection of crime.

The judgment is affirmed.

All of this division concur.

CONSTITUTION OF UNITED STATES.—AMENDMENTS TO, adopted at the first session of Congress, are restrictions upon the powers of the general government only, and not upon those of the states: *Livingston v. Mayor*, 8 Wend. 85; 22 Am. Dec. 622.

MUNICIPAL CORPORATIONS.—ORDINANCE REQUIRING KEEPING OF BOOKS.—A city ordinance requiring every licensed pawnbroker to make out and deliver to the superintendent of police every day, before noon, a legible and correct copy from a book to be kept by him, of all things received on deposit or purchased during the preceding day, together with the hour when received or purchased, and a description of the pledgor or seller, is not unreasonable: *Launder v. Chicago*, 111 Ill. 291; 53 Am. Rep. 625.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
NEW HAMPSHIRE.

**MANCHESTER AND LAWRENCE RAILROAD v. CONCORD
RAILROAD.**

[66 NEW HAMPSHIRE, 100.]

CORPORATIONS—CONTRACT ULTRA VIRES AS DEFENSE TO ACCOUNTING.—If one railroad company has used the road, rolling stock, and equipments of another under a contract, it is estopped to set up that such contract is ultra vires when sued for an accounting and return of the property.

ULTRA VIRES—ESTOPPEL TO PLEAD.—In equity, neither party to a contract ultra vires simply will be heard to allege its invalidity while retaining its fruits.

TRADE, RESTRAINT OF.—A contract between competing railroads to destroy and prevent competition, but not raising the prices of transportation above a reasonable standard, is not void as against public policy.

CONTRACTS—ILLEGALITY AS DEFENSE.—If one railway company has used the roadbed, rolling stock, and equipments of another under an illegal contract, and has received great benefits therefrom, it cannot set up the illegality of the contract as a defense to a bill in equity for an accounting and a return of the property.

CONTRACTS—ILLEGALITY—RELIEF.—Parties to illegal contracts, whether mala prohibita or mala in se, are not generally entitled to relief in equity, but it may grant relief though both parties are in delicto, provided they do not stand in pari delicto.

CONTRACTS—ILLEGALITY AS DEFENSE.—If an executed agreement is void by reason of some statutory or common-law prohibition, either party thereto who has received anything from the other party thereunder, and has failed to perform the agreement on his part, must account to the latter for what has been so received, and cannot set up the illegality of the agreement as a defense, unless it involves some positive immorality or is against public policy.

DISCOVERY.—IF PROSECUTION FOR A PENALTY IS BARRED by the statute of limitations, a person cannot refuse to make discovery of matters connected with the transaction out of which the penalty arises, on the ground that such discovery will expose him to prosecution.

W. S. Ladd, C. H. Burns, J. F. Briggs, T. Ladd, and O. E. Branch, for the plaintiffs.

Chase & Streeter, J. H. Benton, Jr., and J. W. Fellows, for the defendants.

126 **BLODGETT, J.** This proceeding is a bill in equity for a discovery and an accounting of the defendants' dealings with the plaintiffs' railroad properties from December 1, 1856, to July 1, 1887, under various contracts and leases; for the delivery of certain books, records, and papers alleged to belong to the plaintiffs; for the return to them of rolling stock and equipments of the appraised value of one hundred and forty-seven thousand five hundred and ninety-two dollars, which went into the defendants' possession at the time they took the plaintiffs' road, and which they still retain; and for the determination and adjustment of the respective rights of the parties in and to certain lands, depots, and tracks, situate in Manchester.

In bar of the plaintiffs' right to a recovery, the defendants file three special pleas, and, as to the matters in the bill not covered by the pleas, they demur. The plaintiffs demur to the pleas.

The first plea avers that the contracts between the parties, under which the defendants went into and retained the possession and management of the plaintiffs' road for more than thirty years, "were wholly beyond the corporate power" of either party to make or to ratify, and that therefore the defendants should be hence dismissed with their costs and charges. In other words, not denying that they have received the full benefit of the performance of the contract by the plaintiffs, the defendants say that they should be permitted to retain the benefit and property so acquired, and be dismissed with costs, because they were not empowered by **127** their charter to perform what they promised the plaintiffs in return.

The demurrer to this plea is sustained. The defense set up is so repugnant to the natural sense of justice, so contrary to good faith and fair dealing, and so opposed to the weight of modern authority, that it need only be said that, in equity at least, neither party to a transaction *ultra vires* simply is heard to allege its invalidity while retaining its fruits. However the contractual power of the defendants may be limited under their charter, there is no limitation of their power to make restitution to the other party whose money or property they have obtained through an unauthorized contract; nor, as a corporation, are they exempted

from the common obligation to do justice which binds individuals, for this duty rests upon all persons alike, whether natural or artificial.

The second plea avers, and the demurrer admits, that at the time of the making of the contracts between the parties, and of the dealings thereunder, their respective roads "were rival and competing railroads, by the competition of which the prices of transportation thereon were, and but for said supposed contracts, dealings, transactions, operations, and business would have continued to be, materially reduced, and said alleged contracts, dealings, transactions, and business were made and had for the purpose of destroying and preventing such competition, and did destroy and prevent it."

It will be noticed that there is no averment in the plea that the purpose of the contracts was to raise the prices of transportation above a reasonable standard, or that they did have this effect, or that the public were prejudiced by their operation in any manner; and the naked question presented then is, whether all contracts between rival railway corporations which prevent competition are necessarily contrary to public policy, and therefore mala prohibita and illegal in themselves.

To state this question is to answer it in the negative, because it is obvious that the answer depends upon circumstances. While, without doubt, contracts which have a direct tendency to prevent a healthy competition are detrimental to the public, and consequently against public policy, it is equally free from doubt that when such contracts prevent an unhealthy competition, and yet furnish the public with adequate facilities at fixed and reasonable rates, they are beneficial and in accord with sound principles of public policy. For the lessons of experience, as well as the deductions of reason, amply demonstrate that the public interest is not subserved by competition which reduces the rate of transportation below the standard of fair compensation; and the theory which formerly obtained, that the public is benefited by unrestricted competition between railroads, has been so emphatically disproved by the results which have generally followed its adoption in practice, that the hope of any permanent relief from excessive rates through ¹²⁸ the competition of a parallel or rival road may, as a rule, be justly characterized as illusory and fallacious.

Upon authority, also, arrangements and contracts between competing railroads, by which unrestrained competition is pre-

vented, do not contravene public policy. *Hare v. London etc. Ry. Co.*, 2 Johns. & H. 80, is directly in point. In that case a bill in chancery had been brought by a stockholder in the defendant company to annul an agreement between two railway companies to divide the profits of the traffic in fixed proportions; and it was admitted there, as it is here, that the purpose of the agreement was to prevent competition. In dismissing the bill, Vice-Chancellor Wood said (page 103): "With regard to the argument against the validity of the agreement, I may clear the ground of one objection by saying that I see nothing in the alleged injury to the public arising from the prevention of competition. . . . It is a mistaken notion that the public is benefited by pitting two railway companies against each other till one is ruined, the result being at last to raise the fares to the highest possible standard." So, also, in 1 Redfield on Railways, section 146, subdivision 2, it is said: "There is no principle of public policy which renders void a traffic arrangement between two lines of railway for the purpose of avoiding competition." And Mr. Morawetz says, in his admirable treatise on Corporations: "Public policy clearly does not demand that railroad companies operating competing lines shall engage in strife causing their financial ruin; and, so far as agreements among the companies are designed to affect this result, their purpose is not injurious to the public, or illegal. Moreover, such agreements are positively beneficial to the public, so far as they prevent the fluctuation of rates and unjust discriminations among shippers, which invariably attend the unrestricted competition of rival companies. It is therefore impossible to support the proposition that all agreements among railroad companies which restrict competition are condemned by law. Some such agreements may be contrary to public policy, and unlawful; but if an agreement of this character is a reasonable business arrangement to protect the shareholders and creditors of the companies from loss, and does not cause unreasonably high charges or violate any duty which the companies owe to the public, it should be sustained and enforced by the courts": Morawetz on Private Corporations, 2d ed., sec. 1131. In the same section, in speaking of contracts in restraint of trade (to which many of the authorities and much of the argument for the defendants relate), he says: "Even if there were such a rule as has been claimed applicable to competition in trade, the principle and policy of the rule would not be applicable to traffic arrangements designed merely to prevent ruinous competi-

tion and 'wars' among railroad companies. The main objection which has been urged against combinations restraining competition in trade, namely, that such combinations tend to produce monopolies and cause extortion, has no application to combinations among railroad ¹²⁹ companies, for railroad companies are prohibited by law to charge more than reasonable rates. It should be observed, also, that competition among railroad companies has not the same safeguards as competition in trade. Persons will ordinarily do business only when they think they see a fair chance of profit; and, if press of competition renders a particular trade unprofitable, those engaged in that trade will suspend or reduce their operations, and apply their capital and labor to other uses, until a reasonable margin of profit has been reached. But the capital invested in the construction of a railroad cannot be withdrawn when competition renders the operation of the road unprofitable. A railroad is of no use except for railroad purposes, and, if the operation of the road were stopped, the capital invested in its construction would be wholly lost. Hence, it is for the interest of a railroad company to operate its road, though the earnings are barely sufficient to pay the operating expenses. The ownership of the road may pass from the shareholders to the bondholders, and be of no benefit to the latter; but the struggle for traffic will continue so long as the means of paying operating expenses can be raised. Unrestricted competition will thus render the competitive traffic wholly unremunerative, and will cause the ultimate bankruptcy of the companies, unless the portion of their traffic which is not the subject of competition can be made to bear the entire burden of the interest and fixed charges."

The application of these principles to the plea under consideration is patent and decisive. The geographical location and relative resources of the two roads were such as to render it obvious that the plaintiffs could not reasonably hope successfully to compete with their more powerful rival. The alternatives presented, it may be safely assumed, were combination or ruinous competition. They accepted the former; and as the combination did not, so far as appears by the pleadings, raise the rate of transportation above the standard of fair compensation, or violate any duty that is owing to the public from roads which are noncompeting, there is nothing averred in the plea which bars the right of the plaintiffs to an accounting with the defendants.

Numerous cases have been cited in behalf of the defendants in

support of their proposition that the combination between the parties must be regarded as void at common law because against public policy. It is quite impossible, without extending this opinion beyond all reasonable limits, to go through and comment upon these cases in detail, as has been done in the last brief for the plaintiffs; but it is sufficient to say, in general terms, as is there said, that they are cases of contracts in restraint of mercantile business; or cases of contracts which attempt to derogate from the right of eminent domain inherent in the state; or cases where contracts between railroad companies were held contrary to public policy because one of the parties attempted to bind itself not to ¹³⁰ perform duties incident to the legal character of common carriers or public servants; or cases where contracts between railroad companies were held contrary to public policy because one of the parties agreed not to build, or to cease to operate, a road which they were chartered to build or operate; or cases where contracts between railroad companies have been held illegal merely on the ground that they were ultra vires—in short, they do not establish a rule which fairly includes a case like the one at bar. The demurrer to the second plea is sustained.

The averment in the third plea is, "that during all the time from said December 1, 1856, until July 1, 1887, the roads of the plaintiffs and defendants each constituted a part of the different lines of route for public travel and transportation between cities and towns within and without this state, forming rival and competing lines of route between such points."

This plea is understood to be based upon the statute of July 5, 1867, entitled "An act to prevent railroad monopolies," and providing, among other things, that "two or more railroad corporations chartered by the legislature of this state, constituting the whole or parts of different lines of route for public travel and transportation between any two cities or towns, or between any city and town, either within or without this state, forming rival and competing lines of route between such points, shall not be allowed to consolidate such roads or lines; and neither of said lines, or any road or roads composing the same, shall be run or operated by any such rival and competing line, or any road or roads, portion thereof, under any business contract, lease, or other arrangement, but each and every railroad corporation so situated shall be run, managed and operated separately by its own officers and agents, and be dependent for its support on its own earnings from its local and through business in connection with

other roads, and the facilities and accommodations it shall afford the public for travel and transportation under fair and open competition, unless such lease, contract, or arrangement be first authorized by the legislature, and approved by the governor and council."

When this act was passed the contract in force between the parties, and under which the roads were then being operated, was that of December 27, 1860; and the claim of the defendants is, that whatever may be said with reference to the prior contracts and to the operation of the roads under them up to the time of the passage of the act of 1867, that act rendered the further execution of the contract of December 27th illegal, and prohibited it.

This point is well taken. Whatever may now be the sentiment of New Hampshire in respect to the operation of railroads since the results attendant upon consolidation have been sufficiently demonstrated to remove any intelligent fear of extortion in rates or deterioration of service, there can be no doubt that in 1867 its sentiment was in favor of independent and competing lines, and ¹³¹ that the purpose of the legislature was to make the act in question an effective instrumentality against the consolidation of competing roads through contracts or arrangements between them, by means of which competition is removed: *Currier v. Concord R. R. Corp.*, 48 N. H. 321; *Fisher v. Concord R. R. Co.*, 50 N. H. 208. The act, of course, had no *ex post facto* application, and was, therefore, of no effect as to anything which had already been done by the parties under the contract of December 27th, but it did prohibit them from further operating the roads under that contract (unreported opinion of Bellows, J., in *Currier v. Railroad*, N. H., December 1871), and so far rendered it void as to deprive either party of the right of recovery expressly for its subsequent breach. Nevertheless, we do not think the defendants are entitled to retain the money or other property so acquired, and for which they have rendered no corresponding equivalent to the plaintiffs in return, but, on the contrary, we are of opinion that it is their duty to make equitable compensation and restitution, and that the duty may be enforced in this proceeding.

It is true that, in general, where parties are concerned in illegal agreements or other transactions, whether they are *mala prohibita* or *mala in se*, courts of equity do not interpose to grant relief; but this is so only when the parties stand upon equal footing. for the doctrine everywhere running through the books is, that

relief will be granted when both parties are in delicto, provided they do not stand in *pari delicto*: See Story's Equity Jurisprudence, 12th ed., secs. 298, 300. These parties do not so stand, for however guilty the plaintiffs may have been in permitting, or in concurring in, the illegal operation of their road by the defendants after the act of July 5th, their guilt must fairly be regarded as far less in degree than that of their associate in the offense. And that the legislature regarded the defendants as the greater offenders is made plain by the fact that the only penalty prescribed by the act of July 5th for the violation of its provisions is imposed upon the road which operates another road, and not upon the road which is operated; for the reading of the second section is, that, "in all cases where any road, its directors, officers or agents, shall hereafter enforce, or attempt to enforce or exercise, any authority over any other road, situated as provided in said first section, or do any act in conflict with said first section, such officers or agents shall severally be subject to a fine or liability, not exceeding five hundred dollars, for each offense, to be recovered by action of debt, or by information or indictment, for the use of the county within which such suit shall be instituted."

These considerations, as well as others of kindred character which need not be adverted to, bring the case fully within the exception to the general rule that equity does not grant relief to parties concerned in illegal transactions; and, if this be so, it is the end of the case as regards the questions raised by the pleas, because, if the transactions between the parties were of the character ¹⁸² which the defendants now ascribe to them, the plaintiffs, not being in *pari delicto*, are entitled to participate in the property accumulated or its proceeds, which, as between the parties, will be divided according to equity.

There is, however, another ground of relief which should be briefly mentioned. The contracts have been executed on the part of the plaintiffs; they were not immoral, and they were illegal only so far as they were prohibited by statute. Taking this to be so, and regarding the parties as truly in *pari delicto*, the case still falls within the general rule, that "if an agreement is legally void and unenforceable by reason of some statutory or common-law prohibition, either party to the agreement who has received anything from the other party, and has failed to perform the agreement on his part, must account to the latter for what has been so received. Under these circumstances, the courts will

grant relief irrespective of the invalid agreement, unless it involves some positive immorality, or there are other reasons of public policy why the courts should refuse to grant relief in the case": Morawetz on Private Corporations, sec. 721. He adds: "These doctrines have been applied repeatedly in suits arising out of contracts entered into by corporations, although prohibited by statute or by the common law; and although the contracts were held illegal and unenforceable in these cases, a recovery was allowed to the extent of the consideration received": Citing *White v. Franklin Bank*, 22 Pick. 181; *Dill v. Wareham*, 7 Met. 438; *Episcopal etc. Soc. v. Episcopal Church*, 1 Pick. 372, 373; *Whitney v. Peay*, 24 Ark. 22; *Philadelphia Loan Co. v. Towner*, 13 Conn. 249; *Foulke v. San Diego etc. R. R. Co.*, 51 Cal. 365; *Farmers' etc. Co. v. St. Joseph etc. R. R. Co.*, 1 McCrary, 247; *Madison Avenue Baptist Church v. Baptist Church*, 73 N. Y. 82; *Tracy v. Talmage*, 14 N. Y. 162; 67 Am. Dec. 132; *Sacketts Harbor Bank v. Codd*, 18 N. Y. 240; *Oneida Bank v. Ontario Bank*, 21 N. Y. 490, 496; *Vanatta v. State Bank*, 9 Ohio St. 27; *United States Express Co. v. Lucas*, 36 Ind. 361. See, also, in addition, *Pratt v. Short*, 79 N. Y. 437, 445; 35 Am. Rep. 531; *Owen v. Davis*, 1 Bail. 315; *Gilliam v. Brown*, 43 Miss. 641, 644; *Western Union Tel. Co. v. Union Pac. Ry. Co.*, 1 McCrary, 558, 562; *Lewis v. Alexander*, 51 Tex. 578; *Brooks v. Martin*, 2 Wall. 70, and cases cited; *Planters' Bank v. Union Bank*, 16 Wall. 483, and cases cited; *Central Trust Co. v. New York etc. R. R. Co.*, 23 Fed. Rep. 306; *Parkersburg v. Brown*, 106 U. S. 487, 503.

The leading case of *Brooks v. Martin*, 2 Wall. 70, was a bill in equity for an account of profits between the parties under an executed partnership contract for the purchase and location of soldiers' land warrants "confessedly against public policy," as well as in violation of the express provisions of an act of Congress; but the court held that the partner in whose hands the profits were could not refuse to account for or divide them, on the ground of the illegal character of the original contract, Miller, J., saying, on page 80: "It is to have an account of these funds, and a division of these proceeds, that this bill is filed. Does it lie in the mouth of the partner, ¹²³ who has by fraudulent means obtained possession and control of these funds, to refuse to do equity to his other partner, because of the wrong originally done or intended to the soldier? It is difficult to perceive how the statute, enacted for the benefit of the soldier, is to be rendered any more effective by leaving all this in the hands of Brooks, in-

stead of requiring him to execute justice as between himself and his partner, or what rule of public morals will be weakened by compelling him to do so. . . . The transactions which were illegal have become accomplished facts, and cannot be affected by any action of the court in this case." We are aware that the doctrine of this case has been criticised, and perhaps denied, by some of the state courts, but it was reaffirmed in *Planters' Bank v. Union Bank*, 16 Wall. 483, and it is not found to have been changed or modified in any subsequent decision.

It requires no words to apply the doctrine of *Brooks v. Martin*, 2 Wall. 70, to the present case; it applies itself. Nor do we find that its application involves any immorality, or that it is forbidden by any other reasons of public policy. Doubtless a court of equity is not positively bound to interfere in cases of this description, and may exercise its discretion; but it is peculiarly the office of equity to do justice, and justice manifestly requires that the defendants should not keep any part of the plaintiffs' equitable share of the property they obtained from operating the plaintiffs' road, whether legally or illegally. Whatever the legislature may have intended to accomplish by the anti-monopoly act of 1867, there is no reason to suppose their intention was to reward the Concord Railroad for its violation. And however it may once have been, it is certainly now difficult to see how public policy is subserved by allowing the addition of a private wrong to a public wrong, which necessarily results when, without any equivalent in return, one party to an executed illegal transaction excludes the other from participating in the proceeds; and we entirely fail to appreciate the morality which denies in such cases any rights to the party whose money or other property has been thus appropriated by his associate, contrary to express agreement and every principle of fair dealing, and which in conscience the benefited party cannot retain. The demurrer to the third plea is also sustained.

Various causes of demurrer to the bill are assigned by the defendants, but at the argument only the one relating to discovery was insisted upon or need be considered.

The bill prays "that the defendants be ordered to make a full, accurate, and true discovery and disclosure of all and singular the matters and things herein set forth." This is the usual prayer for a discovery, and no objection to its sufficiency is perceived. It is immaterial that the prayer concludes with a request that the "defendants be required, but not under oath, . . . to discover

and state fully and with particularity" certain things specified; for if the word "answer," which it is said was intended to be ¹²⁴ used, is substituted for "discover," the first objection of the defendants, that a prayer for a discovery not under oath cannot be granted, is readily obviated.

The second objection, that the policy of the law exempts the defendants and their officials from discovery, is based wholly upon the unfounded assumption that the plaintiffs' action is against public policy, and has already been sufficiently considered.

The third and last objection is, that the fundamental law does not require the defendants to discover. The argument in its support is, that the defendants are charged with the doing of that which was positively prohibited by the act of July 5, 1867; that if the charge is sustained, each of the defendants is liable to the penalty prescribed by the act; and that they are asked to make discovery of facts which in any event would tend to fix their penal liability under that act, contrary to the constitutional provision that "no subject shall be compelled to furnish evidence against himself."

This objection is unavailing: See *Currier v. Concord R. R. Corp.*, 48 N. H. 321. The defendants are not obliged to discover any matters that may expose them to the penalty of the act of 1867; and they cannot do so, however willing they may be, because prosecution under that act is barred by the statute of limitations. The transactions between the parties as to which discovery is sought ended July 1, 1887, and section 10, chapter 226, of the General Laws provides that "all prosecutions founded upon any penal statute, which are wholly or in part for the use of the prosecutor, shall be brought within one year, and all other suits and prosecutions thereon within two years after the commission of the offense, unless otherwise specially provided."

The defendants' demurrer is overruled.

Case discharged.

Smith, J., did not sit; the others concurred.

CORPORATIONS MUST ACCOUNT FOR BENEFITS RECEIVED UNDER ULTRA VIRES CONTRACTS with interest on the amount found due: *Pauly v. Pauly*, 107 Cal. 8; 48 Am. St. Rep. 98, and note. A corporation having received benefits under a contract made by and with it cannot set up as a defense thereto that it had no power to do business in the state in which the contract was made: *Williams v. Bank*, 71 Miss. 858; 42 Am. St. Rep. 503. A corporation cannot avail itself of the defense of ultra vires, when a contract has been performed in good faith by the other party, and it has received the full benefit of

its performance: *Kadish v. Garden City etc. Assn.*, 151 Ill. 531; 42 Am. St. Rep. 256, and note. See, also, the note to *Visalia Gas etc. Co. v. Sims*, 43 Am. St. Rep. 111.

CORPORATIONS.—WHEN ESTOPPED TO PLEA ULTRA VIRES As a defense: See note to *Williams v. Bank*, 42 Am. St. Rep. 511.

EQUITY—RELIEF FROM ILLEGAL CONTRACTS.—Equity interferes for the relief of the less guilty of parties in *pari delicto* whose transgression has been brought about by the imposition of the party on whom the burden of the original wrong rests: *Bell v. Campbell*, 123 Mo. 1; 45 Am. St. Rep. 505, and note.

CARRIERS—DISCRIMINATIONS.—A carrier may give reduced rates to customers stipulating to give it all their business and refuse those rates to others who are not able or willing to so stipulate, provided the charges exacted from those not joining in the stipulation are not excessive or unreasonable: *Lough v. Outerbridge*, 143 N. Y. 271; 42 Am. St. Rep. 712, and note. An agreement, however, between several transportation companies for the purpose of destroying competition and establishing uniform rates of freight is injurious to trade and commerce: *Hooker v. Vandewater*, 4 Denio, 349; 47 Am. Dec. 258.

NEWTON v. TOLLES.

[66 NEW HAMPSHIRE, 136.]

CONTRACTS—RESCISSION.—The party against whom a contract, made under a mutual mistake of material facts cannot be specifically enforced, is in general entitled to rescind.

VENDOR AND VENDEE—RESCISSION OF CONTRACT TO PURCHASE.—An executory contract for the purchase of a tract of land, may be rescinded by the vendee, when he enters into possession, relying upon the erroneous, though not fraudulent, representation of the vendor that it contains a certain number of acres, and finds, upon a survey of the premises, that it contains a number of acres materially less than thus represented.

VENDOR AND VENDEE—RESCISSION OF CONTRACT TO PURCHASE—EVIDENCE.—In an action to rescind a contract for the purchase of land, on the ground of material mistake as to quantity, evidence is not admissible to show that the quantity contained in the tract, though materially less than represented, is worth as much as the sum agreed to be paid for the tract as represented.

Bill in equity to rescind a contract for the purchase of land, and for a return of the purchase money paid under such contract. Sophia A. Tolles employed a real estate agent to sell her farm. In May, 1886, this agent took Newton, a prospective purchaser, to see the Tolles farm, informed him that it contained two hundred acres, pointed out such of the corners and boundaries as he knew, but he did not know or undertake to point them all out. Such agent, as the agent of both parties, executed an agreement by which Tolles agreed to sell and Newton to buy the Tolles farm for five thousand four hundred dollars, to be paid in certain installments," said Newton to have all the stock, tools, hay,

grain, etc." On the margin of the agreement was written, "farm contains about two hundred acres." On May 15th Newton paid two hundred dollars, and Tolles executed and delivered to him a bond conditioned to convey to him "a certain lot or parcel of land situated in Nashua, . . . meaning and intending to convey all the homestead farm, containing about two hundred acres, as by deed of heirs of Horace C. Tolles to me, and all other land and right in said homestead farm." Upon the margin of the bond was written: "It is agreed, for the above consideration, that said Newton is to have all the stock, tools, hay, grain, etc., and that said Tolles is to remove only household furniture and family stores from said premises." About the 1st of August, 1886, Newton discovered, by a survey, that the farm contained only one hundred and thirty-five acres. On October 20, 1886, Tolles tendered Newton a warranty deed of the premises of which he was in possession, and demanded payment of the balance of the purchase money. Newton refused, and filed his bill, in which he offered to restore all the property to Tolles, to give up and cancel his bond, and to account for the rents and profits. Evidence to show that the property agreed to be conveyed under the condition of the bond was of the value of five thousand four hundred dollars or more was excluded.

G. B. French and H. B. Atherton, for the plaintiff.

C. W. Hoitt and E. S. Cutter, for the defendant.

128 CARPENTER, J. There was a mutual mistake in the quantity of land. The defendant understood she was selling, and the plaintiff that he was buying, a farm of two hundred acres. It in fact contains only one hundred and thirty-five acres. The defendant, believing that the farm contained two hundred acres, informed the plaintiff that it did contain that number. The plaintiff relied on her statement. Under the influence of the error common to both parties, the transaction was consummated. The mistake was one of fact, in a material point affecting the value of the property: *Boynton v. Hazelboom*, 14 Allen, 107, 108; 92 Am. Dec. 738. Its prejudicial consequences to the plaintiff are the same as if the defendant's statement had been designedly fraudulent: *Spurr v. Benedict*, 99 Mass. 463, 467. The deficiency is so great that it would "naturally raise the presumption of fraud, imposition, or mistake in the very essence of the contract," if the mistake were not affirmatively found: *Stebbins v. Eddy*, 4 Mason, 414, 420. A material mistake in the quan-

tity does not, in its effect upon the equitable rights of the parties, differ from a like mistake in the character, situation, or title of the bargained property. It is equivalent to a mistake in the existence of a material part of the subject of the contract. The case is as if, before the contract was executed, and without the knowledge of either party, a parcel containing sixty-five acres of the two hundred contracted for had sunk in the sea: *Allen v. Hammond*, 11 Pet. 63, 71, 72; *Hitchcock v. Giddings*, 4 Price, 135; *Story's Equity Jurisprudence*, secs. 141, 142. The error is as injurious to the plaintiff as if two hundred acres were comprised in the stated boundaries, and the defendant had no title to a parcel of sixty-five acres, or as if she had title to only one hundred and thirty-five two-hundredths of the whole in common with a stranger: *Hooper v. Smart*, L. R. 18 Eq. 683. The defendant could not sustain a bill to compel a specific performance of the contract by the plaintiff, because it would be inequitable: *Pickering v. Pickering*, 38 N. H. 400, 407, 408; *Eastman v. Plumer*, 46 N. H. 464, 479. The party against whom a contract, made under a mutual mistake of material facts, will not be specifically enforced, is in general entitled to rescind: *Pomeroy on Specific Performance*, sec. 250. If there are exceptions to the rule, this case does not fall within them. It is inequitable that the defendant, by reason of her negligent and erroneous, though not fraudulent, representation, should make a profit of the sum at which the parties valued sixty-five acres of land, and that the plaintiff, without fault on his part, should lose that sum. Equity will prevent such a result by rescinding the contract or decreeing a specific performance with compensation in behalf of the injured party, at his election, and by refusing specific performance on the application of the other ¹³⁹ party: *Hill v. Buckley*, 17 Ves. 394; *Price v. North*, 2 Younge & C. Ex. 620; *Dalby v. Pullen*, 3 Sim. 29; *Leslie v. Tompson*, 9 Hare, 268; *Barnes v. Wood*, L. R. 8 Eq. 424; *Whittemore v. Whittemore*, L. R. 8 Eq. 603; *Aberaman Ironworks v. Wickens*, L. R. 4 Ch. 101; *Denny v. Hancock*, L. R. 6 Ch. 1; *Torrance v. Bolton*, L. R. 8 Ch. 118; *In re Turner*, 13 Ch. Div. 130; *Belknap v. Sealey*, 14 N. Y. 143; 67 Am. Dec. 120; *Paine v. Upton*, 87 N. Y. 327; 41 Am. Rep. 371; *Couse v. Boyles*, 4 N. J. Eq. 212; 38 Am. Dec. 514; *Thomas v. Perry*, Pet. C. C. 49; *Daniel v. Mitchell*, 1 Story, 172; *Doggett v. Emerson*, 3 Story, 700; *Smith v. Babcock*, 2 Wood. & M. 246; *Quesnel v. Woodlief*, 2 Hen. & M. 173, note; *Lawrence v. Staigg*, 8 R. I. 256; *Noble v. Googins*, 99 Mass. 231. Neither of the parties understood that

the contract to convey "about" two hundred acres was performed by conveying one hundred and thirty-five acres: *Wilson v. Randall*, 67 N. Y. 338, 341, 342, and cases above cited.

No laches can be imputed to the plaintiff. He had a right to rely on the defendant's statement of the quantity. He could not discover the mistake by examining the external boundaries: *Paine v. Upton*, 87 N. Y. 327, 337; 41 Am. Rep. 371. When, by the defendant's tender of a deed and demand of payment, he ascertained that she would not voluntarily correct the mistake, he immediately filed his bill.

The personal property formed no substantial part of the consideration. It is not named in the body of the bond, but is mentioned apparently as an afterthought on the margin. Upon the rescission of a sale of farm lands by a vendee in possession, there must, in most cases, necessarily be an accounting, in order to restore the parties to the situation they occupied prior to the contract. Upon such an accounting, all the property, the possession of which passed from the defendant to the plaintiff, or its full equivalent, together with the income derived from it, may be fully restored to her. It is no objection to a rescission in a case of this character that such articles as are necessarily consumed in the proper and ordinary management of a farm cannot be restored in specie. It does not appear that the plaintiff, after his discovery of the mistake, took any action by which he intended to affirm the contract (*Montgomery v. Pickering*, 116 Mass. 227), or that he did anything with the property not reasonably necessary for its preservation, or which equity would not require to be done. The plaintiff is to be relieved upon such terms as justice to both parties requires: *Wiswall v. Harriman*, 62 N. H. 671, 672; 2 Story's Equity Jurisprudence, sec. 707. The offered evidence of value was immaterial, and was properly excluded. In the suit at law there must be judgment for the defendant. The details of the decree will be settled at the trial term.

Decree for the plaintiff.

Allen, J., did not sit; the others concurred.

VENDOR AND PURCHASER—RESCISSION BY PURCHASER FOR DEFICIENCY IN QUANTITY.—Purchaser, whether entitled to have a contract for the sale of land rescinded, where there is a great deficiency in the quantity of land agreed to be conveyed: *Glover v. Smith*, 1 Desaus. Eq. 433; 1 Am. Dec. 687, and note; *Pringle v. Witten*, 1 Bay, 258; 1 Am. Dec. 612.

CONTRACTS—EFFECT OF MUTUAL MISTAKE.—A contract induced by a mutual mistake in respect to the subject matter is inop-

erative: *Bedell v. Wilder*, 65 Vt. 406; 36 Am. St. Rep. 871, and note; *Rowland v. New York etc. R. R. Co.*, 61 Conn. 103; 29 Am. St. Rep. 175, and note. See, also, the extended note to *Miles v. Stevens*, 45 Am. Dec. 631.

SEAYER v. ADAMS.

[66 NEW HAMPSHIRE, 142.]

HUSBAND AND WIFE—ALIENATION OF HUSBAND'S AFFECTION.—A wife may maintain an action against another woman for seducing her husband and alienating his affections, provided the wife is allowed, by statute, to sue for her own benefit for personal wrongs suffered by her.

Case. Demurrer to a declaration by a wife alleging that another woman, named as defendant, seduced her husband and alienated his affections from her.

C. P. Eddy and E. P. Dole, for the plaintiff.

Batchelder & Faulkner, Hersey & Abbott, and J. H. Albin, for the defendant.

¹⁴² **BLODGETT, J.** It is not open to question that the tendency of legislation in this state for many years has been to put the husband ¹⁴³ and wife upon an exact equality before the law. As the result of this tendency, successive statutory enactments have been adopted, by force of which the common law of servitude in marriage has been repealed, and by force of which also, it is believed, husband and wife now stand upon an equality of right in respect to property, torts, and contracts, subject only to the exceptions in General Laws, chapter 183, section 12, limiting the liability of the wife upon certain contracts and conveyances therein specified: Rev. Stats., c. 149, sec. 1; Laws 1845, c. 236; Laws 1846, c. 327; Laws 1857, c. 1960; Laws 1858, c. 2073; Laws 1860, c. 2342; Laws 1865, c. 4080; Laws 1869, c. 35; Laws 1871, c. 27; Laws 1876, c. 32; Laws 1877, c. 22; Laws 1879, c. 57, sec. 22; Laws 1887, cc. 24, 100, 103; *Hall v. Young*, 37 N. H. 134; *Albin v. Lord*, 39 N. H. 196; *Claremont Bank v. Clark*, 46 N. H. 134; *Whidden v. Coleman*, 47 N. H. 297; *Houston v. Clark*, 50 N. H. 479; *Cooper v. Alger*, 51 N. H. 172; *Alexander v. Goodwin*, 54 N. H. 423; *Clough v. Russell*, 55 N. H. 279; *Stratton v. Stratton*, 58 N. H. 473; 42 Am. Rep. 604; *Babbitt v. Morrison*, 58 N. H. 419; *Harris v. Webster*, 58 N. H. 481; *Plummer v. Ossipee*, 59 N. H. 55; *Laton v. Balcom*, 64 N. H. 92, 95; 10 Am. St. Rep. 381.

An examination of these decisions (which contain so full a discussion of the respective legal rights of husband and wife as to render further discussion unnecessary and useless) will show that the judicial tendency is in the same direction as the legislative; and as in natural justice no reason exists why the right of the wife to maintain an action against the seductress of her husband should not be coextensive with his right of action against her seducer, nothing but imperative necessity would justify a decision to the contrary. But, happily, we do not find even a plausible reason in its support.

The language of the statute is quite too sweeping and explicit to admit of its limitation to the defendant's construction, that it merely enables a married woman to control and protect her own property, and so relieves her from her common-law disability that she may contract and sue and be sued in reference to it; for while it does this, the statute also, and in express terms, confers upon her the right to sue and be sued in all matters in law and equity, whether of tort or of contract. And the legislative intent to this effect being plainer, if possible, than the language of its expression, and as the only reason why the wife formerly could not maintain an action for the alienation of her husband's affections was the barbarous common-law fiction that her legal existence became suspended during the marriage and merged into his, which long since ceased to obtain in this jurisdiction, there remains now not the semblance of a reason in principle why such an action may not be maintained here. And the weight of authority also is, that the wife can maintain such an action when there is a statute enabling her to sue: *Westlake v. Westlake*, 34 Ohio St. 621; 32 Am. Rep. 397; *Jaynes v. Jaynes*, 39 Hun, 40; *Bennett v. Bennett*, 41 Hun, 640; *Warner v. Miller*, 17 Abb. N. C. 221; *Churchill v. Lewis*, 17 Abb. N. C. 226; *Simmons v. Simmons*, 4 N. Y. Supp. 221; *Mehrhoff v. Mehrhoff*, 26 Fed. Rep. 13.

So, too, say the modern text-books: "To entice away or corrupt the mind and affection of one's consort is a civil wrong, for which the offender is liable to the injured husband or wife. The gist of the action is not the loss of assistance, but the loss of consortium of the wife or husband, under which term are usually included the person's affection, society, or aid": *Bigelow on Torts*, 153. "We see no reason why such an action should not be supported, where, by statute, the wife is allowed, for her own

benefit, to sue for personal wrongs suffered by her": Cooley on Torts, 228, note.

It is claimed, however, in the defendant's behalf, that in any view, section 12 can only extend to such wrongs to the wife as were actionable at common law by joining her husband as plaintiff; and in support of this claim attention is called to section 7, chapter 221 of the General Laws, which provides that any infant, married woman, or insane person may bring any personal action within two years after such disability is removed. Standing upon a later page and in a later chapter than section 12, it is contended that section 7 makes it clear that the legislative intention was, at most, to remove the common-law disability of a married woman to the extent above stated, and that the effect of this section is to modify section 12 accordingly.

But the issue is not between these two sections as they stand in the General Laws, adopted in 1878, but as they stood at the time the plaintiff's cause of action originated, in 1887. As a consequence, whatever force the defendant's contention might otherwise have is destroyed by the amendment to section 12, in 1879, striking out the words "before marriage," thereby putting the right and liability of a married woman upon the same basis as if she were unmarried, and incidentally and impliedly repealing the provision for her benefit contained in section 7.

There is, therefore, no difficulty in harmonizing these sections; and in view of the manifest tendency of legislation on the subject of the rights of married women for nearly half a century, supplemented and sustained as it has been by a long series of judicial decisions, we cannot doubt that it was the intention of the legislature, in adopting the amendment of 1879, wholly to remove the disability of coverture in respect of wrongs, and place married women upon an entire equality with their husbands; and we give it effect accordingly.

Nor are we prepared to hold that the plaintiff's action might not be maintained irrespective of the amendment: See Card v. Foot, 57 Conn. 427; Bennett v. Bennett, 116 N. Y. 584.

Demurrer overruled.

Clark, J., did not sit; the others concurred.

HUSBAND AND WIFE—ALIENATION OF HUSBAND'S AFFECTIONS.—A married woman may maintain an action for the alienation of her husband's affections, if the statute of the state entitles her, while married, to sue and to be sued as if she were unmarried: Hodgkinson v. Hodgkinson, 43 Neb. 269; 47 Am. St. Rep. 759; Clow v. Chapman, 125 Mo. 101; 46 Am. St. Rep. 468, and extended note fully discussing the subject.

HUNTRESS v. BOSTON AND MAINE RAILROAD.

[66 NEW HAMPSHIRE, 155.]

NEGLIGENCE—PRESUMPTION IN FAVOR OF EXERCISE OF CARE.—A person traveling upon a highway, in full possession of all of his faculties, who is killed by a railroad train at a level crossing, is presumed to have been exercising ordinary care, in the absence of evidence of his negligence.

RAILROADS—NEGLIGENCE AT CROSSINGS.—Whether a railroad company, with knowledge of the dangers at level crossings, should guard against accidents by stationing flagmen there, or by slackening the speed of its trains, in the exercise of ordinary care, is a question of fact for the jury.

Action to recover for a death caused by a train at a level crossing. Verdict for the plaintiff.

J. W. & S. W. Emery, for the plaintiff.

Frink & Batchelder, for the defendants.

187 DOE, C. J. In the afternoon of May 19, 1887, the plaintiff's wife, M., in a carriage with her mother, on a highway crossed by the defendants' railroad at grade, attempted to cross the railroad in front of a train that was moving at a speed of from thirty-five to forty miles an hour. There was no gate or flagman, but there were "warning signs," such as are required by the laws of 1885, chapter 98, sections 1, 2, 3. The railroad was straight for a mile or more in the direction from which the train was coming. On the highway where M. was driving, from the nearest rail to a point one hundred and ten feet from it, there was an unobstructed view of the railroad for a long distance. At the whistling post, eighty rods from the crossing, the whistles required by law were given, and the bell was rung constantly from the post to the crossing. The horse was kind and gentle, and was driven upon the crossing without stopping. The carriage was struck by the locomotive and M. and her mother were killed. The fireman, being engaged in putting coal in the firebox, did not see the horse and carriage until it was too late to slacken the speed of the train. The engineer, at his post, looking ahead on the right side of the engine, did not see the horse and carriage approaching the track on the left side until notified by the fireman. Assuming that there was no fault in the engineer or fireman, the question is, whether it could properly be found that the collision was caused by want of due care on the part of the defendants, with no contributory want of due care on the part of M.

"If a railroad crosses a common road on the same level, those traveling on either have a legal right to pass over the point of crossing, and to require due care on the part of those traveling on the other to avoid collision. . . . From the character and momentum of a railroad train, and the requirements of public travel by means thereof, it cannot be expected that it shall stop and give precedence to an approaching wagon to make the crossing first; it is the duty of the wagon to wait for the train. The train has the preference and right of way. But it is bound to give due warning of its approach, so that the wagon may stop and allow it to pass, and to use every exertion to stop if the wagon is inevitably in the way. Such warning must be reasonable and timely. But what is reasonable and timely warning may depend on many circumstances. . . . The speed of a train at a crossing should not be so great as to render unavailing the warning of its whistle and bell; and this caution is especially applicable when their sound is obstructed by winds, and other noises, and when intervening ¹⁸⁸ objects prevent those who are approaching the railroad from seeing a coming train. In such cases, if an unslackened speed is desirable, watchmen should be stationed at the crossing.

"On the other hand, those who are crossing a railroad track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. They have, indeed, the greatest incentives to caution, for their lives are in imminent danger if collision happen; and hence it will not be presumed, without evidence, that they do not exercise proper care in a particular case. But notwithstanding the hazard, the infirmity of the human mind in ordinary men is such that they often do manifest a degree of negligence and temerity entirely inconsistent with the care and prudence which is required of them—such, namely, as an ordinarily prudent man would exercise under the circumstances. When such is the case, they cannot obtain reparation for their injuries, even though the railroad company be in fault. They are the authors of their own misfortune. . . . Conceding that the railway train has the right of precedence of crossing, the parties are still on equal terms as to the exercise of care and diligence. . . . The right of precedence . . . does not impose upon the wagon the whole duty of avoiding a collision. It is accompanied with, and conditioned upon, the duty of the train to give due and timely warning of approach. . . . Both parties are charged with the mutual duty of keeping a careful lookout

for danger; and the degree of diligence to be exercised on either side is such as a prudent man would exercise under the circumstances of the case": *Continental Improvement Co. v. Stead*, 95 U. S. 161, 164, 165.

Many common facts and prevalent conditions, amounting to general rules, within the ordinary experience or observation of jurors, or capable of being ascertained by reasoning, may be adopted by them as grounds of decision in cases not shown to be exceptions to such rules. "The presumption of sanity, whether it be a presumption of law or of fact, is, in one sense, a substitute for evidence. The general presumption of sanity is sufficient *prima facie* evidence of that fact to warrant a finding of sanity, where no evidence is introduced tending to show insanity." "If it be merely a presumption of fact, it is nevertheless a presumption drawn from the common experience of mankind, which the court were well warranted in calling the attention of the jury to; and it is a presumption which the jury would inevitably have made whether the court had referred to it or not": *State v. Pike*, 49 N. H. 399, 408, 444; 6 Am. Rep. 533. "Natural presumptions are nothing else than deductions from general experience; and they therefore belong to the class of circumstantial evidence. They are founded in an assumption of the fact, from its consistency with known principles of human conduct, such as that a man . . . is aware of the natural consequences of his actions, with many others that are put as instances; to which I add the very natural presumption that he is always ¹⁸⁹ ready to take those measures which are obviously necessary to the protection of his property or interests. The presumption that he is endowed with a competent share of sagacity to perceive those measures is a reasonable one; and that he is so true to the instinct of his nature as to pursue them, being perceived, is as much so. These are premises from which a lawyer might argue and a jury draw a conclusion of the fact. As a general rule, then, it may be assumed that a man has sagacity to perceive, and energy to execute, every measure which the preservation of his property may dictate": *Gibson, C. J., in Snevely v. Jones*, 9 Watts, 433, 435.

If the defendants' engineer and fireman had been killed by running the train against a load of logs, which the plaintiff had negligently hauled on the crossing, actions brought against him by their administrators might be maintained without the direct testimony of a witness that the deceased used due care. It might

be inferred that they made reasonable efforts to avoid a collision that would manifestly endanger their lives. The "exercise of due care may be inferred, under some circumstances, from the ordinary habits and dispositions of prudent men, and the instinct of self-preservation": *Pierce on Railroads*, 299, and cases there cited. "If a carriage be driven furiously upon a crowded thoroughfare, and a person is run over, he would not be obliged to prove that he was cautious and attentive, and he might recover though there were no witnesses of his actual conduct. The natural instinct of self-preservation would stand in the place of positive evidence. . . . The purpose of a jury trial is, that the experience, intelligence, and judgment of twelve men may be availed of to settle disputed questions of fact. The duty of the judge . . . is the same in this class of cases as in others: it is to determine whether a case is presented fit for the deliberation of the jury. This is to be decided . . . by considering the facts and circumstances in evidence, in connection with the ordinary habits, conduct, and motives of men. . . . The absence of any fault on the part of the plaintiff may be inferred from circumstances; and the disposition of men to take care of themselves and keep out of difficulty may properly be taken into consideration": *Johnson v. Hudson River R. R. Co.*, 20 N. Y. 65, 69-71; 75 Am. Dec. 375.

In *Reynolds v. New York Cent. etc. R. R. Co.*, 58 N. Y. 248, 252, it was said: "The jury might infer that the deceased was governed by the natural instinct of self-preservation, and would not put himself recklessly and consciously in peril of death." But it was also said: "That men are careless and subject themselves thereby to injury is the common experience of mankind, and, when injured, no presumption exists, in the absence of proof that they were exercising due care at the time." In this remark, "absence of proof" apparently means absence of other proof than the instinct from which, it is admitted, the jury might infer that the deceased would not put himself recklessly and consciously in peril of death. Whatever ¹⁸⁰ portion of mankind is intended when it is said that men are careless, their carelessness does not disprove the proposition that the natural and universal instinct is evidence of such care as a person of ordinary prudence would exercise under the circumstances. The test which the law finds in that degree of care is not altered by calling it negligence.

A person of ordinary prudence, exercising the caution and vigilance which the law has adopted as the test of duty, might

make an extremely hazardous attempt to cross a railroad in front of a train. From the mere fact of great danger, it does not necessarily follow that he exposed himself recklessly and consciously. When there is no evidence of insanity, intoxication, or suicidal purpose, and no evidence on the question of his care, except the instinct provided for the preservation of animal life, it may be inferred from this circumstantial proof that, for some reason consistent with ordinary care and freedom from fault on his part, his attempt to cross was due to his inadequate understanding of the risk. In the full possession and vigorous use of his faculties, without even a momentary absence or preoccupation of mind, with his intelligence alert and diligently applied to the question of waiting for the train to pass, he might act upon an error of judgment in regard to the speed of the train and the time that would elapse before its arrival. There is reason to believe a mistake on this point is the cause of many accidents. A large portion of the community have such knowledge of the danger of crossing a street in front of a horse team moving at a moderate gait as is necessary in determining whether safety requires them to wait for the team to pass. But high rates of speed create a degree of danger that is not generally realized by those who have no special means of information on the subject. Whether a train is going twenty miles an hour or forty is a question on which the opinion of but few observers would be considered valuable by a railway expert. In estimating time, distance, and rapid motion, the mass of men are inexpert. For various reasons, when they see a train at a considerable distance coming towards them at the rate of thirty-five or forty miles an hour, they have little ability to measure the danger of crossing in front of it. They are not ignorant of the probable consequences of a collision, but are likely to be misled by an erroneous view of the probability of a collision.

Reasonable care often depends upon actual knowledge or reasonable and rightful expectation: *State v. Boston etc. R. R. Co.*, 58 N. H. 408, 410; *Nutter v. Boston etc. R. R. Co.*, 60 N. H. 483, 485. After a repeal of the statutory law of the road, a universal custom of turning to the right might be an important fact in cases of collision. If A, driving in a highway and turning to the right, were injured by B driving towards him and turning to the left, B might be liable, at common law, for negligence in not acting upon his presumed knowledge of the fact that A had reason to expect B would turn ¹⁸¹ to the right.

A jury could properly find that A exercised ordinary care in expecting, and acting upon the expectation, that B would comply with the custom. Were B a foreigner, who had arrived an hour before the accident from a country in which the law of the road required travelers to turn to the left, his collision with A might be without actual fault in either party. If A knew that B expected him to turn to the left, A might be negligent in turning to the right without giving due warning. With his knowledge of B's ignorance, ordinary prudence might require him to slacken his speed, or turn to the left, or take other precautions to avoid collision. A reasonably careful person, introducing dangers, in the use of force or the possession of destructive materials, on highways or elsewhere, with full knowledge of probable consequences, adopts the measures known by him to be necessary to avoid an unreasonable exposure of others to risks that are less apparent to them than to him. His knowledge of their un instructed and unskilled condition may be a material element of his duty.

Railway managers may be presumed to have special knowledge of the dangers of their business, and to be aware of the constant peril arising at level crossings from the fact that intelligent and careful people frequently overestimate the safety of attempting to cross in front of trains moving at high speed. The danger thus caused was probably not foreseen when the defendants' road was built. The speed required by public convenience on railways is found to be inconsistent with the public safety at level crossings where there are no gates or watchmen. The expense of watchmen, or gates and watchmen, at all such crossings, would increase the cost of transportation. Without such crossings, the expense of construction would have more nearly approached the cost of English roads, and the price of transportation would not have been so far below English rates as it now is. But the practical difficulties resulting from the conflict of public interests do not change the legal principles applicable to this case, or affect the plaintiff's cause of action. The knowledge which the defendants may be presumed to have of the fact that persons of ordinary prudence frequently go upon level crossings in front of moving trains, when they would wait for the trains to pass if they had been long employed as railway managers or trainmen, is a knowledge of danger caused by high speed, and common misapprehensions and miscalculations. The defendants, presumably aware of this customary danger and its cause, are bound to act

upon their superior knowledge, and to take such precautions as men of ordinary prudence would take, under the circumstances, in their situation. In this case, as in many others, it is a question of fact whether a person of ordinary prudence, operating the defendants' road with their knowledge of the dangers of level crossings, would guard against accidents by stationing flagmen there, or slackening the speed of the trains. If wrong is done in the decision of questions of fact, it ¹⁹² cannot be legally prevented or rectified by a judicial alteration of the law. It is probable that the plaintiff's wife and her mother saw the train, and supposed they could safely cross the rails before it arrived. Their deafness might increase their vigilance; and it could be properly found that they should have been stopped by a flagman charged with the duty of correcting the fatal mistake into which persons of ordinary prudence are liable to fall at such crossings: *Eaton v. Fitchburg R. R. Co.*, 129 Mass. 364.

Judgment on the verdict.

Blodgett, J., did not sit.

Smith, Clark, and Bingham, JJ., concurred.

Allen and Carpenter, JJ., dissented from the decision that there was evidence sufficient to warrant a finding of due care on the part of M., and expressed no opinion upon the question whether, assuming the engineer and fireman were not in fault, there was sufficient evidence of negligence on the part of the defendants.

NEGLIGENCE OF PLAINTIFF—PRESUMPTION OF.—Negligence is not presumed against a plaintiff, but when his own evidence tends to create such presumption, he must rebut it by sufficient proof to produce the belief in the minds of the jury that negligence on his part did not in fact exist: *Missouri Pac. Ry. Co. v. Foreman*, 73 Tex. 311; 15 Am. St. Rep. 785, and note. Contributory negligence will not be presumed, but must be proved, and the burden of proving it rests on the defendant: *Little Rock etc. Ry. Co. v. Leverett*, 48 Ark. 333; 3 Am. St. Rep. 230. Contributory negligence as a defense must be affirmatively proved: *Little Rock etc. Ry. Co. v. Eubanks*, 48 Ark. 460; 3 Am. St. Rep. 245. The burden of proving contributory negligence is always upon the defendant: *Georgia Pac. Ry. Co. v. Davis*, 92 Ala. 300; 25 Am. St. Rep. 47, and note; *Alabama etc. R. R. Co. v. Frasier*, 93 Ala. 45; 30 Am. St. Rep. 28.

RAILROADS—FLAGMEN AT CROSSING—DUTY TO MAINTAIN.—According to many of the decisions, although, as a general rule, a railroad company is not bound at common law to keep a flagman at a crossing, it is nevertheless required to do so when its road is so constructed as to make it hazardous: Extended note to *Ernst v. Hudson River R. R. Co.*, 100 Am. Dec. 412. This subject will be found fully dis-

cussed in the notes to the following cases: *Bauman v. Shenango etc. R. R. Co.*, 37 Am. Rep. 691; *McGrath v. New York etc. R. R. Co.*, 17 Am. Rep. 365; *Louisville etc. R. R. Co. v. Commonwealth*, 26 Am. Rep. 207; *Welsch v. Hannibal etc. R. R. Co.*, 37 Am. Rep. 444.

FOSS *v.* BOSTON AND MAINE RAILROAD.

[66 NEW HAMPSHIRE, 256.]

RAILROADS—FEEBLE PASSENGER.—A railroad passenger in feeble health, carried beyond the station of her destination, is not guilty of contributory negligence, in attempting, with the assistance of the train employees, to alight from the cars at an unsuitable place and from a dangerously high step, without informing them of her feeble condition. If, in such case, the employees fail to assist her from the car without injury, they are guilty of negligence and she may recover.

RAILROADS—DUTY TO FEEBLE PASSENGER—NOTICE TO CONDUCTOR, NOTICE TO COMPANY.—Notice to a railroad conductor of the feeble health of a passenger on his train is notice to the company, and the failure of such passenger to repeat such notice to another conductor who takes charge of the train is not contributory negligence. The failure of the first conductor to repeat such notice to his successor on the train is negligence for which the company is liable.

Case by a passenger in feeble health to recover for injuries received in alighting from a railroad train after being carried from five hundred to seven hundred feet beyond the station of destination. Verdict for the plaintiff.

Russell & Boyer and W. L. Foster, for the plaintiff.

Worcester & Gafney and J. A. Edgerly, for the defendants.

259 ALLEN, J. The motion for a nonsuit for want of evidence to charge the defendants was properly denied. The plaintiff, without apparent fault of her own, was carried some distance—five hundred to seven hundred feet—beyond her destination to which she had a ticket, and was there hurriedly assisted from the car to the ground over steps the lowest of which was twenty-two inches above the ground. The injury she received in jumping to the ground was aggravated by being compelled to walk from her landing-place to the station. In the flustered state of her mind, and the fear of being carried beyond her destination, she did not notice the distance ²⁰⁰ of the car step from the ground. She had a right to rely on the assistance offered by the conductor and brakeman at such a place, and, if they failed to assist her from the car without injury, the fault was the defendants' and not hers. However this may be, the question of

her own negligence or want of care was fairly submitted to the jury, whose verdict, under the instructions, has left her free from fault.

The case in principle is not different from *Bullard v. Boston etc. R. R. Co.*, 64 N. H. 27, 10 Am. St. Rep. 367, where the plaintiff was injured on leaving the train, the rear car of which, in which she was riding, not having reached the station platform. She was injured on leaving the car by steps about three feet from the ground. The plaintiff recovered a verdict, and the court, in the opinion, decided that "these facts were evidence from which a jury might find that the plaintiff exercised due care in leaving the train at a place which she knew was a bad one for alighting, and, further, might find that the defendants intended she should leave at that place."

In that case the car step was fourteen inches farther from the ground than in the present case; but the plaintiff had no assistance in alighting, and the distance from the station platform was very much less. The question of the reasonable care of the parties was the same in each case. The defendants' first exception is overruled.

The defendants requested the instruction that the plaintiff, enfeebled as she was, should not have attempted to get off the car at the place she did, but should have notified the attendant train hands of her condition, that they might have set the train back to the station, where she could have alighted on the platform in safety; that no notice being given them of her feeble condition, she cannot recover. Such a request was properly refused. It left out of sight the fact that, at the time, the train had passed the station platform a long distance, and that the step of the car from which she must jump was too high for a well person to step from safely. The request, too, leaves out of sight the flustered condition of the plaintiff's mind under fear of being carried beyond her destination, and the fact that until she struck the ground she was not aware that the car had passed beyond the station platform. The instruction which the court gave was sufficiently explicit. The jury were told that "if the place [where the plaintiff left the car] was suitable, and the defendants fully performed the duty they owed to the plaintiff, the defendants are not liable for any injury the plaintiff may have received. If the place was unsuitable, and the plaintiff received injury in consequence, the defendants are liable therefor, unless the plaintiff's want of care contributed to the injury. Was the plaintiff in fault for being

left at that place, or for leaving the car without objection, or for not saying anything about her feeble condition? Was she induced to alight there by the defendants' servants? Did her want of ordinary care contribute to her injury?" ²⁶¹ These pertinent instructions and inquiries made to the jury were plain and explicit, covered the ground of the case, contained the settled law on the subject, and were sufficiently favorable to the defendants. The exception to the refusal of the defendants' request is overruled.

A special exception was made to the instruction that, in determining the question of care exercised by the defendants and the plaintiff, the evidence that the plaintiff's husband informed Conductor Jefferson, at Rochester, that the plaintiff was feeble and would need assistance, and that Jefferson said he would notify the conductor who was to take the train at Conway Junction, and it would be all right, and that the plaintiff's husband so informed her, is material. Knowledge communicated to Jefferson was notice to the defendants of the plaintiff's condition, and she was not required to notify every other conductor and trainhand on the train. A conductor who had charge of the train and the oversight of its passengers was the person to whom a knowledge of the plaintiff's health and need of assistance in leaving the train should be given, and the plaintiff had a right to rely on his assurance that he would inform the conductor beyond. The question was one of due and reasonable care. The plaintiff relied, and had a right to rely, on Jefferson's giving his successor the information about her condition. And if the conductor failed to bring her condition to the notice of the conductor who followed him, his neglect could not be charged upon the plaintiff. The defendants were as much affected by Jefferson's knowledge as they would have been by the same facts communicated to the superintendent or one of the directors of the road in season to have made use of them. The defendants had no reasonable ground of complaint on account of the instructions.

Judgment on the verdict.

Clark, J., did not sit; the others concurred.

RAILROADS—DUTY TO SICK OR INFIRM PASSENGERS.—If a railroad company, with notice that a person is in a sick and helpless condition, receives him as a passenger on one of its trains, it is answerable in damages for a failure to exercise proper care over him whereby he is made worse: *Weightman v. Louisville etc. Ry. Co.*, 70 Miss. 563; 35 Am. St. Rep. 660, and note; *Croom v. Chicago etc. Ry. Co.*, 52 Minn. 296; 38 Am. St. Rep. 557, and note. See, also, the extended note to *New Orleans etc. R. R. Co. v. Statham*, 97 Am. Dec. 499.

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DUNTLEY v. BOSTON AND MAINE RAILROAD.

[66 NEW HAMPSHIRE, 263.]

CARRIERS—REGULATION OF FREIGHT CHARGES.—A common carrier may prescribe just and reasonable regulations to protect himself against fraud, and fix a rate of charges for freight proportionate to the magnitude of the risk he assumes.

CARRIERS—REGULATION LIMITING LIABILITY.—Common carriers may by regulation make rates for the transportation of live animals to depend upon their value as given by the shipper, and may restrict his claim for damages for injury or loss to the value he places upon his property for transportation with notice of such regulation.

Exceptions to a referee's report in favor of plaintiff.

G. E. Cochrane, J. G. Hall, and J. Smith, for the plaintiff.

Worcester & Gafney, for the defendants.

²⁶³ CLARK, J. In *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 831, which, like the present, was an action to recover damages from a railroad ²⁶⁴ for injuries received by the plaintiff's horses during transportation by the defendants as a common carrier, the bill of lading, issued by the defendants and signed by the plaintiff, contained a stipulation that the carrier assumed a liability to the extent of an agreed valuation, not exceeding two hundred dollars for each horse, and the rate of freight was based upon that condition; and it was held that, even in case of loss or damage by the negligence of the carrier, the contract should be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight received. In that case, as in this, the plaintiff claimed and offered to prove that his horses were worth much more than two hundred dollars, but it was held that his recovery must be limited to the amount stated in the bill of lading. The basis of the decision was, that a common carrier may prescribe just and reasonable regulations to protect himself against fraud, and fix a rate of charges proportionate to the magnitude of the risk he assumes.

The doctrine of *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331, is applicable to the facts in the case before us. The referees have found that the plaintiff shipped his horse as an ordinary horse, understanding that the railroad had a regulation limiting its liability, in case of injury, to two hundred dollars for an ordinary horse, and if a higher valuation was given a higher rate would be charged. Knowing that the freight charges were measured by the valuation put upon the property, and that the rate was fixed

upon the basis that the liability assumed by the defendants would not exceed two hundred dollars in case of loss or injury, the plaintiff, by shipping his horse as an ordinary horse, fixed his value for transportation purposes at two hundred dollars, and, having elected to treat his value as two hundred dollars for the purpose of securing a low rate of freight, he cannot insist upon a higher valuation in case of loss or injury. In fixing the freight charges on the assumed valuation of two hundred dollars, both parties understood that the liability assumed by the defendants was limited to two hundred dollars. The plaintiff's conduct was, in effect, a declaration as to the value of his horse and an admission that the defendants' liability as carrier would not exceed two hundred dollars. The case is as if, upon inquiry by the defendants, the plaintiff had stated the value of his horse to be two hundred dollars, the sum named in the defendants' regulation as determining the freight charges and the liability assumed in the transportation of a horse of ordinary value.

The rule or regulation of the defendants, of which the plaintiff had notice, was not designed and did not purport to relieve the defendants from their common-law responsibility as a carrier. The purpose was to secure information as to the value of the animals received for transportation, and compensation proportionate to the risk incurred. As such, the regulation was a reasonable one, and not in conflict with the general principle that a common carrier ²⁶⁵ cannot discharge himself of legal responsibility by a general notice: *Moses v. Boston etc. R. R. Co.*, 24 N. H. 71, 90, 91; 55 Am. Dec. 222. Such a stipulation is not prohibited on grounds of public policy. In *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331, 340, 341, the court say: "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be repugnant to the soundest principles of fair dealing and of the freedom of con-

tracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

There is no injustice in restricting the shipper's claim for damages to the value he places upon his property for transportation. If the plaintiff obtained the lowest rate of freight by shipping his horse as of ordinary value, it is not unreasonable that his recovery should be restricted to two hundred dollars, which was the amount of the risk the parties understood the plaintiff paid for and the defendants assumed as carrier: *Magnin v. Dinsmore*, 62 N. Y. 35, 56; 20 Am. Rep. 442; *Squire v. New York Cent. R. R. Co.*, 98 Mass. 239, 245; 93 Am. Dec. 162; *Graves v. Lake Shore etc. R. R. Co.*, 137 Mass. 33; 50 Am. Rep. 282; *Hill v. Boston etc. R. R. Co.*, 144 Mass. 284.

The motion to set aside the award on the ground of disqualification of the referees, and the request for a further hearing on that motion, were questions of fact for the trial term, not ordinarily revisable at the law term, and no error of law appears in the denial of the motions. As greater damages were awarded the plaintiff than he was legally entitled to recover, he suffered no injustice from the award: *Holman v. Manning*, 65 N. H. 92; *Sanford Mfg. Co. v. Wiggin*, 14 N. H. 441, 451; 40 Am. Dec. 198.

Exceptions overruled.

Blodgett, J., did not sit; the others concurred.

In *Durgin v. American Express Co.*, 66 N. H. 277, the action was brought to recover the value of a box of merchandise which the defendants, as common carriers, received from the plaintiff and failed to deliver to the consignee. The shipping receipt given by the carrier upon receiving the goods contained a stipulation that "it is further agreed that this company is not to be held liable or responsible for any loss of, or damage to, said property, or any part thereof, from any cause whatever, unless in every case the said loss or damage be proved to have occurred from the fraud or gross negligence of said company or their servants; nor, in any event, shall this company be held liable or responsible, nor shall any demand be made upon them beyond the sum of fifty dollars, at which sum said property is hereby valued, unless the just and true value thereof is stated herein." The value of the merchandise received was not stated, nor was any inquiry made, nor did defendants or their agents know its value. The sum to be charged for carrying the box was not mentioned, and the express charges were charged to the consignee, to be paid upon delivery. The supreme court held that the carrier was not liable for the true value of the goods lost, under the rule that common carriers may limit their common-law liability by express and reasonable contract or stipulation against risks not arising from their own negligence, as in the present case, where the goods were lost or stolen without the fault of the carrier: *Merrill v. American Express Co.*, 62 N. H. 514; *Rand v. Merchants' etc. Co.*, 59

N. H. 363; *Barter v. Wheeler*, 49 N. H. 9-30; 6 Am. Rep. 434; *Moses v. Boston etc. R. R.*, 24 N. H. 71; 55 Am. Dec. 222.

In conformity with this view, "conditions and stipulations designed to secure to carriers information as to the character and value of articles delivered to them, and to limit their responsibility to the amount and extent of the risk apparently assumed by the carrier and paid for by the purchaser, are upheld as just and reasonable": *Duntley v. Boston etc. R. R.*, 66 N. H. 263; ante, p. 610; *Edwards on Bailments*, 2d ed., secs. 567-569; *Hart v. Penn R. R. Co.*, 112 U. S. 331; *Graves v. Lake Shore etc. R. R. Co.*, 137 Mass. 33; 50 Am. Rep. 282; *Little v. Railroad Co.*, 66 Me. 239; *Magnin v. Dinsmore*, 62 N. Y. 35; 20 Am. Rep. 442; *St. Louis etc. Ry. Co. v. Weakley*, 50 Ark. 397; 7 Am. St. Rep. 104. "The stipulation as to an agreed valuation inserted in the shipping receipt taken by the plaintiff, was designed to determine the extent of the defendant's liability, in case of loss of the goods, and the plaintiff so understood it, and having agreed upon a valuation for the purpose of fixing the express charges, he cannot insist that the goods are of greater value for the purpose of increasing his claim for damages for the loss. Nor is it material whether the loss arose from the negligence of the defendants, or from some other cause. The defendants agreed to respond in a sum not exceeding fifty dollars, in case of loss, and, for the purposes of the contract of transportation between the parties to the contract, the goods can have no greater value: *Hart v. Penn R. R. Co.*, 112 U. S. 331-341; *Graves v. Lake Shore etc. R. R. Co.*, 137 Mass. 33; 50 Am. Rep. 282; *Hill v. Railroad Co.*, 144 Mass. 284. If the question is raised in this case, it seems to be settled by the great weight of authority that a common carrier cannot stipulate for exemption from responsibility for the negligence of himself or his servants on grounds of public policy, even by express contract: *Railroad Co. v. Lockwood*, 17 Wall. 357; *Liverpool etc. Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174; *Willis v. Railway Co.*, 62 Me. 488; *Mann v. Birchard*, 40 Vt. 326; 94 Am. Dec. 398; *Squire v. New York etc. R. R. Co.*, 98 Mass. 239; 93 Am. Dec. 162; *Louisville etc. R. R. Co. v. Oden*, 80 Ala. 38; *Wallingford v. Railroad Co.*, 26 S. C. 258; *Grogan v. Adams Express Co.*, 114 Pa. St. 523; 60 Am. Rep. 360; *Edwards on Bailments*, sec. 563.

CARRIERS—FREIGHT—REGULATION OF CHARGES.—The agreement of the parties usually fixes the rate of freight to be charged, and, if not so fixed, the carrier may recover for the transportation on a quantum meruit, and he can recover only a reasonable sum: *Extended note to Crawford v. Williams*, 60 Am. Dec. 149.

CARRIERS—VALUATION OF ARTICLES—LIMITING LIABILITY FOR NEGLIGENCE TO THAT AMOUNT.—A contract specifying that the value of property does not exceed a sum named, and that in the event of its loss through the negligence of the carrier, the liability should be limited to such sum, if fairly and honestly made as a basis of the carrier's charges and responsibility, is a just and reasonable mode of securing the due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting him against extravagant and fanciful valuations, and is therefore valid: *Alair v. Northern Pac. R. R. Co.*, 53 Minn. 160; 39 Am. St. Rep. 588, and note. See, also, the extended note to *Chicago etc. Ry. Co. v. Chapman*, 23 Am. St. Rep. 593.

HICKEY v. DOLE.

[66 NEW HAMPSHIRE, 386.]

STATUTE OF FRAUDS—CONTRACT BY LETTERS.—A contract binding under the statute of frauds, though signed by only one of the parties thereto, may be gathered from letters between them relating to the subject matter, and so connected with each other as to fairly constitute one paper.

SPECIFIC PERFORMANCE—MUTUALITY OF REMEDY.—Plaintiff's right to specific performance does not depend upon the defendant's right to that remedy.

SPECIFIC PERFORMANCE—PARTIES.—The administrator and heirs of one of the parties to a contract for the conveyance of land are properly made parties defendant to a suit for specific performance, when their joinder is necessary to a decree that will leave no part of plaintiff's title open to controversy or doubt.

Bill for specific performance. In March, 1882, plaintiff owned timber land and a mill known as the "Stark mill" property. This was mortgaged to one Emery, who had foreclosed and was in possession, and the time for redemption had nearly expired. Plaintiff herein applied to defendant Dole and one Soule, now deceased, for assistance. They agreed to redeem from the mortgage, and entered into the following agreement, signed by Soule alone:

"Whereas, Edward Hickey has this day quitclaimed to Charles E. Dole, of Bangor, Maine, and Gilbert Soule, of Northumberland, New Hampshire, all his real estate in the towns of Stark, Milan, and Berlin.

"Now the said Dole and Soule agree, in case they fail to redeem said property from the mortgage now existing upon the same, to release said real estate to said Hickey upon demand, after the first day of April, 1882; and in case said Dole and Soule do redeem said property from the mortgage thereon, said Hickey shall have the right to pay said Dole and Soule one-half of all the advances made by them upon said property, and thereupon said Dole and Soule are to release to said Hickey one undivided half of said real estate.

"Dated this 20th day of March, 1882.

"GILBERT SOULE."

Plaintiff furnished Dole and Soule one thousand dollars, and they used this and nine thousand five hundred dollars of their own money to redeem the mortgage, taking a warranty deed from the mortgagee April 28, 1882. Plaintiff continued to manage the lumber business under an agreement with Dole and Soule, and on February 20, 1886, brought this suit. Soule died in

January, 1884, and his administrator and heirs were made parties defendant to the bill.

Ladd & Fletcher, F. Ladd, and Drew & Jordan, for the plaintiff.

E. A. & C. B. Hibbard and W. & H. Heywood, for Dole and Stuart.

Drummond & Drummond, for Soule's administrator and heirs.

²³⁷ DOE, C. J. The writing signed by Soule is a valid contract, and if it had been signed by Dole, the statute of frauds would not have been a defense. Letters written by Dole to the plaintiff refer to and recognize the contract signed by Soule, and the plaintiff's "right to redeem the property." They contain the substance of so much of that contract as is material in this case, and they are as ²³⁸ effective as his signing the formal agreement would have been: *Brown v. Whipple*, 58 N. H. 229; *Webster v. Clark*, 60 N. H. 36; *Rafferty v. Lougee*, 63 N. H. 54; *Barrell v. Joy*, 16 Mass. 221, 223; *Urann v. Coates*, 109 Mass. 581, 584; *Kingsbury v. Burnside*, 58 Ill. 310; 11 Am. Rep. 67; *Ryan v. United States*, 136 U. S. 68, 83; *Forster v. Hale*, 3 Ves. 696, 708, 709; 5 Ves. 308, 315; *Browne on the Statute of Frauds*, secs. 7, 98, 99, 346, 346 b. They prove the plaintiff's "right to redeem" at least one-half of the Stark mill property; and, as one-half is all he claims, it is not necessary to inquire whether, as against Dole, the letters show the plaintiff entitled to more than half. His "right to redeem," established against Dole by the letters, is his right, established by the writing signed by Soule, to have half of the property when he pays half of the advances made by Dole and Soule. Both descriptions of this right mean that the amount to be paid by him is to be ascertained by such an equitable accounting as attends a mortgager's exercise of his right of redemption. On such an accounting the referee has found a balance due the plaintiff. When he receives that balance and half of the land, the other half of the land will be the profit of those who prevented a foreclosure. The plaintiff's right to specific performance does not depend upon the mutuality of that remedy: *Eckstein v. Downing*, 64 N. H. 248; 10 Am. St. Rep. 404.

Upon the facts found, it cannot be held as matter of law that the suit was not seasonably brought. The plaintiff is entitled to a conveyance from Dole and from Stuart who became a grantee of some of Soule's heirs with notice of the plaintiff's rights.

Soule's administrator was properly joined as a defendant. Whatever may be the several obligations of the defendants to contribute to the payment of the balance due the plaintiff, Soule's administrator and heirs may well be made defendants for the purpose of a decree that will leave no part of the plaintiff's land title open to controversy or doubt. He is not bound to rely upon the evidence relating to Stuart's acquisition of a part or the whole of Soule's title.

Decree for the plaintiff.

Bingham, J., did not sit; the others concurred.

CONTRACTS BY LETTER—STATUTE OF FRAUDS.—If a contract which comes within the statute of frauds can be extracted from correspondence between the parties upon the subject of the contract, the statute is satisfied: *Austin v. Davis*, 128 Ind. 472; 25 Am. St. Rep. 456, and note.

SPECIFIC PERFORMANCE—MUTUALITY.—Though a contract is not binding upon one of the parties when it is executed, yet if it gives him an option to accept its terms, he may, by suit or otherwise, waive the want of mutuality, and enforce specific performance of the contract: *South etc. R. R. Co. v. Highland Avenue etc. R. R. Co.*, 98 Ala. 400; 39 Am. St. Rep. 74, and note, with the cases collected, showing the conflict of authority.

WALKER v. WALKER.

[66 NEW HAMPSHIRE, 390.]

HUSBAND AND WIFE—GIFTS BY HUSBAND IN FRAUD OF WIFE.—A transfer of personal property, which is a mere device or contrivance by which the husband, not parting with the absolute dominion over the property during his life, seeks at his death to deprive his widow of her distributive share of his estate, is fraudulent and void as to her.

HUSBAND AND WIFE.—CONVEYANCES OF REAL ESTATE MADE BY A HUSBAND during coverture for the purpose of defeating the wife's marital rights are fraudulent and void as against her.

HUSBAND AND WIFE—GIFTS BY HUSBAND.—A husband has power to dispose of his personal property in good faith, by gift or otherwise, during coverture, free from all postmortem claims thereon by his widow.

Bill in equity by the widow of N. B. Walker to obtain her legal share to his estate. Walker died, leaving a will by which he gave one-third part of his estate to the plaintiff, and the remainder to his two sons by a former wife. The defendant Mellen holds in trust for these sons corporate stock and bonds valued at over thirty-eight thousand dollars, delivered to him to be kept by them by Walker in his lifetime. About ten years prior to his

death, Walker purchased a house for six thousand five hundred dollars, taking the deed in his name as trustee for his two sons, and he and his wife occupied this house as his homestead until his death. Plaintiff did not know of the state of the title to this house, and dower and homestead were assigned to her out of it, she having waived the provisions made for her in her husband's will. Upon discovering the state of the title, she amended her bill so as to claim a share in that property. This claim was denied. Mellen, as trustee, always acted in managing the estate for the sons under the father's direction, and they did not know the amount and kind of securities held by the trustee for them until their father's death, and the gift was not intended to take effect until his death. The court below ruled that the trustee should pay to the plaintiff one-third of the value of the property in his hands, or that he deliver all of such property to the executor to be administered as part of Walker's estate. The defendants excepted.

Chase & Streeter, for the plaintiff.

W. L. Foster, for the defendants.

³²² **BLODGETT, J.** Upon the facts found at the hearing, the bill can be maintained. The attempt of the plaintiff's husband to dispose of nearly all of his personal estate, so that he should have the enjoyment and control of it for life, and the plaintiff be deprived of any portion of it at his decease, cannot be sanctioned. It is settled law that conveyances of real estate made by the husband during the coverture for the purpose of defeating the wife's rights, are, as to her, fraudulent and void. Whether the same rule obtains in transfers of personal property for the like purpose, when the husband reserves therein no right to himself, is a question upon which the authorities are somewhat at variance; but where the transfer is a mere device or contrivance by which the husband, not parting with the absolute dominion over the property during his life, seeks at his death to deprive his widow of her distributive share, there is no substantial conflict of authority that the rule applicable to conveyances of realty prevails: *Thayer v. Thayer*, 14 Vt. 107; 39 Am. Dec. 211; *Hays v. Henry*, 1 Md. Ch. 337; *Rabbitt v. Gaither*, 67 Md. 95, 100, 105; *Littleton v. Littleton*, 1 Dev. & B. 327; *McGee v. McGee*, 4 Ired. 105; *Davis v. Davis*, 5 Mo. 183; *Stone v. Stone*, 18 Mo. 389; *Tucker v. Tucker*, 29 Mo. 350; *Smith v. Smith*, 12 Cal. 216, 225; 73 Am. Dec. 533; *Lord v. Hough*, 43 Cal. 581; *Cranston v. Cran-*

son, 4 Mich. 230; 66 Am. Dec. 534; *Holmes v. Holmes*, 3 Paige, 363; *Richards v. Richards*, 11 Humph. 429; *Petty v. Petty*, 4 B. Mon. 215; 39 Am. Dec. 501.

Such, also, were the decisions under the ancient custom of London, from which our statute of distributions is said to have been borrowed. Thus, in *Hall v. Hall*, 2 Vern. 277, it was held that if a freeman gives away goods in his lifetime, and yet retains the deed of gift in his own power, or retains the possession of the goods or any part of them, it is a fraud upon the custom, and will not conclude the widow; and in *Fairebeard v. Bowers*, 2 Vern. 202, a voluntary judgment by a freeman, payable after his death, was postponed to the widow's claim for her customary share. So, in *City v. City*, 2 Lev. 130, where the deceased had by deed assigned a term to his son, and the son had gone into possession, it was held that this did not bar the widow of her customary share, the assignment being without consideration; and it was said: "The same is the law as to goods." And *Edmundson v. Cox*, 7 Vin. Abr. 203, is of the like general purport. That case was a bill by ³⁹³ the widow of a freeman of London for her customary share. The husband had made his will and devised to the wife certain real and personal estate. There was, sealed up in the will, the bond of the testator, executed before the date of the will, conditioned to pay the defendant a given sum of money, or transfer to him a given amount of bank stock. The obligee was the testator's nephew, and the bond without valuable consideration. It was held by the master of the rolls that the widow, on first disclaiming all benefit under the will, could have a decree for her customary share, and that the bond should not stand in her way; and he adds: "Such sort of contrivances to evade the custom have always been set aside in this court": See, also, *Smith v. Fellows*, 2 Atk. 62, and *Coomes v. Elling*, 3 Atk. 676. These decisions well illustrate what should be the course of decision under our statute. The widow's claim for her share under the statute being strictly analogous to the claim of the widow of a freeman under the custom of London, if a contrivance to evade the rights of the widow under that custom was never tolerated, there is no reason why it should meet with more favor under the statute.

By the declaratory statute of 13 Elizabeth, chapter 5, made perpetual by 29 Elizabeth, chapter 5, and adopted as part of the common law in this state, for avoiding feigned, covinous, and fraudulent feoffments, gifts, grants, alienations, conveyances,

bonds, suits, judgments, and executions, as well of lands, tenements, and hereditaments as of goods, chattels, wares, and merchandise, which feoffments, etc., have been devised of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, etc., not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, etc., it was declared and enacted in the second section, "that all and every feoffment, gift, grant, alienation, and conveyance, and all and every bond, suit, judgment, and execution, to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken," as against such creditors and others and their representatives, "to be utterly void and of none effect."

There is no ground to claim, and no claim is made by the defendants, that the act of the plaintiff's husband in relation to the stocks and bonds comes within the proviso in the sixth section, exempting from the operation of the act transactions upon a good consideration and bona fide; but it is contended that the plaintiff is not within the act as a creditor, and therefore is not within its protection. Technically, and in a strict legal sense, she may not, perhaps, be a creditor; but "the statute, by the words 'creditors and others,' embraces others than those who are strictly and technically creditors. Even the word 'creditor' does not receive a strict definition, for a party who is not strictly speaking a creditor ³⁰⁴ may stand in the equity of a creditor, and have an interest that may be defrauded. . . . The character of the claim, if it is just and lawful, is immaterial . . . and a contingent claim is as fully protected as one that is absolute": *Bump on Fraudulent Conveyances*, 2d ed., 491, 492. Under this construction of the statute, which is fully supported by the decisions, it is not open to reasonable doubt that the plaintiff comes within its protection. The character of her claim is just and lawful in the highest degree; she stands in the equity, if not in the attitude, of a creditor; she is as much injured as any creditor can be; and the fact that at the time the securities were transferred her distributive right therein was contingent entitles it none the less to protection than if it had been absolute. And this should be so. Marriage is equivalent to a pecuniary consideration; that is to say, it is a valuable consideration. The plaintiff's right to her distributory share of her husband's large estate, and which is

quite likely to have been one of the inducements to her marriage with him, is therefore in the nature of an actual purchase of that right, and may well be given the same effect, under the liberal and beneficial construction which the statute is entitled to receive for the suppression of fraud, the advancement of justice, and the promotion of the public good.

But however this may be, inasmuch as the design of the statute obviously was to embrace others than those who are creditors in a strict and technical sense, we think that under its designation of "creditors and others" the plaintiff is fairly included; "and if," in the language of Mason, J., in *Feigley v. Feigley*, 7 Md. 537, 61 Am. Dec. 375, "under such a comprehensive clause as 'creditors and others,' a wife who has been made the victim of her husband's fraud is not to be included, we are at a loss to ascertain to whom it was designed to relate." The same or equivalent statutory language is also held to apply to and include the defrauded wife, in *Tyler v. Tyler*, 126 Ill. 525; 9 Am. St. Rep. 642; *Green v. Adams*, 56 Vt. 602; 59 Am. Rep. 761; *Jiggitts v. Jiggitts*, 40 Miss. 718; *Reynolds v. Vance*, 1 Heisk. 344; *Boils v. Boils*, 1 Cold. 287; *Brewer v. Connell*, 11 Humph. 500; *Killinger v. Reidenhauer*, 6 Serg. & R. 531; *Bouslough v. Bouslough*, 68 Pa. St. 495, 499; *Johnson v. Johnson*, 12 Bush 485. And if it were even held that the statute does not include the plaintiff, either as a creditor or as one to whom the conveyancer owes a lawful duty in respect of his property which he fraudulently attempts to avoid, it would not leave her remediless under the common law, which is still in force. "As the act is merely declaratory, resort may always be had to the principles of the common law, whenever the statute fails to reach a case of fraud. The act itself is not affected by this doctrine, and will, in general, be received as a true declaration of what the law was; but wherever the statute is ineffective, either through a change of custom, or the introduction of a new kind of property, or the concoction of some new device, there the common law intervenes ³⁹⁵ with its pure and elevated principles of morality and justice, and enforces the dictates of common honesty and common sense": *Bump on Fraudulent Conveyances*, 11.

But irrespective of the statute and the common law, the obligations and duties of husbands and wives to each other disable each of them alike successfully to defraud the other by such a disproportionate, unreasonable, and fraudulent transfer of property as appears in this case: *Laton v. Balcom*, 64 N. H. 93, 94-96;

10 Am. St. Rep. 381; and upon general principles of equity alone the plaintiff's bill may be supported. It is an established rule that a husband will, upon a proper case being made out, be restrained by injunction from transferring property in fraud of the legal or equitable rights of the wife: 2 Story's Equity Jurisprudence, 12th ed., sec. 955; Kerr on Injunctions, 2d ed., 534, and cases cited; Eden on Injunctions, 295, 296; and if such transfers are made, equity puts her on the same footing with a creditor who finds himself hindered, delayed, or defrauded by his debtor.

With these views of the transaction, the plaintiff is entitled to her distributive share of the stocks and bonds, as if no transfer of them had been made or attempted. If, however, the transfer was not fraudulent as against her, the same conclusion follows. The gift was not perfected. It was not valid as a gift *inter vivos*, for that goes into absolute and immediate effect, the donor parting not only with the possession, but with the dominion of the property; nor as a *donatio causa mortis*, for the securities were not delivered by the deceased in his last sickness, nor when in any particular peril of death, or under any special apprehension of such peril: *Craig v. Kittredge*, 46 N. H. 57, and authorities cited.

As to the house occupied by the plaintiff and her husband as a homestead, a different case is presented. At the hearing, the plaintiff moved to amend her bill so as to claim a one-third part of the homestead premises; but the claim was denied, on the ground that at the time her husband took the homestead deed as trustee for his sons, he had ample means remaining for a suitable provision for the plaintiff—to which denial she excepted.

If the purpose which prompted the husband's act was not to defraud the plaintiff, but a desire to make a reasonable provision for his minor children, whose interests it was his duty to guard and protect, it would be a misnomer to call the transaction fraudulent, and it must be allowed to stand. In such cases the facts are always open to inquiry, "and it seems settled that the court is warranted in considering such circumstances as the meritorious object of the conveyance, and the situation of the husband in point of pecuniary means": *Schouler's Domestic Relations*, 270. And this is right and reasonable. Marriage does not debar a man from all right to dispose of his property during his life according to his will and pleasure. On the contrary, "nothing is better settled than the power of a husband to dispose of his personal property in good faith, by gift or otherwise,

during coverture, free from all postmortem ³⁰⁶ claims thereon by his widow": Dickerson's Appeal, 115 Pa. St. 198; 2 Am. St. Rep. 547, 552. It simply debars him from making gifts and conveyance with the view of defeating his wife's marital rights, and to this extent only is his power of disposal clogged and fettered. When his object is not to defraud her, he may therefore lawfully sell or convey, and he may even make a gift of his property for any lawful purpose. If possessed of large estate, the voluntary conveyance of a small portion of it to a stranger would scarcely be deemed fraudulent as against her; and if the conveyance is to his children by a former marriage, and he retained that which would, in the ordinary course of events, be ample provision for himself and wife and family, there surely would be no fraud upon her marital rights cognizable in equity: See *Butler v. Butler*, 21 Kan. 521; 30 Am. Rep. 441, 446, and authorities generally.

Taking into consideration Mr. Walker's pecuniary circumstances, the comparatively small amount invested in the homestead trust estate with reference to the entire amount of his property, the meritorious claims of his children, as such, upon him, and the pregnant fact that this trust was created long before his estrangement from the plaintiff, we are of opinion that the provision made by him for his children was, under the existing circumstances, a just and reasonable one, that no fraud upon the plaintiff was intended, and that her claim for a share of the homestead estate was properly denied.

Exceptions overruled.

Doe, C. J., and Allen, J., did not sit; the others concurred.

HUSBAND AND WIFE—GIFTS BY HUSBAND IN FRAUD OF WIFE.—A husband may dispose of his personal property by voluntary gift, during the coverture, without his wife's consent, freed from every postmortem claim by her. She cannot after her husband's death assail such gift as being in fraud of her rights: *Lines v. Lines*, 142 Pa. St. 149; 24 Am. St. Rep. 487, and extended note. The inchoate right of dower possessed by a wife in the lifetime of her husband is such an interest in his realty as entitles her to maintain an action in equity to cancel of record, so far as she is concerned, a deed of the husband purporting to be executed by the wife also, on the ground that, so far as she is concerned, it is a forgery: *Clifford v. Kampfe*, 147 N. Y. 383. A man about to marry may convey a reasonable portion of his property to his children by a former wife, and such conveyance will not be deemed fraudulent as to the second wife: *Kinne v. Webb*, 54 Fed. Rep. 34. The same doctrine was laid down in *Alkire v. Alkire*, 134 Ind. 350, where it was further held that if representations were made as an inducement for the wife to enter into the contract, or if agreements with the wife were violated, or conveyances made on the eve of the marriage under certain circumstances, so as to operate as fraud, a conveyance under such conditions would be set aside and the wife granted her interest in the estate.

STIEN v. McQUADE.

[66 NEW HAMPSHIRE, 403.]

INSOLVENCY—DISCHARGE AS BAR TO ACTION BY CITIZEN OF ANOTHER STATE.—A discharge in insolvency granted by a court of one state to one of its citizens is not a bar to an action in that state by a citizen of another state, who has not voluntarily submitted himself to the jurisdiction of the court in the insolvency proceedings.

Assumpsit for goods sold and delivered. Judgment for plaintiffs, and defendants excepted.

Drury & Peaslee, for the plaintiffs.

D. F. O'Connor, Sulloway & Topliff, and J. H. Riedell, for the defendants.

⁴⁰³ CLARK, J. It is settled that the insolvent law of one state has no effect in another state against the citizens of the latter holding claims that follow the person of the creditor, unless they place themselves under the jurisdiction of the law by voluntarily becoming ⁴⁰⁴ parties to the insolvency proceedings: *Perley v. Mason*, 64 N. H. 6; *Carbee v. Mason*, 64 N. H. 10; *Dunlap v. Rogers*, 47 N. H. 281; 93 Am. Dec. 433; *Newmarket Bank v. Butler*, 45 N. H. 236; *Baldwin v. Hale*, 1 Wall. 223; *Gilman v. Lockwood*, 4 Wall. 409; *Denny v. Bennett*, 128 U. S. 489. The plaintiffs, being citizens of New York, were not under the jurisdiction of the insolvent law of this state, and not having in any way voluntarily submitted themselves to its jurisdiction, their claim was not affected by the discharge granted to the defendants by the insolvency court.

But it is contended that the plaintiffs, by bringing their action in this court, have voluntarily submitted themselves to the jurisdiction, and are bound from enforcing their claim, which is covered by the terms of the discharge granted to the defendants under the insolvent law of this state. The question presented is, whether a discharge in insolvency granted by an insolvent court of this state to one of its citizens is a bar to an action brought by a citizen of another state in the courts of this state. Insolvency proceedings involve a judicial investigation and partake of the nature of judicial proceedings, and a discharge in insolvency is valid and operative only as to persons and claims over which the insolvency court has jurisdiction. As the insolvency court of this state had no jurisdiction over the plaintiffs as citizens of New York, the discharge granted to the defendants was inoperative as to the plaintiffs, and cannot

be pleaded as a discharge of their claim; *Eastman v. Dearborn*, 63 N. H. 364. As to the plaintiffs and their debt against the defendants, it is as though there had been no insolvency proceedings or certificate of discharge granted to the defendants. The discharge is no defense to the plaintiffs' claim. The plaintiffs' debt not being extinguished, they have an equal right to enforce the payment of it by suit in the courts of this state with other citizens having claims to be enforced. It is no reason for denying the plaintiffs' access to the courts of the state to enforce a valid claim against the defendants, in no way affecting the rights of other citizens, that the defendants have obtained a certificate of discharge from an insolvency court having no jurisdiction over the plaintiffs. This view is supported by the decisions of other courts where the question has been considered: *Guernsey v. Wood*, 130 Mass. 503; *Kelley v. Drury*, 9 Allen, 27; *Hills v. Carlton*, 74 Me. 156; *Bedell v. Scruton*, 54 Vt. 493; *Anderson v. Wheeler*, 25 Conn. 603; *Main v. Messner*, 17 Or. 78; *Phoenix Nat. Bank v. Batcheller*, 151 Mass. 589.

Exceptions overruled.

Smith, J., did not sit; the others concurred.

INSOLVENCY—DISCHARGE AS BAR TO ACTION BY CITIZEN OF ANOTHER STATE.—A nonresident creditor is not barred by a discharge in insolvency granted here, unless he has come in and submitted himself to the jurisdiction of the court: *Pattée v. Paige*, 163 Mass. 352; 47 Am. St. Rep. 459, and note.

LANGLEY v. FARMINGTON.

[66 NEW HAMPSHIRE, 431.]

ESTATES FOR LIFE—RIGHTS OF TENANT.—If a person is given a life estate, by will, to enjoy the property in specie, and is also appointed executor, he is entitled to the possession of the property without giving a bond to the remainderman or anyone else to account for it.

EXECUTORS AND ADMINISTRATORS.—PAYMENT TO AN EXECUTOR named in a will, who, without appointment of any court or without giving bond, has administered the estate according to the terms of the will, is a defense to an action for the same demand, brought by an administrator subsequently appointed for the same estate.

Assumpsit on notes payable to John H. Langley, or order. Said Langley died December 21, 1875, possessed of such notes and leaving a will, of which he named his wife executrix, and, after making specific legacies, bequeathed to her the residue of his

estate under conditions outlined in the opinion of the court. The will was proved in January, 1876, and without being appointed executrix, Mrs. Langley took possession of the testator's estate, including the notes, and paid his debts and legacies. The makers of the notes paid her the full amount thereof in May, 1878. She afterwards married and died, and the plaintiff was appointed administrator of the estate of said John H. Langley. He then brought this suit against the makers of said notes, who obtained judgment, and the administrator excepted.

J. W. Towle and J. S. H. Frink, for the plaintiff.

G. E. Cochrane, J. Kivel, and T. Cogswell, for the defendants.

⁴³² CHASE, J. It is unnecessary to determine whether the widow, under the residuary clause, took an absolute estate, as claimed by the defendants, or an estate for life enlarged by the addition of a right or power to use and dispose of the principal as she saw fit: *Burleigh v. Clough*, 52 N. H. 267; 13 Am. Rep. 23; *Kimball v. Bible Soc.*, 65 N. H. 139, 151. If her interest was only an enlarged life estate (which is the smallest that can be claimed in her behalf), the testator intended that her possession of the property should immediately succeed his and be of the property in specie, and that she should have the control, use, and disposal of it during her life. The facts that his bequest of the residue to her is accompanied by a habendum clause which provided that she was to have and to hold it to her use and behoof forever; that he gave it to her without the intervention of a trustee, and without imposing on her an obligation to give a bond to protect those in remainder, if any; that he made her residuary legatee and executrix, so that a bond to pay debts and legacies might be accepted from her instead of one to return an inventory (*Gen. Laws*, c. 195, secs. 12, 13; *Emery v. Judge of Probate*, 7 N. H. 142); that she was to be amply supported and maintained out of the estate, and was to use and dispose of it as she saw fit; and that the bequest ⁴³³ over is of the remainder of said estate, "if any" (*Harris v. Knapp*, 21 Pick. 412), all disclose an intention to give her the possession, and a right to use and manage the property with a large share of the freedom and independence which he had enjoyed.

While the ordinary rule is, that if a testator makes a general bequest of all his property, or the residue, to one for life with remainder over, and the property consists in part of perishable personal property, the perishable property should be converted by the executor into permanent securities and the income only be

paid to the life tenant, the rule is not applied in a case like this, where the testator intended the life tenant should enjoy the property in specie: *Healey v. Toppan*, 45 N. H. 243, 260; 86 Am. Dec. 159, and authorities cited, particularly *Morgan v. Morgan*, 14 Beav. 72; 7 Eng. L. & Eq. 216. In such case the life tenant is entitled to the possession without giving a bond to the remainderman, the same as he would be if the property were specifically bequeathed to him: *Healey v. Toppan*, 45 N. H. 243; 86 Am. Dec. 159; *Weeks v. Weeks*, 5 N. H. 326; *Marston v. Carter*, 12 N. H. 159, 163; *French v. Hatch*, 28 N. H. 331, 352; *Weeks v. Jewett*, 45 N. H. 540, 543; *Burleigh v. Clough*, 56 N. H. 267; 13 Am. Rep. 23; *McCarty v. Cosgrove*, 101 Mass. 124. Whether Mrs. Langley was absolute owner or only life tenant of the residue, she was entitled to receive possession of the property in specie from the testator's representative without giving a bond to anyone to account for it.

Although she did not qualify as executrix, she appears to have fully administered the estate in accordance with the provisions of the will. She took possession of the property, and paid the debts and general legacies. If she had given a bond as executrix, that would not have caused a different disposition of the property, nor secured the performance of additional duties in respect to it, except the filing of an inventory and the settlement of an account. The bond would not have protected the remaindermen against the unauthorized, negligent, or fraudulent use or disposal of the property while in her possession as life tenant, for the executrix would not be responsible to the remaindermen for the preservation of the property after it passed into the possession of the life tenant: *Lynde v. Estabrook*, 7 Allen, 68, 72; *Weeks v. Jewett*, 45 N. H. 540. If the testator's brothers had an interest in the residue as remaindermen, their interest could be protected, whether the executrix's official duty to file a bond and inventory was performed or not. They could compel her, by a suit in equity, to file an inventory of the property in which they were interested, and thus insure their protection against her misuse or misappropriation of it: 2 Kent's Commentaries, 354; *Westcott v. Cady*, 5 Johns. Ch. 334; 9 Am. Dec. 306; *Langworthy v. Chadwick*, 13 Conn. 42; *Homer v. Shelton*, 2 Met. 194; *Healey v. Toppan*, 45 N. H. 243; 86 Am. Dec. 159.

The testator's estate having been settled, and his property having gone to those who were entitled to it, and would have received ⁴³⁴ it if all the requirements of the law had been complied with, the settlement cannot be disturbed: *Hibbard v. Kent*,

15 N. H. 516; *Clarke v. Clay*, 31 N. H. 393; *George v. Johnson*, 45 N. H. 456; *Mercer v. Pike*, 58 N. H. 286. The plaintiff is administrator of the estate only in name. No trust now remains for him to execute. The payment of the notes in-suit by the defendants to Mrs. Langley was, under the circumstances of the case, payment as against all parties beneficially interested in the estate, and therefore as against the plaintiff: *Clark v. Clark*, 62 N. H. 267, 272. The proceeds of the notes, together with the other property of the testator, went into the possession of Mrs. Langley, where they belonged; and if she has not expended the whole of them, as she was authorized to do by the will, and the testator's brothers have any interest in the remainder, their remedy is against her representatives directly, and not against the defendants indirectly through the plaintiff.

Exceptions overruled.

Carpenter, J., did not sit; the others concurred.

ESTATES FOR LIFE—RIGHT OF TENANT TO POSSESSION. A specific bequest of personal property to one person for life, with remainder over, entitles the tenant to its possession and use during his lifetime, and the remainderman to the property thereafter, where the property is of such a nature that it is not consumed but only deteriorates or wears out by use; and the tenant is not required to give security to the remainderman, but only to file an inventory for his benefit: *Healey v. Tappan*, 45 N. H. 243; 86 Am. Dec. 159, and note.

STURTEVANT v. ARMSBY COMPANY.

[66 NEW HAMPSHIRE, 557.]

INSOLVENCY—ASSIGNMENT IN—EFFECT IN OTHER STATES.—An assignment in insolvency made under the law of one state is not a bar to a subsequent attachment of the insolvent's property situated in another state by a citizen thereof, or of a third state.

Bill to enjoin an action at law. On December 31, 1890, one Hanson, a citizen of Massachusetts, filed a voluntary petition in insolvency in that state. On January 22, 1891, the plaintiff, a citizen of that state, was appointed assignee of such insolvent's estate. The defendants, a corporation organized under the law of Illinois, afterwards brought suit in New Hampshire against Hanson for the recovery of a demand provable in insolvency, and attached certain of his property situated in the latter state.

M. R. Thomas, for the plaintiff.

F. Weeks, for the defendants.

558 CARPENTER, J. The insolvency proceedings afford no objection to the maintenance of the defendant's action against Hanson; nor, it seems, would they against such a suit in Massachusetts: *Morse v. Reed*, 13 Met. 62; *Barker v. Haskell*, 9 Cush. 218. In these cases the objection was made by the debtor. The plaintiff, as assignee, has no interest to prevent the defendants from prosecuting their suit to judgment. His interest, if any, lies in the opposite direction. If the defendants obtain judgment, they can prove neither it, nor their original demand against Hanson's estate: *Sampson v. Clark*, 2 Cush. 173; *Woodbury v. Perkins*, 5 Cush. 86; 51 Am. Dec. 51; *Bangs v. Watson*, 9 Gray, 211; *Hollister v. Abbott*, 31 N. H. 442; 64 Am. Dec. 342. On either ground the bill might properly be dismissed. But the bill may be amended. It is not the prosecution of the suit, but a levy on the attached property, that the plaintiff desires to prevent. He claims a right in the property superior to the defendant's lien. He can properly ask for nothing but due protection of that right. If the defendants cannot obtain judgment, they cannot levy. But to prevent a levy, it is not necessary to enjoin them against pursuing their action to judgment. They are not to be enjoined any further than is necessary for the protection of the plaintiff. The case is considered as if the bill were so amended as to ask for an injunction against a levy on the property attached.

An assignment under the insolvency law of another state is not permitted to prevail against a subsequent attachment by a citizen of this state of the insolvent's property found here: *Saunders v. Williams*, 5 N. H. 213; *Dalton v. Currier*, 40 N. H. 237; *Dunlap v. Rogers*, 47 N. H. 281; 93 Am. Dec. 433; *Perley v. Mason*, 64 N. H. 6; *Carbee v. Mason*, 64 N. H. 10. But as against subsequent attaching creditors who are citizens of a foreign country, the assignment prevails: 559 *Sanderson v. Bradford*, 10 N. H. 260. The defendants are not foreigners. They are citizens of Illinois, and as such, when in this jurisdiction, are entitled, under the fourteenth amendment of the federal constitution, to the equal protection of our laws: *Pembina Min. Co. v. Pennsylvania*, 125 U. S. 181; *Minneapolis etc. Ry. v. Beckwith*, 129 U. S. 26. They are now in this jurisdiction. They are here lawfully in court as suitors, and in that character entitled to all the rights the law gives to our own citizens. The amendment "means that no person, or class of persons, shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances": *Missouri v. Lewis*,

101 U. S. 22, 31. "It opens the courts of the country to everyone on the same terms for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts; it assures to everyone the same rules of evidence and modes of procedure; it allows no impediments to the acquisition of property and the pursuit of happiness to which all are not subjected; it suffers no other or greater burdens or charges to be laid upon one than such as are equally borne by others; and in the administration of criminal justice it permits no different or greater punishment to be imposed upon one than such as is prescribed to all for like offenses. It secures to all persons their civil rights upon the same terms": Field, J., in *Ex parte Virginia*, 100 U. S. 367, and in *Barbier v. Connolly*, 113 U. S. 31. The same view of the operation and effect of the amendment is expressed by the court in *Soon Hing v. Crowley*, 113 U. S. 703, 709; *Yick Wo v. Hopkins*, 118 U. S. 356, 367; *Hayes v. Missouri*, 120 U. S. 68, 71, 72; *Minneapolis etc. Ry. Co. v. Beckwith*, 129 U. S. 26, 28-31; *Bell's Gap R. R. v. Pennsylvania*, 134 U. S. 232, 237, 238; *Chicago etc. Ry. Co. v. Minnesota*, 134 U. S. 418, 458. To deny the defendants the right, given by law to our own citizens in a like case, to pursue their suit to judgment, and to apply in satisfaction of the judgment the property attached, would be depriving them of the equal protection of the laws. The plaintiff's bill must be dismissed. The same conclusion, upon a like state of facts, was reached in *Paine v. Lester*, 44 Conn. 196, 26 Am. Rep. 442, and in *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367; 38 Am. Rep. 518. In the latter case the attaching creditor and the insolvent debtor were citizens of Louisiana. It is not certain that the same result would not be reached if the defendants in this case were citizens of Massachusetts; *Cunningham v. Butler*, 142 Mass. 47; 56 Am. Rep. 657; *Cole v. Cunningham*, 133 U. S. 107; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367, 386; 38 Am. Rep. 518; *Kidder v. Tufts*, 48 N. H. 121; *Eddy v. Winchester*, 60 N. H. 63.

Bill dismissed.

Smith, J., did not sit; the others concurred.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS—FOREIGN—EFFECT OF.—An assignment made by a debtor upon his own motion, for the benefit of his creditors, under the statute providing that an insolvent may make an assignment for the equal benefit of all of his creditors, is voluntary and transfers his entire personal property wherever situate: *Whitman v. Mast*, 11 Wash. 318; 48 Am. St. Rep. 874, and note. A voluntary assignment in insolvency for the benefit of

creditors, if valid where made, is valid everywhere, unless repugnant to the law of the place where the property of the insolvent is situated and detrimental to the rights of domestic creditors in the latter jurisdiction: *Hayden v. Yale*, 45 La. Ann. 362; 40 Am. St. Rep. 232, and note.

WAIT v. NASHUA ARMORY ASSOCIATION.

[66 NEW HAMPSHIRE, 581.]

CORPORATIONS—AUTHORITY OF PRESIDENT AS AGENT.

The president of a corporation has no authority as such, to act as its agent.

EVIDENCE—ADMISSION OF, AS AFFECTING VERDICT.—

The improper admission in evidence of the by-laws of a corporation, to show that the president thereof has no authority to act as its agent, is not ground for setting aside a verdict based on such want of authority.

EVIDENCE—ADMISSION OF, AS AFFECTING VERDICT.—

The admission in evidence of what the jury must have been instructed as matter of law if the evidence had been excluded, is not ground for setting aside the verdict.

Assumpsit against a corporation to recover for the services of the plaintiffs, as architects, in preparing plans and specifications for a proposed armory. On the trial, plaintiffs took exceptions to the admission in evidence of certain by-laws of the defendant corporation, and, after judgment against them, removed the case to this court.

C. W. Hoitt and Z. S. Arnold, for the plaintiffs.

G. B. French, for the defendants.

581 **BLODGETT, J.** The plaintiffs have no ground of complaint, for even if the by-laws were improperly admitted for the purpose of showing that the president had no power to make contracts in behalf of the corporation without the sanction of the directors, it does not afford sufficient cause for setting aside the verdict.

The evidence for the plaintiffs simply tended to show that they were employed by the president to prepare plans and specifications for the proposed armory, and that he assumed to act for the corporation, but there was no evidence that the corporation in any way authorized him to procure such plans and specifications, nor was there any evidence of such authority on his part from any source, unless it could be implied from his office. But no such authority is incident to the office. The directors, and not the president have the powers of the corporation, and the president has no implied authority as such to act as the agent of the cor-

poration, but, like ⁵⁸² other agents, he must derive his power from the board of directors or from the corporation: Gen. Laws, c. 148, sec. 3; *Morrill v. Boston etc. R. R. Co.*, 58 N. H. 68; *Charlestown etc. Shoe Co. v. Dunsmore*, 60 N. H. 85, 86; *Goodspeed v. East Haddam Bank*, 22 Conn. 530; 58 Am. Dec. 439, 444; *Mathone v. Manchester etc. R. R. Co.*, 111 Mass. 72, 75; 15 Am. Rep. 9; *Walworth County Bank v. Farmers' etc. Co.*, 14 Wis. 325; *Titus v. Cairo etc. R. R. Co.*, 37 N. J. L. 98, 102; *Burrill v. Nahant Bank*, 2 Met. 163; 35 Am. Dec. 395; *Mount Sterling etc. Turnp. Co. v. Looney*, 1 Met. (Ky.) 550; 71 Am. Dec. 491; *Pierce on Railroads*, 32-34; *Morawetz on Corporations*, 2d ed., sec. 537; *Cook on Stock and Stockholders*, sec. 716. The by-law put in evidence was therefore but the statement of the general rule of law which obtains in such cases, and, if wrongly admitted, it is not susceptible of perception how the verdict could have been improperly influenced, or the plaintiffs in any manner prejudiced, by putting in evidence merely what the jury must have been instructed as matter of law if the evidence had been excluded.

Exception overruled.

Clark, J., did not sit; the others concurred.

CORPORATIONS—PRESIDENT—AUTHORITY OF TO ACT AS AGENT.—The president of a manufacturing corporation, who is in the active conduct and management of the business, must be presumed to have all the powers of any agent exercising like control and management and to have authority to do what is done by such agents: *Ceeder v. Loud etc. Lumber Co.*, 86 Mich. 541; 24 Am. St. Rep. 134, and note; to the same effect see *Sparks v. Dispatch Transfer Co.*, 104 Mo. 531; 24 Am. St. Rep. 351, and note. The president of a corporation has no authority as such to make contracts binding upon the corporation, except as to matters arising in the ordinary course of the business of the corporation: *Blen v. Bear River etc. Min. Co.*, 20 Cal. 602; 81 Am. Dec. 132, and note. A corporation cannot be bound by a contract made by its president, unless power to bind it is given to him by the act of incorporation or he is authorized by the corporation to make the contract: *Mount Sterling etc. Road Co. v. Looney*, 1 Met. 550; 71 Am. Dec. 491, and note.

ROBINSON v. ROBINSON.

[66 NEW HAMPSHIRE, 600.]

DIVORCE—CRUELTY.—Under a statute authorizing divorce for "treatment injuring health or endangering reason," any behavior by one of the spouses affecting the other physically or mentally is within the meaning of the statute, without regard to the intent of such behavior. The practice of Christian Science as a doctor by a wife who believes it to be her duty, is ground for divorce by a husband who is abnormally sensitive.

DIVORCE—CRUELTY—QUESTION OF FACT.—In an action for divorce for "treatment injuring health and endangering reason," the question whether husband or wife has been so treated by the other as to seriously injure health or endanger reason is one of pure fact. It cannot be declared as matter of law that any particular treatment may not have that effect.

DIVORCE—CRUELTY.—In an action for divorce for treatment injuring health and endangering reason the question is not whether the treatment reasonably ought, or could be expected seriously to injure the health or endanger the reason of a person of ordinary intelligence and mental strength, but whether it has in fact had that effect upon the health or reason of the party complaining.

Libel for divorce on the ground of cruelty and treatment seriously injuring health and endangering reason. The parties were married in 1882, and resided together happily until 1884, when Mrs. Robinson became interested in Christian Science and a believer in its doctrines. She attended lectures and took a course of instruction, and subsequently received the degree of "Doctor of Christian Science." She at once began, and has continued, to practice as a Christian Science doctor. Mr. Robinson did not believe in the doctrine, and had no sympathy with his wife in her advocacy of the practice under it. He did not object to her belief in, but was opposed to her practice of, the doctrine as a doctor, and frequently requested her to give it up, as it exposed him to ridicule and injured his business as a druggist. He was naturally proud, sensitive, and reasonably ambitious, besides being somewhat passionate and hasty. From being sociable and jovial, he became moody, morose, reticent, and inattentive to business, besides generally unhappy from brooding over his changed domestic relations, caused by the practice of Christian Science as a doctor by his wife. He separated from her in July, 1889. He afterwards sought, through his personal efforts and those of third parties, to bring about a reconciliation with his wife on the basis that she should give up her practice. She refused, and only consented to live with her husband on the basis that she should be allowed to continue to practice as a doctor of Christian Science. No further attempt at a reconciliation was made, and the causes above mentioned operated upon the abnormally sensi-

the nature of the plaintiff so as to seriously injure his health. The defendant, in embracing and practicing Christian Science, intended no injury to her husband or to his business. She is sincere in her belief in the truthfulness of the doctrine, and, outside thereof, possesses the qualifications to make a good wife, mother, and neighbor.

E. Aldrich, Brigham, Mitchell & Batchellor, and J. W. Remick, for the plaintiff.

O. Ray, for the defendant.

⁶⁰⁴ CARPENTER, J. The act of February 17, 1791, declared that "divorces may be decreed for the cause of extreme cruelty in either of the parties": *Laws*, ed. 1830, p. 157. What constitutes extreme cruelty was left to be determined by the ecclesiastical common law. "Mere austerity of temper, petulance of manners, ⁶⁰⁵ rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty; they are high moral offenses in the marriage state undoubtedly, not innocent surely in any state of life, but still they are not that cruelty against which the law can relieve. Under such misconduct of either of the parties—for it may exist on the one side as well as on the other—the suffering party must bear in some degree the consequences of an injudicious connection; must subdue by decent resistance or by prudent conciliation; and if this cannot be done, both must suffer in silence. If it be complained that by this inactivity of the courts much injustice may be suffered and much misery produced, the answer is, that the courts of justice do not pretend to furnish cures for all the miseries of human life; they redress or punish gross violations of duty, but they go no further; they cannot make men virtuous; and as the happiness of the world depends upon its virtue, there may be much unhappiness in it which human laws cannot undertake to remove.

"Still less is it cruelty when it wounds not the natural feelings, but the acquired feelings arising from particular rank and situation; for the court has no scale of sensibilities by which it can gauge the quantum of injury done and felt; and therefore, though the court will not absolutely exclude considerations of that sort where they are stated merely as matter of aggravation, yet they cannot constitute cruelty where it would not otherwise have existed. . . . The rule cited by Dr. Bever from Clarke and the other books of practice is a good general outline of the canon law, the law of this country, upon this subject. In the older cases

of this sort which I have had an opportunity of looking into, I have observed that the danger of life, limb, or health is usually inserted as the ground upon which the court has proceeded to a separation. This doctrine has been repeatedly applied by the court in the cases that have been mentioned; the court has never been driven off this ground; it has been always jealous of the inconvenience of departing from it; and I have heard no one case cited in which the court has granted a divorce without proof given of a reasonable apprehension of bodily hurt. I say an apprehension, because assuredly the court is not to wait till the hurt is actually done; but the apprehension must be reasonable; it must not be an apprehension arising merely from an exquisite and diseased sensibility of mind. Petty vexations applied to such a constitution of mind may certainly in time wear out the animal machine, but still they are not cases of legal relief; people must relieve themselves as well as they can by prudent resistance—by calling in the succours of religion and the consolations of friends; but the aid of courts is not to be resorted to in such cases with any effect": *Evans v. Evans*, 1 Hagg. Const. (1790), 35, 38-40. "There must be something which renders cohabitation unsafe; for there may be much unhappiness ⁶⁰⁰ from unkind treatment and from violent and abusive language; but the court will not interfere—it must leave parties to the correction of their own judgment; they must bear as well as they can the consequences of their own choice. Words of menace are different; if they are likely to be carried into effect, the court is called on to prevent their being carried on to mischief": *Harris v. Harris* (1813), 2 Phill. Ecc. 111. "To amount to cruelty, there must be personal violence or manifest danger of it; for unkindness, reproachful language on the one side, or vain and unfounded fear on the other, do not constitute any case of cruelty which the law can notice": *Barlee v. Barlee* (1822), 1 Add. Ecc. 301, 305. "Legal cruelty is not established. Quarrels, and, if implicit credit can be given to the witnesses on the libel, much improper language by the husband passed, but there was no conduct to excite in the wife any reasonable apprehension of danger to her person": *Kenrick v. Kenrick* (1831), 4 Hagg. Ecc. 114, 129. "Where there is a strong conviction in the mind of the court that the personal safety of the wife is in jeopardy, or where even it may see reasonable ground to apprehend such consequence, it is its bounden duty to protect the wife from risk and danger. In these suits the species of facts most generally adduced are: 1. Personal ill-treatment, which is of different kinds, such as blows or bodily injury of any

kind; 2. Threats of such a description as would reasonably excite in a mind of ordinary firmness a fear of personal injury. For causes less stringent than these the court has no power to interfere and separate husband and wife. . . . Short of personal violence, or reasonable apprehension of it, I have no authority to interfere": *Neeld v. Neeld* (1831), 4 Hagg. Ecc. 263, 265, 271. To constitute cruelty "there must be either actual violence committed, attended with danger to life, limb, or health, or there must be a reasonable apprehension of such violence. This I apprehend to be the substance of the doctrine laid down in *Evans v. Evans*, . . . and in other subsequent cases": *Lockwood v. Lockwood* (1839), 2 Curt. Ecc. 281, 283.

In *Chesnutt v. Chesnutt* (1854), 1 Spinks, 196, one of the charges against the defendant was that "he used obscene and blasphemous language, was constantly intoxicated, and thereby occasioned his wife great mental suffering and bodily ill-health." The court (Dr. Lushington) say, on pages 188, 191: "Here is no charge either of bodily violence inflicted, or of threats of personal ill-treatment. However disgusting the use of the language charged, if proved, may be—however degrading habits of intoxication, however annoying to a wife, especially the wife of a gentleman and a clergyman—these facts standing alone do not constitute legal cruelty. If it be said that the consequences to the wife are mental suffering and bodily ill-health, I do not think that the case would be carried farther. The same might be said of other vices—of gaming for instance; of gross extravagance, to the ruin of a wife ⁶⁰⁷ and family; all these might occasion great mental suffering, and, consequent thereon, bodily ill-health to the wife, but they do not constitute legal cruelty. Such consequences, to be the subject of legal redress, must emanate from bodily ill-treatment, or threats of the same. Such I apprehend to be the clear line of distinction drawn by all the authorities. . . . Mental anxiety, excitement, bodily illness, though occasioned to the wife by the conduct of the husband, do not constitute cruelty, except such conduct was accompanied with violence or threats of violence."

In *Barrere v. Barrere* (1819), 4 Johns. Ch. 187, 189, Chancellor Kent, after reciting the facts, says: "There can be no doubt that these acts of bodily violence and harm amount to that cruelty against which the law intended to relieve. Mere petulance and rudeness and sallies of passion might not be sufficient; but a series of acts of personal violence, or danger of life, limb, or health, have always been held sufficient ground for a separation by the

canon law, which is the law of England upon this subject. Though a personal assault and battery, or a just apprehension of bodily hurt, may be ground for this species of divorce, yet it must be obvious to every man of reflection that much caution and discrimination ought to be used on this subject. The slightest assault or touch in anger would not surely, in ordinary cases, justify such a grave and momentous decision."

"The cruelty which entitles the injured party to a divorce consists in that kind of conduct which endangers the life or health of the complainant, and renders cohabitation unsafe. If the charges in this bill are true—if this defendant permits her passions so far to usurp the throne of reason as to allow her to commit personal violence upon her husband in his sleep, to threaten his destruction by poison, and even to go so far as to procure a deadly drug for that purpose—not only his health, but even his life, is in actual danger from her violence": *Perry v. Perry* (1831), 2 Paige, 501-503. "It is true, that to constitute *saevitia* known to the civil law, it is not necessary there should be an infliction of bodily injury, or any act of personal violence committed. It is sufficient if there be a series of unkind treatment, accompanied by words of menace creating a reasonable apprehension that bodily injury may result to the wife unless prevented. . . . It [cruelty] must be actual personal violence, menaces, or threats, creating reasonable apprehension of bodily harm": *Mason v. Mason* (1832), 1 Edw. Ch. 278, 291, 292. The courts of Massachusetts held substantially the same doctrine: *Hill v. Hill* (1806), 2 Mass. 150; *Warren v. Warren* (1807), 3 Mass. 321; *French v. French* (1808), 4 Mass. 587.

The question, What constitutes extreme cruelty? first came before this court in 1834, in *Harratt v. Harratt*, 7 N. H. 196; 26 Am. Dec. 730. The evidence proved that the defendant had threatened to take the plaintiff's life, had treated her harshly and with neglect in sickness, and had ⁶⁰⁸ ceased to provide for her support; it also tended to show a reasonable apprehension that cohabitation might subject the plaintiff to disease. The court (Parker, J.), after citing with approval *Warren v. Warren*, 3 Mass. 321, *Evans v. Evans*, 1 Hagg. Const. 35, and some of the other foregoing cases, say: "That cruelty may be extreme without blows cannot be doubted; and we have no difficulty in holding that where the causes are grave and weighty, and such as to show an impossibility that the duties of the married life can be discharged—when violence is menaced, and there is reasonable

apprehension of danger to life, limb, or health—the case comes within our statute, and that the court ought not to wait until the hurt is actually done. There has been more doubt whether the case before us, on the facts in evidence, comes clearly within the principle. The evidence, however, shows that the life of the libelant has been threatened, and we cannot say that there is no probability that violence will be resorted to; and as there is further evidence of harsh treatment and neglect, and of circumstances tending to show that cohabitation would be attended with danger to the health of the libelant, the court is of opinion that all these circumstances combined bring the case within the statute.” In *Poor v. Poor*, 8 N. H. 307, 315, 316, 29 Am. Dec. 664, decided in 1836, Richardson, C. J., says: “What, then, is extreme cruelty? It is not mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention, or even occasional sallies of temper, if there be no threat of bodily harm. . . . In the judgment of law, any willful misconduct of the husband which endangers the life or health of the wife, which exposes her to bodily hazard and intolerable hardship and renders cohabitation unsafe, is extreme cruelty. And, in order to amount to such cruelty, it is not necessary that there should be many acts. Whenever force and violence, preceded by deliberate insult and abuse, have been once wantonly and without provocation used, the wife can hardly be considered safe.”

To constitute extreme cruelty, direct bodily injury, actual or threatened, was essential. Threats of personal violence, unless of such a character as to create “in a mind of ordinary firmness” a reasonable apprehension that they might be executed, were not legal cruelty. To the exceptionally sensitive and timid wife, put in actual and constant fear of limb or life by conduct not calculated to have that effect on a person of normal and ordinary sensibility, the law of divorce afforded no relief. The infliction of mere mental pain, however seriously it might injure health or endanger reason, was not legal cruelty. A husband might violate all the proprieties and decencies of social life; he might call “his virtuous wife a strumpet, saying so not to herself alone, but before everybody,” although, “as far as suffering was concerned, he had better kick her” (*Paterson v. Paterson*, 3 H. L. Cas. 308, 313); he might bring prostitutes into his family and seat them at his table—make his house a brothel—and the law, if it would justify the wife in ~~soo~~ leaving him, afforded her no other remedy. For such conduct as that described in *W— v. W—*, 141 Mass. 495, 55 Am. Rep. 491, and the injury caused to “her

health by its effect upon her feelings," the wife was then, in New Hampshire, as she is now in Massachusetts, remediless. Constant, innumerable, and nameless indignities of speech and action, each possibly petty in itself, might cause mental anguish less endurable, more hurtful to physical well-being, and more likely to overturn reason, than any degree of pain produced by blows; they might make life intolerable and death welcome, yet they were not legal cruelty. The sufferer's only remedy was "by prudent resistance," and "by calling in the succours of religion and the consolations of friends."

In consideration of this state of the law, the legislature, in 1840, enacted that "divorces . . . shall be decreed in favor of the innocent party . . . when either party shall so treat the other as seriously to injure health or endanger reason": Laws 1840, c. 573, sec. 1. This provision in substantially the same language has ever since remained in force: Rev. Stats., c. 148, sec. 3. In the revision of 1867 it was verbally modified to read as follows: "A divorce . . . shall be decreed . . . 5. When either party has so treated the other as seriously to injure health; 6. When either party has so treated the other as seriously to endanger reason": Gen. Stats., c. 163, sec. 3; Gen. Laws, c. 182, sec. 3. The provision is to be construed in view of the mischief it sought to cure. It was intended to provide for a divorce of the parties in cases of the character referred to, where the conduct complained of did not fall within the established definition of extreme cruelty. It gave by legislation the relief which the English courts, pressed by the weight of the same considerations, have gone far to afford (*Paterson v. Paterson* (1849), 3 H. L. Cas. 308, 318, 319, 325-329; *Kelly v. Kelly* (1869), L. R. 2 Pro. & D. 31; *Mytton v. Mytton* (1886), L. R. 11 P. D. 141; *Bishop on Marriage and Divorce*, 4th ed., sec. 722, note), and which the courts of some jurisdictions, under like pressure, have afforded by a more liberal interpretation of the term "cruelty": *Butler v. Butler*, 1 Pars. Cas. 329; *Powelson v. Powelson*, 22 Cal. 358; *Latham v. Latham*, 30 Gratt. 307; *Cole v. Cole*, 23 Iowa, 433; *Gholston v. Gholston*, 31 Ga. 625; *Palmer v. Palmer*, 45 Mich. 150; 40 Am. Rep. 461; *Carpenter v. Carpenter*, 30 Kan. 712; 46 Am. Rep. 108; *McMahan v. McMahan*, 9 Or. 525; *Kelly v. Kelly*, 18 Nev. 49; 51 Am. Rep. 732; *Jones v. Jones*, 60 Tex. 460.

Whether one party has been so treated by the other as seriously to injure health or endanger reason is a pure question of fact. It cannot be declared as matter of law that any particular

treatment may not have that effect. The gist of these causes of divorce is the injury to health and the danger to reason. Conduct which to a serious extent produces either, though not intended to have such a result—though it be “purely self-regarding,” and not “directed towards” or “forced even upon the knowledge of” the other party “otherwise than by the usual intimacy of matrimony” (W—— ⁸¹⁰ v. W——, 141 Mass. 495, 496; 55 Am. Rep. 491)—is a cause of divorce. Any behavior of one party which affects the other physically or mentally is treatment within the meaning of the statute. A narrower sense cannot be given to the language used without ignoring the extent of the evil to be cured, and depriving a large proportion of those who suffer from it of the protection the legislature intended to provide for them. The purpose of the legislature was to make the remedy coextensive with the mischief. A malevolent motive in the party complained of need not be shown. Divorce is not punishment of the offender, but relief to the sufferer. Whether the behavior proved is a sufficient ground of divorce depends on the question whether it has seriously injured health or endangered reason. This is the sole test. The question is, not whether the treatment reasonably ought, or could reasonably be expected, seriously to injure the health or endanger the reason of a person of ordinary intelligence and mental strength, but whether it has in fact had that effect upon the health or reason of the person complaining. A course of conduct which would drive one person crazy might have no effect on, or might even be grateful to, another and perhaps more sensible or less sensitive person; but he or she whose reason is imperilled by it is not therefore to be compelled to endure the treatment. That the conduct complained of is in itself innocent, or even laudable, and is pursued from a sense of duty, does not afford a sufficient reason for requiring the party injured by it to submit to the destruction of health, reason, and life. The abstract reasonableness of the treatment, or its effect upon reasonable persons of ordinary firmness, does not enter into the question. If it did, the redress intended by the statute could not in many cases be obtained. The provision was designed for the benefit of the sensitive—not excepting the abnormally sensitive—and not for the insensible and apathetic, whom nothing but blows can affect. It was intended to reach and provide relief in a class of cases where extreme cruelty, as defined by law, cannot be established—cases, among others, of slow and continuous mental torture, destructive of health or reason, and caused by conduct not necessarily wrong-

ful, possibly even praiseworthy, in itself, and made a cause of divorce only because of its effect upon an abnormally sensitive mind.

The injury, and in greater part the suffering, caused by acts tending to the destruction of health or reason may not depend upon the intention with which they are done. Whether they are done with or without malice, they may be in their effect equally hurtful and destructive. In the judgment of the legislature, it is better that the marital relation be dissolved, than that by its continuance the health or reason of either party be destroyed. Whether the legislation is wise or unwise is a question upon which opinions may differ; but with it the court has no concern. Its duty is to enforce the law as it is found to be. To hold that to warrant a divorce ⁶¹¹ treatment seriously endangering health or reason must be willful, malicious, or malevolent would repeal the statute.

It is found that the defendant's conduct has seriously injured the plaintiff's health, and the court cannot say that the finding is not warranted by the evidence: *Jones v. Jones*, 62 N. H. 463, 467.

Divorce decreed.

Smith, J., did not sit; the others concurred.

DIVORCE—CRUELTY—HOW DETERMINED. — What acts of a spouse constitute extreme cruelty within the meaning of a statute making this a ground for divorce cannot be defined with precision, but each case is to be determined according to its own peculiar circumstances, by the court or jury, keeping always in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party: *Fleming v. Fleming*, 95 Cal. 430; 29 Am. St. Rep. 124, and note. See, especially, the extended notes to *Poor v. Poor*, 29 Am. Dec. 674; *Morris v. Morris*, 73 Am. Dec. 619, and the note to *Nye's Appeal*, 12 Am. St. Rep. 877.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

CUNNINGHAM v. DAVENPORT.

[147 NEW YORK, 43.]

SAVINGS BANK—DEPOSIT IN TRUST FOR ANOTHER.—The act of a depositor in opening an account in a savings bank in trust for a third party, the depositor retaining possession of the bank-book, and failing to notify the beneficiary, creates a trust, if the depositor dies before the beneficiary, leaving the trust account open and unexplained.

SAVINGS BANK—DEPOSIT IN TRUST FOR ANOTHER.—One who opens an account in a savings bank in trust for a third party is not bound to disclose his reasons for so doing.

TRUSTS—SAVINGS BANK—DEPOSIT IN TRUST FOR ANOTHER.—The act of depositing one's own money in a savings bank, to the depositor's own credit, in trust for another, retaining possession of the pass-book, making no disclosure or publication of the trust, treating it apparently as a mode of transacting his own business, does not create a trust, where the depositor survives the proposed beneficiary, especially if the depositor is alive, claiming the money as his own, and denying that he ever had any intention of divesting himself of ownership.

Action to recover possession of certain savings bank books of deposit.

J. Stewart Ross, for the appellant.

James J. Rogers, for the respondent.

44 **BARTLETT, J.** The plaintiff appealed from the judgment of the general term, second department, which affirmed that part of the judgment of the special term adjudging that William B. Davenport, public administrator, as administrator of the goods etc., of Patrick Cunningham, deceased, recover of the plaintiff a judgment for two thousand eight hundred and thirty dollars and fifteen cents.

This case presented questions between other parties that were determined by the judgment of the special term in plaintiff's favor, and as to which no appeal is taken. In order to properly understand that portion of the special term judgment ⁴⁵ appealed from, it is only necessary to examine a few of the facts as found.

It appears that the plaintiff, on the second day of July, 1869, opened an account in the Bowery Savings Bank in the city of New York by a deposit of his own money, and made other like deposits down to about the year 1881, when the account was transferred, at plaintiff's request, to a new account entered on the books of the bank to the credit of "John Cunningham, in trust for Patrick Cunningham, his brother," and so remained until the seventeenth day of April, 1890, when plaintiff surrendered to the bank his deposit-book and had the account transferred to his own credit, and on the 6th or 7th of June, 1890, withdrew all of the money, amounting to two thousand three hundred and twenty-two dollars and fifty-four cents.

It further appears that the plaintiff always retained possession of the bank-books representing these accounts; that there is no evidence that plaintiff ever informed Patrick Cunningham of the transfer of the account to the credit of plaintiff in trust for him; that there is no evidence that plaintiff ever received any moneys from Patrick Cunningham, and plaintiff claims never to have intended to give the money contained in the account to Patrick Cunningham, or to have ever intended it for his benefit.

It also appears that Patrick Cunningham, the alleged beneficiary, died April 14, 1890, three days before the account in the Bowery Savings Bank was changed back into the name of plaintiff individually.

The question now presented is whether, under the facts as stated, the plaintiff created a trust in favor of his brother, Patrick Cunningham, when he opened the alleged trust account in 1881, which he could not afterwards revoke.

It is insisted by the learned counsel for the respondent that this is no longer an open question in this court, and that plaintiff's action in 1881 created an irrevocable trust in favor of Patrick Cunningham, and that the administrator of the latter can recover of plaintiff the money he withdrew from the Bowery Savings Bank, with interest and costs.

We are of opinion that this case is distinguishable from the ⁴⁶ cases in this court to which we have been referred and that the recovery against plaintiff by the administrator of Patrick Cunningham's estate cannot be sustained.

The first case is *Martin v. Funk*, 75 N. Y. 134; 31 Am. Rep. 446. The account was here opened: "The Citizens' Savings Bank in account with Susan Boone, in trust for Lillie Willard." The depositor opened this account in 1866 and retained possession of the bank-book until her death in 1875. A like account was opened at the same time in trust for Kate Willard, a sister of the other beneficiary. Neither beneficiary was informed of the account. The court held that such a transaction, unexplained, and followed by the death of the depositor with the accounts still existing, created a valid trust.

The case of *Willis v. Smyth*, 91 N. Y. 297, was quite similar in its facts to *Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 446, and the latter case was held to be a controlling authority.

In the case of *Mabie v. Bailey*, 95 N. Y. 206, the deposit was the same in form as in *Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 446, but the intention of the depositor was not left to inference, it being shown that the pass-book had been exhibited to plaintiff's mother and was matter of conversation on several subsequent occasions.

Judge Andrews, after calling attention to this proof, also pointed out that *Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 446, left undecided the point whether, in respect to such a transaction, surrounding circumstances may not be shown to vary or explain the apparent character of the acts and the intent with which they were done, and he then adds: "If it was now necessary to decide that point, I should incline to the opinion that the character of such a transaction, as creating a trust, is not conclusively established by the mere fact of the deposit, so as to preclude evidence of contemporaneous facts and circumstances constituting *res gestae*, to show that the real motive of the depositor was not to create a trust, but to accomplish some independent and different purpose inconsistent with an intention to divest himself of the beneficial ownership of the fund."

In the case of *Beaver v. Beaver*, 117 N. Y. 421, 15 Am. St. Rep. 531, the matter ⁴⁷ of deposit in savings bank by father in name of his son was under consideration. Owing to the peculiar circumstances of that case, it was held that the plaintiff's title to the fund depended upon the question of gift rather than trust.

Judge Andrews uses this language in a general discussion of the subject: "It may be justly said that a deposit in a savings bank by one person of his own money to the credit of another is consistent with an intent on the part of the depositor to give the money to the other. But it does not, we think, of itself, without

more, authorize an affirmative finding that the deposit was made with the intent, when the deposit was to a new account, unaccompanied by any declaration of intention, and the depositor received at the time a pass-book, the possession and presentation of which, by the rules of the bank, known to the depositor, is made the evidence of the right to draw the deposit." Judge Andrews, pointing out various motives that impel depositors to open accounts to the credit of third parties or fictitious persons, with no intention of divesting themselves of ownership, continues as follows: "We are inclined to think that to infer a gift from the form of the deposit alone would, in the great majority of cases, and especially when the deposit was of any considerable amount, impute an intention which never existed and defeat the real purpose of the depositor. The relation of father and son does not in this case, we think, strengthen the plaintiff's case."

We think the reasoning of this opinion is equally applicable to a case presenting the question whether a trust is created by opening an account in the name of, or in trust for, a third party.

The doctrine laid down by this court in the previous cases amounts to this, that the act of a depositor in opening an account in a savings bank in trust for a third party, the depositor retaining possession of the bank-book and failing to notify the beneficiary, creates a trust if the depositor dies before the beneficiary, leaving the trust account open and unexplained.

⁴⁸ If the intent can be strengthened by acts and declarations of the depositor in his lifetime amounting to publication of his intent, a more satisfactory case is made out, but it is not absolutely essential, in the absence of explanation, where he dies leaving the trust account existing.

In the case at bar we have a state of facts in every way distinguishable from the cases heretofore passed upon by this court. John Cunningham, the depositor, is alive, denying the trust and seeking in his old age to hold his own money as against the administrator of his deceased brother, the beneficiary under this alleged trust.

This case was tried at special term; the record does not contain the evidence, and the findings of facts are conclusive.

The findings show, as already stated, that this was a transaction between John Cunningham and the Bowery Savings Bank: that the depositor first opened the account in his own name, then changed it to his own name in trust for his brother, then changed it back to his own name three days after the death of the alleged

beneficiary; that the depositor at all times retained possession of the bank-books representing these accounts until delivered up to the bank; that Patrick Cunningham, the brother, was not informed of the account; that John never received any money from Patrick; that John claims never to have intended to give the money represented by the account to Patrick, nor to have ever intended it for his benefit.

Surely this is a full and complete explanation by the living depositor of his intentions in this matter.

The learned trial judge uses this language in his opinion, viz: "An intention not to give it to his brother is inconsistent with his act and the form of his deposit, and his evidence is insufficient, to my mind, of what would otherwise be the legal effect without some explanations of the reasons for making the deposit in the form he did."

We think it was quite sufficient for the depositor to state, as he did, that he did not intend to create a trust and never ⁴⁹ intended to give his brother the money; he was not called upon to disclose his reasons for opening the account in trust for his brother.

We have presented here the case of a man who takes his own money and deposits it to his own credit in trust for another, making no disclosure or publication of the trust, treating it apparently as a mode of transacting his own business, and then survives the proposed beneficiary. We are of opinion that such a transaction does not create a trust.

There are no sufficient circumstances or declarations from which a court of equity can spell out a trust, even under the liberal rule as to the creation of trusts in personal property which holds no formal or written agreement or particular form of words necessary.

The death of the beneficiary three days before the trust account was closed is urged as a reason why this alleged trust should be sustained. It is a circumstance of no moment, for the opening of the account, as now explained, did not create a trust.

The order and judgment appealed from are reversed, with costs to plaintiff in all the courts.

All concur.

Order and judgment reversed.

TRUSTS, DEPOSIT IN SAVINGS BANK IN NAME OF ANOTHER.—If one deposits money in a bank in another's name, but subject to his own order, and without notice to the other, and retains the pass-book and control of the fund, this is not a gift *inter vivos*, nor a trust: *Marcy v. Amazeen*, 61 N. H. 181; 60 Am. Rep. 320. But if a de-

positor in a savings bank, having put money therein in trust for another, and retaining the pass-book, dies, the transaction constitutes an effectual trust for the benefit of the cestui que trust, though he was ignorant of the deposit: *Martin v. Funk*, 75 N. Y. 134; 31 Am. Rep. 446. There is, however, a conflict of authority as to the effect of deposits in trust for another, which is discussed in the monographic note to *Williamson v. Yager*, 34 Am. St. Rep. 219, on voluntary trusts arising from the declaration of the trustor.

HOLMES v. JONES.

[147 NEW YORK, 59.]

LIBEL—GOOD MOTIVES.—The publication of a libel is a wrongful act, presumably injurious to those persons to whom it relates, and, in the absence of legal excuse, gives a right of recovery, irrespective of the intent of the defendant who published it, notwithstanding he had reason to believe the statement to be true, and was actuated by an honest or even commendable motive in making the publication.

LIBEL—DAMAGES.—In an action for libel the amount of damages is peculiarly within the province of the jury, and may be either compensatory or punitive.

LIBEL—MITIGATION OF DAMAGES.—A defendant cannot show, in mitigation of damages for a specific libel, other and disconnected immoralities on the part of the plaintiff, and must confine himself to attacking only the plaintiff's general character. But if two charges relate to the same subject matter, are not disconnected and independent, and only one is submitted to the jury, although the other was counted on and justified in the answer, it is reversible error not to permit the defendant, in mitigation of damages on the charge submitted, to give evidence supporting the other charge.

Libel. The plaintiff, an undertaker, had rendered some services at Mount McGregor in preparing the body of General Grant for burial. The defendant, and appellant, was sued as treasurer of The New York Times. The plaintiff, through the request of one Mr. Arkell, and by the direction of Dr. Douglas, went, on the morning of July 23, 1885, to Mount McGregor, took charge of the body, and proceeded with the process of embalming. In the afternoon of that day, Mr. Merritt, an undertaker from New York, who been sent for by the son of General Grant, arrived, and from that time assumed control. He superseded the plaintiff, and practically the whole service rendered by the plaintiff was confined to what he did preceding the arrival of Merritt. He, however, visited Mount McGregor daily until July 30th, when the body was taken to New York. The plaintiff subsequently sent a bill for \$500 to Col. Grant for his services and disbursements. The bill was given by Col. Grant to Merritt. Correspondence ensued between Merritt and the plaintiff. The bill was not paid, and finally the plaintiff again sent it to Col. Grant,

who returned it accompanied with a letter which substantially denied the validity of the claim, stating that Mr. Merritt was alone employed to superintend the preparations for the funeral of General Grant, and advising that the bill should be presented to Merritt. On October 4, 1886, Holmes addressed a letter to the editor of *The Sun*, which purported to be "a plain statement of the facts" relating to the bill, in answer to many statements made in the press. This provoked a public discussion of the nonpayment of the bill by General Grant's family. *The Sun* offered to pay the bill and did pay it, which fact was announced in that paper. Subsequently, Col. Grant, in corresponding with *The Sun*, while denying the justice of the claim, stated that the family were unwilling that the bill should be paid by *The Sun*. He inclosed a check for the amount, but it was returned to him. Afterwards, *The Times* published the article complained of as libelous. It was headed, "Even beyond the grave. The malice of *The Sun* hounds General Grant." The plain intent of the article was to denounce *The Sun* for its officious and offensive interference in paying the bill. It characterized the action of *The Sun* as wholly "unnecessary and malicious," and charged the plaintiff with presenting an exorbitant bill and with intoxication at the time he performed the service. The complaint counted on both charges, and the answer justified both. On the first trial, the defendant established a justification of the charge of extortion. On the second trial, the plaintiff omitted to read to the jury the part of the libelous article which charged extortion, but put in evidence only the part which alleged intoxication. The defendant put in evidence the whole article and gave evidence tending to justify the charge of drunkenness. Upon this issue, the only one submitted, a verdict was rendered for the plaintiff for punitive damages in the sum of three thousand five hundred dollars. The defendant, during the trial, offered to prove, in mitigation of damages, the truth of the alleged libel in relation to the subject of extortion, but the evidence was excluded. This was complained of as error.

B. F. Einstein, for the appellant.

Matthew Hale, for the respondent.

68 ANDREWS, C. J. The primary purpose of the article published in *The New York Times* November 26, 1886, containing the defamatory matter for which the action was brought, was to expose the conduct of *The Sun* in officiously offering to pay, and in subsequently paying, the claim of Holmes & Co. for

alleged services in embalming and caring for the body of General Grant, after the claim had been repudiated by his family and its justice had become the subject of public comment. The offer to pay the bill made in the columns of *The Sun*, which, as was stated by Holmes & Co. in their letter of October 4, 1886, "was under no legal or moral obligation" to pay it, appended to a statement which imputed to the family of General Grant in their dealings with Holmes & Co., a disregard of honor and moral obligation, was well calculated to wound the feeling of the members of the family and to excite the indignation of their friends and the friends of the illustrious soldier whose name was associated with the transaction. The offer carried an implication that the family of General ⁶⁶ Grant had disregarded and refused to recognize an honest claim for services connected with the preparation of his body for burial, which, if well founded, would justly expose them to animadversion. This was the occasion for the article in *The Times*, and the plaintiff had made himself a party to the controversy by his letter to *The Sun* of October 4, 1886, in which he put himself in the attitude of having a just claim for services rendered for the amount of the bill rendered by Holmes & Co., which the family of General Grant had declined to recognize, and, to accentuate the alleged injustice with which he was treated, he intimated his willingness to accept the public offer of a stranger to the transaction to pay the claim, in case "those whom we think are legally and morally bound to pay the claim do not sooner recognize their obligation by its payment." The plaintiff had, by his own act in writing the letter of October 4, 1886, thrust himself and his conduct into the arena of public discussion, and, as might reasonably have been anticipated, the charge made against the family of General Grant of delaying and repudiating the payment of an honest claim was met by public denial in the New York papers, and a public criticism of the origin and character of the claim asserted by Holmes & Co. The defendant failed to establish before the jury the justification set up in the answer to the statement in the article in *The Times*, that the plaintiff was intoxicated in the afternoon and evening of July 23, 1885, during his alleged employment at Mount McGregor. The evidence upon the point was conflicting, but the finding of the jury determines the fact in favor of the plaintiff. The plaintiff was, therefore, entitled to recover damages for this misstatement. It was defamatory, and while there is no ground to suppose that the statement was instigated by actual malice or ill-will towards the plaintiff, its absence constitutes no answer to the

claim for damages. The publication of a libel is a wrongful act, presumably injurious to those persons to whom it relates, and in the absence of legal excuse gives a right of recovery irrespective of the intent of the defendant who published it, and this ⁶⁷ although he had reason to believe the statement to be true, and was actuated by an honest or even commendable motive in making the publication. But the amount of damages in an action for libel is peculiarly within the province of the jury. The jury may give nominal damages, or damages to a greater or less amount, as they shall determine. The jury may accord damages which are merely compensatory, or damages beyond mere compensation, called punitive or vindictive damages, by way of example or punishment, when in their judgment the defendant was incited by actual malice or acted wantonly or recklessly in making the defamatory charge: *Taylor v. Church*, 8 N. Y. 452. The trial judge left it to the jury to determine, in case they should find for the plaintiff, the whole subject of damages, and whether punitive damages should be awarded. The plaintiff having practically withdrawn from the jury the consideration of the charge in the article that he had presented an unjust and extortionate bill, by not reading that part of the article to the jury, although it was counted on in the complaint, the defendant had no occasion to justify that charge, although a justification was set up in the answer. The omission of the plaintiff to rely upon this charge was apparently to avoid a trial of the issue of justification thereon, which, on the former appeal in this case, was held to have been established: *Holmes v. Jones*, 121 N. Y. 461. On the trial now under review, the defendant offered in substance to prove, in mitigation of damages of the charge of intoxication, that the bill presented by Holmes & Co. was unjust and extortionate, and, if the evidence was competent for that purpose, the pleadings were in proper form to permit its introduction. We are of the opinion that, under the circumstances of the case, the evidence should have been admitted. Of course, the fact that the plaintiff had presented an extortionate bill did not tend to show the truth of the charge of intoxication, nor did it tend to disprove malice on the part of the defendant in making the latter charge that another and dissimilar charge in the same article was true. When the article was published, the defendant only knew from information as to the truth of ⁶⁸ either charge. That *The Times* believed the article to be true in both respects, and that in making the statements therein it relied upon what it supposed to be credible information, was permitted to be shown. Whether the

information was actually true, it could not know at the time, and, so far as its motive was concerned, and whether or not it was actuated by actual malice in making the charge of drunkenness, the actual fact subsequently proved of the truth of the charge of extortion could have no retroactive influence in determining the *quo animo* of the publication: *Hatfield v. Lasher*, 81 N. Y. 246. But we think the excluded evidence was admissible as bearing upon the conduct of the plaintiff in the transaction which he had aided in bringing before the public. It must be assumed, in view of the evidence offered and its rejection upon the plaintiff's objection, that he had posed before the public as having an honest claim, which had been dishonestly rejected, when in truth the claim made was dishonest and unjust. The plaintiff had by his conduct invited public discussion of the transaction. The article was written and published to meet the aspersions cast by the plaintiff and others upon the family of General Grant. It truly (as must now be assumed) exposed the conduct of the plaintiff as a distinct attempt, through appeals to the public and otherwise, to coerce the payment of a dishonest claim. In giving what purported to be a history of the transaction, *The Times* superadded a false and calumnious incident, without actual malice, as the jury might well have found. The two charges were made in respect of the same subject matter. They related to the same transaction. The plaintiff makes no denial of the main matter in which the calumny originated, namely, the extortionate and unjust bill, but does deny the truth of one of the incidents of his conduct alleged in the article. He comes claiming damages for injury to his character. It is well settled that a defendant cannot show, in mitigation of damages for a specific libel, other and disconnected immoralities, but can attack only the plaintiff's general character. But the charges in the article were not disconnected and independent in any ^{or} proper sense, and we think it plain in reason that the plaintiff ought not in justice to recover punitive damages for a misstatement in the article as to his intoxication, if it appeared that his conduct in other matters in the transaction to which the charge related had been reprehensible, and when he himself had provoked public discussion. The conduct of both parties in the whole matter should have been permitted to be shown, so as to aid the jury in determining the extent of the damages to be awarded.

The judgment should be reversed and a new trial ordered.

All concur.

Judgment reversed.

LIBEL.—Every libelous publication concerning another is presumed to have been made maliciously, whether the offender intended ill-will toward the person injured or not. The intention to produce the probable results of the libel must be presumed: *State v. Mason*, 26 Or. 273; 46 Am. St. Rep. 629, and note. The law implies malice and infers damages from a libelous publication: *Note to Belo v. Fuller*, 31 Am. St. Rep. 80; and belief in the truth of a libelous charge does not justify its publication, if it is false and injurious and not privileged: *Note to Brown v. Vannaman*, 39 Am. St. Rep. 864. Damages in actions of libel or slander are measured by the injury caused by the words published, and not by the moral culpability of the writer or speaker: *Sickra v. Small*, 87 Me. 493; 47 Am. St. Rep. 344. Two classes of damages may be recovered in an action for libel to wit, actual or compensatory damages and exemplary damages: *Childers v. San Jose etc. Co.*, 105 Cal. 284; 45 Am. St. Rep. 40. This question as to damages is fully discussed in the monographic note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 339, on newspaper libel. It is not competent in libel, as in other actions, to prove distinct facts in defense that have not been made a part of the issue as framed. Hence, extraneous specific charges cannot be gone into for any purpose: *Bourreseau v. Detroit Evening Journal Co.*, 63 Mich. 425; 6 Am. St. Rep. 320, and note; note to *Bradstreet Co. v. Gill*, 13 Am. St. Rep. 776; note to *Thayer v. Thayer*, 100 Am. Dec. 113. In actions of libel or slander, the defendant may introduce evidence as to the plaintiff's bad reputation in mitigation of damages: *Sickra v. Small*, 87 Me. 493; 47 Am. St. Rep. 344; *Stone v. Varney*, 7 Met. 86; 39 Am. Dec. 762. Evidence in mitigation of damages is admissible, notwithstanding a plea of justification; and other parts of a pamphlet alleged to be libelous in certain paragraphs may be read in evidence by the defendant to explain the paragraphs upon which the action is founded, to show the motive and intent of the publication, and to mitigate the damages: *Morehead v. Jones*, 2 B. Mon. 210; 36 Am. Dec. 600.

KOUNTZE v. KENNEDY.

[147 New York, 124.]

DECEIT, ACTION FOR.—Fraud without damage, or damage without fraud, gives no cause of action for deceit, but when these two concur an action lies.

DECEIT.—THE GRAVAMEN of an action for deceit is actual intentional fraud, and nothing less will sustain it. The representation upon which it is based must be shown not only to have been false and material, but that the defendant when he made it knew that it was false, or, not knowing whether it was true or false and not caring what the fact might be, made it recklessly, paying no heed to the injury which might ensue.

DECEIT, ACTION FOR.—ACTUAL INTENTIONAL FRAUD, as distinguished from a mere breach of duty or the omission to use due care, is, in addition to proof of damage, an essential factor in an action for deceit.

DECEIT.—MISJUDGMENT, HOWEVER GROSS or want of caution, however marked, is not fraud.

DECEIT.—MISREPRESENTATIONS.—The man who intentionally deceives another to his injury should be legally responsible for the consequences; but if, through inattention, want of judgment, reliance upon information which a wiser man might not credit, misconception of the facts or of his moral obligation to inquire, he makes a

representation designed to influence the conduct of another, and upon which the other acts to his prejudice, yet, if the misrepresentation was honestly made, believing it to be true, whatever other liability he may incur, he cannot be made liable in an action for deceit.

DECEIT—REPRESENTATIONS WITHOUT KNOWLEDGE—RECKLESS ASSERTIONS.—A man is presumed to warrant his own belief of the truth of that which he asserts. Hence he who makes a representation which he neither knows, nor cares, whether it is true or not, can have no real belief in the truth of what he asserts, and is justly guilty of deception.

DECEIT—FALSE ASSERTION AS TO PERSONAL KNOWLEDGE.—One who falsely asserts a material fact, susceptible of accurate knowledge to be true of his own knowledge, and thereby induces another to act upon the fact represented, to his prejudice, commits a fraud which will sustain an action for deceit.

DECEIT—LACK OF FRAUDULENT INTENT.—If plaintiff is induced to purchase stock and bonds of a corporation, which fails soon afterwards, upon the application of the defendant, who is president of the company, and who furnishes the buyer with a written statement purporting to contain the entire assets and liabilities of the company, but from which a claim in suit, finally resulting in a judgment against the company, is omitted, and the defendant contends that the claim was omitted because it was not regarded by the company and their counsel as a valid obligation, the defendant's fraudulent intent is lacking, and the charge of deceit must fail if the nondisclosure of the claim was attributable to an honest belief, upon reasonable grounds, that the claim was not valid and could not be enforced.

DECEIT—NO INFERENCE THAT FACTS STATED ARE TRUE OF ONE'S OWN KNOWLEDGE EXISTS, WHEN.—If the purchaser of the stock and bonds of a corporation, which soon afterwards fails, is furnished with an incomplete written statement of the assets and liabilities of the corporation having affairs widely extended, and agencies in numerous cities throughout the country, the mere facts that the defendant, in an action for deceit, was president of the corporation, and that he furnished the statement as showing the entire assets and liabilities, are not of themselves enough to warrant the inference that the defendant represented that the statement was true of his own knowledge.

Action to recover damages for fraud and deceit alleged to have been practiced by the defendant, John P. Kennedy, by which the plaintiff claims to have been induced to purchase certain bonds and stock of the Howe Machine Company from that company. The action was originally brought against John P. Kennedy. He died before this appeal was taken, and his executor was substituted as defendant in his stead. The Howe Machine Company was a corporation organized under the laws of the state of Connecticut, having its principal place of business at Bridgeport, in that state, and was engaged for many years, and up to September 26, 1885, in manufacturing sewing machines. There was a judgment in favor of the defendant, originally entered upon the report of a referee, and the plaintiff appealed.

Wheeler H. Peckham and George W. Van Slyck, for the appellant.

William R. Bronk, for the respondent.

¹²⁸ ANDREWS, C. J. The plaintiffs on this appeal are met by the serious difficulty that the finding of the referee, affirmed by the general term, exonerated the defendant's testator from the charge of fraud in making the representations upon which the plaintiffs relied in purchasing the bonds and stock of the Howe Machine Company. If this finding has support in the evidence, it ends all controversy upon the merits here, because, although it was found that the statement of the liabilities of the company presented by Kennedy to the plaintiffs, upon the faith of which the purchase was made, was grossly inaccurate, and largely understated the actual liabilities of the company, nevertheless, if Kennedy believed the statement to be a true exhibit of the affairs of the company and was guilty of no dishonesty, the action must fail. The principle stated by Croke, J. (3 Bulst. 95), in respect to actions for damages for deceit, that "fraud without damage, or damage without fraud, gives no cause of action, but when these two concur an action lies," has ever since been recognized as the true rule governing the subject. The cases are numerous. The principle has been obscured by the use by judges of the phrase ¹²⁹ "legal fraud," which has sometimes been interpreted as meaning fraud by construction, and as indicating that something less than actual fraud may sustain an action for deceit. The gravamen of the action is actual fraud, and nothing less will sustain it. The representation upon which it is based must be shown not only to have been false and material, but that the defendant when he made it knew that it was false, or, not knowing whether it was true or false and not caring what the fact might be, made it recklessly, paying no heed to the injury which might ensue. Misjudgment, however gross, or want of caution, however marked, is not fraud. Intentional fraud, as distinguished from a mere breach of duty or the omission to use due care, is an essential factor in an action for deceit. The man who intentionally deceives another to his injury should be legally responsible for the consequences. But if, through inattention, want of judgment, reliance upon information which a wiser man might not credit, misconception of the facts or of his moral obligation to inquire, he makes a representation designed to influence the conduct of another, and upon which the other acts to his prejudice, yet, if the misrepre-

sentation was honestly made, believing it to be true, whatever other liability he may incur, he cannot be made liable in an action for deceit. The law affords remedies for the consequences of innocent misrepresentation. A contract induced thereby may, in many cases, be avoided, and the equitable powers of courts are frequently interposed for the rescission of contracts or transactions based upon mistake or innocent misrepresentation. While the common-law action of deceit furnishes a remedy for fraud which ought to be preserved, we think it should be kept within its ancient limits, and should not, by construction, be extended to embrace dealings which, however unfortunate they may have proved to one of the parties, were not induced by actual intentional fraud on the part of the other. We have referred to a representation made without knowing whether it was true or false, and whether the party making it was indifferent whether it was true or false, as sufficient to sustain the action, if the representation was in fact ¹³⁰ untrue. The making of a representation to influence the conduct of the person to whom it is made carries with it an assurance, necessarily implied from the situation, of the belief of the party making it in the truth of the affirmation. As was said by Maule, J., in *Evans v. Edmonds*, 13 Com. B. 777, "he takes upon himself to warrant his own belief of the truth of that he asserts, and a man who makes a representation which he neither knows nor cares whether it is true or not, can have no real belief in the truth of what he asserts, and is justly guilty of deception." So, also, it has been held that one who falsely asserts a material fact, susceptible of accurate knowledge, to be true of his own knowledge, and thereby induces another to act upon the fact represented to his prejudice, commits a fraud which will sustain an action for deceit. This is not an exception to, but an application of, the principle that actual fraud must be shown to sustain such an action. The purpose of the party asserting his personal knowledge is to induce belief in the fact represented, and if he has no knowledge, and the fact is one upon which special knowledge can be predicated, the inference of fraudulent intent in the absence of explanation naturally results. We shall refer to the subject again when we come to consider one of the points made by the plaintiffs.

In the present case the plaintiffs invested more than one hundred thousand dollars in the bonds and stock of the Howe Machine Company in April, 1884, and the company went into the hands of a receiver in the fall of 1885, and the plaintiffs practi-

cally lost their whole investment. They purchased upon the application of Kennedy, who was president of the corporation, and the statement of assets and liabilities furnished by Kennedy at their request, after the application and before the purchase, showed that the assets, real and personal, as valued in the statement, exceeded one million dollars, and that the liabilities were five hundred thousand dollars. And the referee found that the statement was presented by Kennedy as a statement of the entire assets and liabilities. The voluminous record before us is taken up to a large extent with the evidence, on ¹³¹ the one side, to show the untruthfulness of the statement, both as respects the assets and liabilities, and of circumstances which, as was claimed, tended to establish that the defendant's testator knew of its falsity when he presented it to the plaintiffs, and, on the other side, with evidence in rebuttal and by way of explanation of the discrepancies between the value of the assets as given in the statement and what was realized therefrom, and between the actual liabilities and the liabilities as represented, and also evidence bearing upon the good faith of the defendant's testator in making the representation. The evidence was taken before an intelligent and able referee, and we are satisfied that his conclusion that the defendant's testator acted in good faith, and that the statement, although in material respects untrue, was believed by him to be true, is supported by evidence. The facts were fully considered in the opinion of the general term, and a recapitulation here to any considerable extent is unnecessary.

The learned counsel for the plaintiffs insists that the omission from the statement of liabilities of the claim against the Howe Machine Company in favor of the Credit Company, Limited, of England, was upon the undisputed facts a fraudulent concealment. The claim originated in or prior to 1878, and was based on acceptances alleged to have been made by the Howe Machine Company of drafts drawn by one Stockwell upon the company, accepted by his brother, the secretary and treasurer, in the name of the company. It seems to be conceded that the acceptances were made without authority of the company, and that the proceeds were used by the Stockwells in stock speculations in London on their own account. Suit was brought against the company on the drafts in the state of Connecticut in 1878, and, as in all cases in that state, were commenced by attachment. The company defended the action. In the fall of 1883 the facts were reported, and in 1886, two years after the plaintiffs had purchased their bonds, the court rendered judgment in the ac-

tion against the Howe Machine Company for the sum of sixty-two thousand four hundred and seventy-five dollars, the chief justice dissenting. The existence of this claim was not disclosed¹³² to the plaintiffs, and was not embraced in the items of liabilities mentioned in the statement. It was claimed on the part of the defendant Kennedy that this item was omitted for the reason that the company was advised by counsel that the acceptances did not bind the company, and that it could not be made liable in the action, and evidence was given that neither the company nor its counsel regarded the claim as a valid obligation of the company. The referee further found that the defendant Kennedy and the other officers and directors of the company "had reasonable cause to believe that said company was not liable on said claims," and he refused to find the request of the plaintiffs, "that the said defendant (Kennedy) knew of said claim and suit and concealed and intended to conceal the same from the plaintiffs." The defendant's testator was bound to include in the statement all liabilities of the company known to him. He was not required to include claims made which were not valid or enforceable obligations. The defendant omitted this claim from the schedule because he believed it was not a liability of the company. It may be admitted that he was blameworthy in not calling the matter to the attention of the plaintiffs, leaving them to determine whether it constituted a reason for declining the transaction. But if the nondisclosure was attributable to an honest belief that the claim was not valid and could not be enforced, the fraudulent intent is lacking and the charge of deceit fails. The recent case of *Derry v. Peck*, 14 App. Cas. 337, decided in the house of lords, contains a very full discussion of the principles governing the action for deceit and of the adjudged cases. The action was brought against directors of a company for damages for a false representation contained in a prospectus issued by them, to the effect that the company had authority to use steam motor power on its tramway, whereby the plaintiff was induced to buy shares of the company. The judges who gave the opinion united in asserting that actual fraud, that is, fraud in intention, and not constructive or implied fraud, was necessary to be shown to uphold the action, and, applying this general principle, they held that if¹³³ the defendant believed the representation made by him to be true, although without reasonable cause for such belief, the action would not lie. It is not necessary to go to this extent to uphold the present judgment, for the referee, as has been stated, found that the belief of

Kennedy that the claim of the Credit Company, Limited, of London, was unfounded, was based upon reasonable grounds.

The plaintiffs requested the referee to find that the representations of Kennedy to the plaintiffs were so made as to convey the impression that he had actual knowledge of their truth and the referee refused to find as requested. This, it is urged, was error requiring a reversal of the judgment. It must be assumed that the referee found that the representations contained in the statement presented by Kennedy were not made, or understood by the plaintiffs to have been made, by him upon his personal knowledge. The evidence and the circumstances support this conclusion. Kennedy testified that when the plaintiffs requested a statement of the assets and liabilities of the company, he informed them that he would request the secretary to prepare it, and after the statement was delivered to the plaintiffs, Luther Kountze, at Kennedy's request, went to Bridgeport to examine the property, and while there the items of the statement were gone over between him and Mr. Parmly, the person having the principal management of the business, and the referee found that the inquiries of Mr. Kountze were truthfully answered. It cannot be assumed from the mere form of the statement that the assets and liabilities were given upon the personal knowledge of Kennedy. It related to the affairs of a large corporation, widely extended and having agencies in a great number of the large cities of the country. It would ordinarily be understood that a statement furnished by the president or director of the company of its assets and liabilities would be furnished upon information derived from the books and other sources. Certainly the mere presentation of such a statement, without more, would not amount to an affirmation that the statement was true to his knowledge. There was ¹⁸⁴ conflicting evidence upon the trial upon the point whether, outside of the statement, such an affirmation was made, but that issue was decided against the plaintiffs. Their claim, therefore, that Kennedy represented that the statement was true of his own knowledge rests solely on the facts that he was president of the corporation, and that he furnished the statement as a statement of the entire assets and liabilities. The most that the plaintiffs could claim was that it became a question of fact, but we are of opinion that the evidence was wholly insufficient to have warranted a finding that Kennedy asserted the truth of the statement as of his own knowledge.

Upon a full examination of all the questions presented by the

plaintiffs, we have reached the conclusion that there was no material error committed on the trial and the judgment should, therefore, be affirmed.

All concur, except Bartlett, J., who dissents on the ground that it is not proper for an officer of a corporation making a written statement of its indebtedness to a proposed purchaser of its stock to omit therefrom the amount involved in a pending action against the company, for the reason that he is of opinion that the company will not be held in final judgment; that it is the manifest duty of such officer to inform the proposed purchaser of stock of the existence of this contingent liability, and the failure to do so is a fraud.

Peckham, J., not voting.

Judgment affirmed.

ACTION FOR DECEIT OR FALSE REPRESENTATIONS.—An action for false representations, called also an action for deceit, may be maintained against one who makes a false representation of a fact, with knowledge of its falsity, with intent that it shall be acted upon, where the person to whom it is made acts upon it, and by so doing suffers injury: *Note to Bergeron v. Miles*, 43 Am. St. Rep. 913. An intent to deceive is essential to maintain the action: See monographic note to *Cottrill v. Krum*, 18 Am. St. Rep. 561, an action to recover for false representations. Representations are not fraudulent where made for an honest purpose, and with fair reason for believing them to be true, although they may turn out to be untrue: *Lewark v. Carter*, 117 Ind. 206; 10 Am. St. Rep. 40. The plaintiff must prove that he has sustained damage by reason of his reliance upon the representations. Fraud without damage is no ground for an action: *Note to Cottrill v. Krum*, 18 Am. St. Rep. 561. The ground of liability in such actions rests upon the affirmation of some existing fact which the party making it knows, or has good reason to know, to be false: *People v. Healey*, 128 Ill. 9; 15 Am. St. Rep. 90. If a party makes an untrue representation of a material fact as of his own knowledge, not knowing whether it is true or false, it is a fraud. An unqualified affirmation as of one's own knowledge makes the fraud as great as if the party knew his statement to be false: *Bullitt v. Farrar*, 42 Minn. 8; 18 Am. St. Rep. 485. In actions of deceit, the charge of fraudulent intent is maintained by proof of a statement, made as of a party's own knowledge, which is false, provided the thing stated is not merely a matter of opinion, estimate, or judgment, but is susceptible of actual knowledge, and in such case it is not necessary to make any further proof of an actual intent to deceive. The fraud exists in stating that the party knows the thing to exist when he does not know it to exist, and, if he does not know it to exist, he must ordinarily be deemed to know that he does not: *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403; 9 Am. St. Rep. 727. In an action of deceit, scienter must not only be alleged, but proved; and the jury must be satisfied that the defendant made the statement knowing it to be false, or with such conscious ignorance of its truth as to be equivalent to a falsehood. But the plaintiff in such action has made out a prima facie case, without direct proof of deceitful intent, when he has proved that the defendant made a positive statement of a material fact, its falsity, and the circumstances under which it was made, tending to show a reckless assertion in conscious ignorance of the fact: *Griswold v. Gebbie*, 126 Pa. St. 353; 12 Am. St. Rep. 878. If a person is in a

situation to know, and it is his duty to know, whether a statement, upon the faith of which another has been induced to enter into a contract, is true or false, the law imputes such knowledge to him, and the statement, if untrue, is held to be fraudulent as regards the person who relied upon it. Thus a statement signed by the president and directors of a bank, which is circulated with, and refers with approval to, a statement in which the cashier sets forth the resources and liabilities of the bank, is a deliberate affirmation of the truth of the latter statement, and equivalent to a report of the affairs of the bank made by the president and directors themselves. Under such circumstances, if the cashier's statement proves to be false, one who has been induced by it to purchase bank shares from the president at a price exceeding their real value may maintain an action against his vendor to recover damages for misrepresentation or to procure the rescission of the sale: *Prewitt v. Trimble*, 62 Ky. 176; 36 Am. St. Rep. 586. On the other hand, while one, by his gratuitous answers, must not mislead, if he answers honestly to the best of his ability, he does his whole duty, and cannot be liable because he is ignorant or stupid. Mere negligence, ignorance, or stupidity on his part do not constitute fraud: *Nash v. Minnesota Title Ins. etc. Co.*, 163 Mass. 574; 47 Am. St. Rep. 489.

SULLY v. SCHMITT.

[147 NEW YORK, 243.]

LANDLORD AND TENANT—EVICTION.—A physical eviction is not necessary to exonerate the tenant from payment of rent. He is justified in abandoning the premises and refusing to pay rent, if the landlord's acts, though not amounting to a physical expulsion, are of so pronounced and offensive a character as to create a nuisance, thereby preventing the tenant's reasonable use of the premises.

LANDLORD AND TENANT—CONSTRUCTIVE EVICTION.—If the tenant of a ground room in a building, without a previous opportunity for examination, discovers, after the execution of his lease and taking possession, an open sewer under the leased premises, into which offensive matter drops from closets in the adjacent portion of the building occupied as a hotel by his landlord, and which is insufficient to carry off the deposit, giving out a disagreeable stench, creating a nuisance, and rendering the occupation of the leased premises dangerous to life, and the tenant cleans out the sewer from time to time, but the landlord continues to maintain it in an offensive condition by suffering it to be refilled from the adjacent premises as often as the tenant cleans it, without any effort to change its construction, these facts constitute an eviction at law, which warrants an abandonment of the premises and exonerates the tenant from thereafter paying rent.

LANDLORD AND TENANT—LEASE—COVENANTS BY TENANT.—The tenant's covenants in a lease, obligating him to maintain the leased premises in good repair and in a cleanly condition, do not require him to keep them clear of a nuisance caused by a stench from sewage coming from the landlord's adjacent premises by reason of the latter's neglect.

LANDLORD AND TENANT—ABANDONMENT—EVIDENCE. In an action for rent, the defense of abandonment and surrender of the premises, upon the ground that they were untenable and dangerous to life and health, is made out, without any showing that the tenant was induced to enter into the lease by the misrepresentation or

fraud of the landlord, by evidence that during the tenant's occupation, the landlord was guilty of affirmative acts causing a nuisance dangerous to life or health, and against which the tenant was remediless by the performance of any acts called for by his own covenants.

LANDLORD AND TENANT—EASEMENT IN SEWER.—A landlord has a right, in the nature of an easement, to continue the use of a sewer running from premises occupied by him to and under adjacent premises leased by him to another, but he does not have a right to maintain it in a defective condition, injuriously affecting the tenant's possession and making it impossible or unsafe for him to continue in occupation.

Action to recover rent.

Seward A. Simons, for the appellant.

Adelbert Moot, for the respondent.

250 GRAY, J. This was an action to recover rent due to the plaintiff by the terms of a written lease between her ²⁵¹ and the defendant, and the defense was that the premises were untenable and dangerous to life and health, and that defendant had abandoned them and had surrendered the same to the plaintiff.

After the plaintiff had proved the making of the lease and an occupation and payment of the stipulated rent for two years of the term by the defendant, the latter undertook to prove that, after the execution of the lease and after he went into possession, he discovered the presence of an open sewer under the leased premises, which was filled with filth and dirt from the plaintiff's hotel, of which his premises were a portion; that the sewer was insufficient in size to carry away the deposit from the hotel closets; that the hotel sewer, instead of being connected with this open sewer, simply dropped its contents into it; that the plaintiff continued to use her sewer in this way during the time of his occupation, and no change was made in its construction; that he, from time to time, cleaned out the sewer under his premises, but it was immediately refilled by the use made by plaintiff of her adjacent premises; that from this open sewer came a stench, which was a nuisance and disagreeable, and which rendered the occupancy of the premises by the defendant dangerous to life. Evidence of these facts was excluded by the trial court, upon the plaintiff's objection; as was, also, evidence to show various other facts, namely, that the plaintiff represented to the defendant, before he took possession, that there was no cellar underneath the leased premises; that there was no opportunity for the examination of the premises before the execution of the lease, and that the defendant had no knowledge of their condition before, or at the time, when he entered into possession. There

was conflicting evidence upon the subject of whether the plaintiff had accepted a surrender of the leased premises from the defendant, and the defendant asked to go to the jury upon the proposition that there had been such a surrender and an acceptance; but the request was denied and the defendant excepted. A verdict was directed for the plaintiff.

²⁵² The lease was for a term of three years, and described a front room on the ground floor of the Fillmore House, in the city of Buffalo, which had formerly been the diningroom of that hotel. It contained, among other provisions unimportant to be mentioned, the agreements of the lessee to keep the premises in good repair; to prevent them from being injured by fire or otherwise, and to keep "the premises hereby leased . . . in a cleanly and healthful condition." It was shown that the premises were leased for a barroom. They consisted of one room, with no windows or openings, except a door opening upon the street. The floor covered the entire room, with no aperture, or access, to a cellar beneath. Some four months after the defendant took possession, he was allowed to make use of the space underneath the floor, for the purpose of storing liquors and jugs, and then first became acquainted with its nature and condition.

The case presented seems to be one as to which there should be no doubt with respect to the propriety of permitting the defendant to prove the facts set up in his defense and contained in his offer of proof. If the evidence, which he was not allowed to give, should establish the existence of such a state of things as was set forth in the answer and the offer, and the abortiveness of his efforts to remedy it, through the continuance of acts by his landlord which rendered it possible, there was an eviction at law, which warranted the abandonment of the premises and exonerated the tenant from the payment of rent thereafter. There was neither any express nor any implied warranty that the premises were fit for habitation when leased, or for any purpose for which leased; but the landlord could not be instrumental in rendering them uninhabitable and hold his tenant to his agreement to pay rent. If they became untenable through her default and wrongful acts, then she did that which obstructed their beneficial enjoyment and justified the tenant in abandoning them. It is a long established and perfectly familiar rule that a physical eviction is not necessary to exonerate the tenant from the payment of rent. The landlord's acts, though not amounting ²⁵³ to a physical expulsion, may, nevertheless, be of so pronounced and offensive a character as to create a nuisance; which,

by preventing the reasonable use by the tenant of the premises, would affect directly the consideration of the contract between them: *Dyett v. Pendleton*, 8 Cow. 727; *Edgerton v. Page*, 20 N. Y. 281; *Boreel v. Lawton*, 90 N. Y. 293; 43 Am. Rep. 170. Applying the rule to the present case, if the plaintiff's evidence had been received it would have shown, or tended to show, that when he discovered the state of things underneath his room and endeavored to remedy it by cleaning out the sewer, the landlord not only made no change in its construction, but continued to maintain it in a disagreeable and possibly dangerous, certainly offensive, condition, by suffering the contents of her hotel sewer to flow into and refill the open sewer as often as the tenant would clean it. The neglect of the landlord would seem to be monstrous and to amount to the creation and continuance of a nuisance upon the adjacent premises. Certainly it would be for the jury to say whether the evidence made out such a state of facts as exhibited the landlord in the attitude of continuing in the performance of acts which amounted to the maintenance of a nuisance, and through which her tenant's premises were rendered unfit for reasonable use and occupation.

The tenant's covenants in the lease obligated him with respect to the maintenance of his own premises in good repair and in a cleanly condition; but the nuisance from the stench arose upon the landlord's property and because of her repeated neglect. The tenant's covenants did not bear upon such a condition of things, and went no further than to oblige him to do what lay in his power towards keeping his premises in good repair and in a cleanly state.

The verdict would turn upon the question whether the defendant had neglected anything which he was able and might reasonably be required to do under his lease, and, if he was not at fault, whether the premises, through the wrongful acts of the landlord, were rendered unfit for occupation; in consequence of which the tenant was justified in abandoning, ²⁵⁴ and did in fact abandon, their possession. It was not necessary that the defendant should have been induced to enter into the lease by the misrepresentation or fraud of the plaintiff. If he was able to show that, during his occupation, his landlord was guilty of affirmative acts which caused a nuisance, of a nature dangerous to life or health and against which the tenant was remediless by the performance of any acts called for by his own covenants, the evidence should have been received.

It is argued for the respondent that she has a right, in the

nature of an easement, to continue the use of the sewer. While that is true as a general proposition, as applied to the facts of this case, it fails as a defense, if the use made of it amounted to an abuse of the right and so injuriously affected the tenant's possession as to make it impossible, or unsafe, for the latter to continue in occupation. The point is, not that the landlord did not have the right to make use of this sewer for his house; but that by its defective construction it became a source of offense and possible danger, and the efforts which the tenant made to keep it in clean and reasonably fit condition were nullified by the refusal of the landlord to remedy the defects in construction; the result whereof was that the stench and offense were constantly renewed by the refilling of the sewer with the filth and waste from the hotel.

Upon the question, also, of whether the plaintiff had accepted the defendant's surrender of possession, there was evidence given by the latter which, if believed by the jury, would have supported a verdict to that effect.

For the errors adverted to there should be a reversal of the judgment below and a new trial ordered with costs to abide the event.

All concur.

Judgment reversed.

LANDLORD AND TENANT—EVICTION—ABANDONMENT OF LEASED PREMISES.—An actual expulsion from the property is not essential to an eviction to the extent of sustaining the right of the tenant to refuse the payment of rent. It may consist of any interference with the tenant's beneficial enjoyment of the demised premises: *Edmison v. Lowry*, 3 S. Dak. 77; 44 Am. St. Rep. 774, and note showing that acts of a grave and permanent character, which amount to a clear indication of intention on the landlord's part to deprive the tenant of the enjoyment of the demised premises, amount to an eviction. The tenant is justified in abandoning the demised premises whenever the landlord does any act amounting to an eviction, at the election of the lessee. And such an act, accompanied by an abandonment of possession by the lessee, is deemed a virtual expulsion of the tenant, and, equally with an actual expulsion, bars the recovery of rent. The maintenance of a nuisance on the demised premises by the landlord is such an act: See monographic note to *Minneapolis Co-operative Co. v. Williamson*, 38 Am. St. Rep. 485, 490, on what justifies the tenant in abandoning leased premises. If there is a distinct understanding that a demised house is in good condition, a tenant will be justified in abandoning it on account of defects in the sewerage, which he did not discover at first, and afterward endeavored without success to remedy: Note to *Minneapolis Co-operative Co. v. Williamson*, 38 Am. St. Rep. 481. While the landlord is not, in the absence of an express stipulation, or some statutory provision, bound to see that the demised premises are suitable for the purpose for which they are hired, or to make repairs (*Blake v. Dick*, 15 Mont. 236; 48 Am. St. Rep. 671. and note), he cannot, by any positive act or neglect of duty, substantially defeat the tenant's enjoyment of

the premises, and at the same time hold him to his contract. A failure to perform a duty which the landlord owes to the tenant, and without the due performance of which the leasehold premises are not tenantable, is an eviction: *Note to Minneapolis Co-operative Co. v. Williamson*, 38 Am. St. Rep. 488. Some cases hold that the unhealthy condition of the premises at the time of renting, or arising during occupancy, is a constructive eviction, and is ground to be released from the payment of rent, and that the landlord must keep the premises in a healthy condition; but other cases assert the contrary: See monographic notes to *Gilbert v. Hoffman*, 55 Am. Rep. 265; *Bowe v. Hunking*, 46 Am. Rep. 474.

BOOKMAN v. NEW YORK ELEVATED R. R. Co.

[147 NEW YORK, 298.]

RAILROADS—ELEVATED, WHEN DAMAGES ARE PROPERLY DENIED.—If an elevated street railroad enters a vacant and uninhabited locality which normal city growth has not effectively reached, which improvement has not seriously touched, which remains to be developed, and which has no element of growing value except such as lies in hope and expectation, and thereupon and thereby population and growth, tending elsewhere, are diverted to the new line of rapid transit, creating a steady increase of values, both directly on the line, and in the side streets near by, the only reasonable and sensible inference is that the increased values are the sole and substantial product of the newly opened line, and courts, under such circumstances, are justified in refusing to award damages to an abutting property owner, for there is no injury, and none can be proved.

RAILROADS—INCREASE OF VALUES IN IMPROVED LOCALITIES PENETRATED BY ELEVATED STREET RAILWAYS. If an elevated street railway enters an area already substantially built up and improved, where normal city growth has come, and there has been an increase of values with which the rapid transit line has had nothing whatever to do, the average rate of the observed increase in such locality can be approximately ascertained, and if the rate continues, after the construction of the road, in the side streets, but a less rate of increase is found on the avenue occupied by the cars, and facts are shown explaining such loss by evil effects of the new line, it is possible to infer that the avenue property has not shared as it should in the normal and independent increase of value to the extent to which it was entitled.

RAILROADS—RULE FOR ESTIMATING DAMAGES CAUSED BY CONSTRUCTION OF ELEVATED STREET RAILWAY.—In an action by an abutting property owner against an elevated street railway for damages caused by the construction of its road, no damages should be awarded, and the complaint should be dismissed, if the proof shows that that particular locality before the coming of the road was substantially or mainly vacant, and that after the road came the building and improvement swiftly followed, accompanied by steady and serious increases of value, although the side streets increased in value more rapidly than the avenue occupied by the road. But if the proof shows that the road has occupied a locality already substantially built up, in which a normal city growth is operating and seriously increasing values, but as a consequence of the road the natural advance has halted or palpably lessened, while in the adja-

cent side streets it continues, there is possibly an inference of fact that the abutter has been injured.

RAILROADS—ELEVATED STREET RAILWAYS—DAMAGES—FAILURE OF PROOF.—In an action by an abutting property-owner against a street railway company, to restrain the operation and maintenance of its elevated road, and for damages caused thereby, a judgment for the plaintiff should be reversed, if the finding of the trial court that plaintiff's property was injured by the railroad over and above all benefits conferred is wholly unsupported by proof and contradicted by specific findings that the locality was previously substantially vacant and unimproved, or at the most only partially built up, while soon after the construction of the road it was compactly built up; that both the rental and fee values of the property had largely increased after the construction of the road; that the presence of the road with its stations near by had brought multitudes to the locality, increased business, and benefited the fee and rental values, a benefit in which the adjacent side streets had also shared; that the increased accessibility had induced the settlement and building; that the same improvement would not have occurred in the absence of rapid transit; and that the road had been one of the great and efficient factors in building up the locality; as the fact that there may have been a greater increase of value in the side streets than in the avenue occupied by the road, due in part, at least, to the influence of the defendant's road, does not prove or even indicate damage in such a situation.

Action to restrain the operation and maintenance by the defendants of their elevated railroad in front of the plaintiff's premises, in Third avenue, New York city, and for the recovery of damages caused thereby. The plaintiff had eight lots on Third avenue, and the judgment was in the form usual in this class of actions. An injunction was granted, and by way of incidental relief, past damages to rental value in the sum of eight thousand two hundred dollars were allowed. It was also provided that the injunction could be avoided on payment of nine thousand eight hundred dollars, which was found to be the damage to the fee value, over and above all benefits, by reason of the construction, maintenance, and operation of the elevated road in front of the plaintiff's premises.

Arthur O. Townsend, for the appellants.

E. W. Tyler, for the respondent.

³⁰¹ **FINCH, J.** It is impossible to decide this appeal correctly without a full and definite appreciation of the difference between the case of *Bohm v. Metropolitan etc. Ry. Co.*, 129 N. Y. 576, and that of *Becker v. Metropolitan etc. Ry. Co.*, 131 N. Y. 509. Both belonged to the class of actions in which the abutting property was shown to have seriously increased in value since the construction of the elevated road, so that, presumably and apparently, benefit instead of damage had resulted; and in each it

was, therefore, necessary to show, as ground of recovery, two things: 1. That when the road was built the locality was increasing in value from the tendency toward it of incoming population and normal city growth; and 2. That in the continuance of that progressive increase of value the plaintiff's property would have shared if the railroad had not been built, but was prevented from so sharing to its due extent by the presence of the road, ³⁰² operating more or less as a barrier to a normal advance. In the earlier case we held that there was no evidence of either essential fact, and reversed an award of damages; in the latter case we decided that there was some evidence of the necessary facts, and so a reversal was not possible, however just such a reversal might have been. Since the evidence in the two cases was very much alike, the real difference in its effect was necessarily due to the wide difference of situation and surroundings existing when the new structure was built, and some consideration of that difference, and of its results, may prudently precede a reference to the facts now before us.

Where an elevated street railroad enters a vacant and uninhabited locality, which normal growth has not effectively reached, which improvement has not seriously touched, which remains to be developed, and which has no element of growing value, except such as lies in hope and expectation, and thereupon and thereby population and growth, tending elsewhere, are diverted to the new line of rapid transit, and build up the vacant locality, creating a demand for lots and a steady and persistent increase of values both directly on the line and in the side streets near by, the only reasonable and sensible inference is that the increased values are the sole and substantial product of the newly opened line which has brought prosperity to a neglected locality. So far as normal growth or incoming population has had anything to do with the increase of value they are themselves as operating causes due to the new mode of access, and in no respect separate from or independent of it. In and of themselves they would have done the locality no good; would have spent their force elsewhere; would have built up homes even in other states whence steam would give rapid and easy passage, and left the locality to its normal solitude. Of course, in such a case, it is little short of an absurdity to say that the coming of the road prevented the abutter from having his share of the normal city growth, since it is the coming of the road that enables him to participate in that growth at all; that brings it to his vacant and unmarketable lots; that sets it in operation as a cause of ³⁰³ in-

creasing values. It is the obvious truth of such a situation that the removal of the road to some other locality would at once diminish the value of the abutting property by taking away the adequate cause of its advancement, and diverting the growth which had begun to the new line adopted. It is further true of such a case that no ingenuity and no proof can separate what is called the normal city growth as a cause of increasing value from the chief and principal cause, which is the rapid transit system. The two are not only interwoven and inextricably mingled, but the former has no existence in the supposed locality separate from and independent of the latter. It follows that in the supposed situation neither proposition essential to a recovery is or can be proved, for it is not true that the local values were seriously increasing when the road was built, nor that the increase, when it came, was due to any cause independent of the stimulating effect of the road. Such was *Bohm v. Metropolitan etc. Ry. Co.*, 129 N. Y. 576, and we were justified in refusing an award of damages, in disregarding the guess of experts, and in denying any force to a greater increase in the side streets.

But the situation changes materially when the elevated road enters an area already substantially built up and improved. In such a locality normal growth has come, and built the blocks up solidly, or nearly so, and caused an increment of value due to itself alone, and with which the rapid transit line had nothing whatever to do. Such normal growth it is evident had its own independent existence and operation, because it had already worked, and was continuing to work, its result of an increase of values when the railroad did not exist. The average rate of that observed increase in such locality can be approximately ascertained, and if the rate continued after the construction of the elevated road in the side streets, but a less rate of increase is found on the avenue occupied by the cars, and facts are shown explaining such loss by evil effects of the new line, it is possible to infer that the avenue property has not shared as it should in the normal and independent increase of value to the extent to which it was entitled. That I understand to be the substantial basis of *Becker v. Metropolitan etc. Ry. Co.*, 131 N. Y. 509. The distinction ³⁰⁴ I have sketched was plainly drawn in the opinion. It was there said: "That although certain of the side streets were not all built upon when the road was erected and put in operation, yet it does appear that the locality where this property is situated was fairly built up before the road was operated, although to some extent the adjacent side streets have been more

compactly built upon since that time. There has been no such change from absolute vacancy within large and extensive portions of the city limits as has occurred in the vicinity of Harlem, where it has appeared in evidence the side streets and the avenues have been practically brought into existence and peopled since the building and operation of the elevated roads. It was in regard to such a locality that we said in *Bohm v. Metropolitan etc. Ry. Co.*, 129 N. Y. 576, there was no proof whatever of damages. I have thus repeated the language of Judge Peckham's opinion, pointing out the difference between *Becker v. Metropolitan etc. Ry. Co.*, 131 N. Y. 509, and that of *Bohm v. Metropolitan etc. Ry. Co.*, 129 N. Y. 576, to show that I have strictly followed it, and merely further explained and discussed it, and that no new doctrine is in any manner asserted. The distinction is not narrow or argumentive, but radical and real. It enables the courts below to put an end to any such injustice as awarding damages where benefits have instead accrued, and upon speculative theories destitute of actual foundation. If the proof shows that before the coming of the elevated road in the particular locality that locality was substantially or mainly vacant and not built up, and that after the road came the building and improvement swiftly followed, accompanied by steady and serious increases of value, it will be the duty of judge or jury to award no damages and dismiss the complaint, even though experts may guess or side streets appreciate more rapidly. But if the proof shows that the elevated road has occupied a locality already substantially built up, in which normal city growth is operating and seriously increasing values, but as a consequence of the road the natural advance has halted or palpably lessened, while in the adjacent side streets it continues, there is possible an inference of fact that the abutter has been ^{so} injured. But even in those cases a trial court may well hesitate, and require decided and clear proof, and refuse to be misled by deceptive comparisons. It is very rare that in any case or any locality, where the value of the property has largely increased from the date of the coming of the road, and is more or less coincident with it, that any damages ought to be awarded by the process of entangling one's common sense in a web of theory. There may be here and there some exceptional case. We thought *Storck v. Metropolitan etc. Ry. Co.*, 131 N. Y. 514, was one, and affirmed it as such, though with much of doubt and hesitation. The property involved was in the same locality with that owned by *Bohm*, and a similar decision denying damages would have been inevitable but for the proof of

some exceptional facts and circumstances. There was evidence of a diminution of rentals because of the erection of the road, and that the influx of population which usually and naturally tends to increase values was of such a character as to prejudice, rather than benefit, the values in question. We thought there was something to raise a question of fact, and, without approving the judgment, felt bound to affirm it. That case was not intended to overrule *Bohm v. Metropolitan etc. Ry. Co.*, 129 N. Y. 576, and must be deemed exceptional and to stand on its own facts.

The present case comes clearly within the scope of *Bohm v. Metropolitan etc. Ry. Co.*, 129 N. Y. 576. It is specifically and explicitly found, and upon the evidence no other finding was possible, as to all the property except No. 261 Third avenue, that the locality was substantially vacant and unimproved, or, at the most, only partially built up, while soon after the construction of the elevated road it was compactly built up. It is found that the rental value of No. 261 was increased after such construction, and that the fee value rose from twenty-two thousand five hundred dollars, in 1869, to forty thousand dollars, in 1890, and that the premises were worth more in 1890 than at any time prior to the coming of the new line. It is further found that the presence of the railroad, with its stations near by, has brought multitudes to the locality, increased business, and benefited the fee and rental values, a benefit in which property on the adjacent side streets has also shared.

³⁰⁶ As to No. 1028 it is found that its rental increased from two thousand four hundred dollars, in 1875, to five thousand five hundred dollars, in 1892, and the fee value from thirty-six thousand dollars, in 1881, to seventy-five thousand dollars, at the date of the trial. And the same facts as to the beneficial effect of the railroad upon values are again found.

As to Nos. 1240 to 1248 and 1255 a similar state of facts appeared. The rents of the former in 1877 were nine thousand one hundred and thirty-six dollars, and in 1892 had grown to eleven thousand eight hundred and fifty-five dollars, and in that year the rents were greater than ever before the construction of the road. The great change was in the rental of the stores. While the rental of the flats overhead diminished, evidently because of the new supply of better apartments, the business rentals increased from three thousand four hundred and forty dollars, in 1876, to eight thousand two hundred dollars, in 1893, showing a gain of one hundred and thirty-eight per cent. It must have

been difficult to persuade the owner who took that gain that nevertheless he had been damaged. The value of the lots, as distinguished from the buildings, was, in 1872, about sixty-six thousand dollars, and at the time of the trial about one hundred and twenty thousand dollars. The value of No. 1255 was fifteen thousand dollars, in 1873, and at the time of the trial about twenty thousand dollars. It is further found that, in 1873, the streets and avenues in the vicinity were practically vacant and have all been built up since 1877; that the increased accessibility has induced the settlement and building; that the same improvement would not have occurred in the absence of rapid transit, and that the defendant's road has been one of the great and efficient factors in building up the locality.

We have thus before us a state of facts corresponding to that disclosed in *Bohm v. Metropolitan etc. Ry. Co.*, 129 N. Y. 576. The result must be the same. That there may have been a greater increase in the side streets, due, in part, at least, to the influence of the defendant's road, does not prove, or even indicate, damage in a situation like the present. For in every case where a vacant area is built up and gains an increase of value coincident with the coming of the railroad and obviously stimulated by it, the appreciation of property in the adjacent side streets is largely due to the same cause, and the case is one in which benefits only have accrued, and they do not become injury on the ³⁰⁷ avenue because they help more largely the residence lots near by. In such a case there is no normal city growth operating independently, or capable, by itself, of severance or measurement. It is, relatively to the unimproved locality, a secondary cause set in operation by a primary one, and the primary one, originating the general benefits flowing from the secondary one, does not become hurtful to one lot because it helps to a greater degree some other. The railroad in the vacant locality cannot be said to hinder what it in fact produces.

It follows that the judgment rendered is erroneous. The finding that plaintiff's property was injured by the railroad over and above all benefits conferred is wholly unsupported by proof and contradicted by the specific findings.

The judgment should be reversed and a new trial granted, costs to abide the event.

³⁰⁸ Andrews, C. J., and Peckham and Haight, JJ., concur with Finch, J., for reversal.

O'Brien and Bartlett, JJ., concur with Gray J., for affirmance. Judgment reversed.

THE PRINCIPAL CASE was followed in *Malcolm v. New York Elevated R. R. Co.*, 147 N. Y. 308, an action brought by an abutting owner to restrain the operation of an elevated railroad in front of his premises on Third avenue in New York city, and to recover damages caused thereby. The defendants requested the trial court to find that prior to the coming of the road the land in the vicinity of the premises in suit was largely unimproved and unutilized. The trial court found that the fee value of the premises had increased since the building of the road, but refused to find to the extent of increase requested. It also refused to find that the rental value had increased since the same date. There was a judgment in favor of the plaintiff, awarding him damages for injury to rental value, together with a sum found to be the amount of injury to the fee value of his premises over and above the benefit resulting from the road. On appeal, it was held that the requests to find were in accordance with the undisputed evidence, and that the refusals so to find constituted material and reversible error. "If, therefore, the trial judge," said the court, "had found the facts requested, as he should have done, the legal conclusion that no damages had been proved would have followed inevitably under the doctrine of *Bohm v. Metropolitan etc. Ry. Co.*, 129 N. Y. 578. The railroad comes into an area substantially vacant and unimproved. It finds values and rents at the lowest ebb following the panic. It brings in population, stimulates improvement, and causes values to rise until they exceed the highest limit of the speculative period which preceded the panic. The side streets grew, and their values increased largely from the same cause, and comparison with them only indicates a more or less unequal increment of benefit flowing from the same operative cause. The authority of *Bohm v. Metropolitan etc. Ry. Co.*, 129 N. Y. 578, and *Bookman v. New York etc. R. R. Co.*, 147 N. Y. 298, ante, p. 664, requires us to hold that there was no proof of damage." It seems that proof of a substantial and continuing injury to the rental value of abutting property will sustain an action for an injunction against an elevated street railroad; and that the right to such equitable relief is not defeated by the fact that the injury to the fee value is found to be merely nominal: *Jamieson v. Kings County etc. Ry. Co.*, 147 N. Y. 822.

SCHUYLER v. CURTIS.

[147 NEW YORK, 434.]

INJUNCTION—STATUE OF DECEASED PERSON, RIGHTS OF RELATIVES.—Persons concerned in getting up a proposed statue or bust in honor of a deceased woman cannot be restrained by her surviving relatives from so doing, upon the ground that the persons so acting were not friends of the deceased, and did not know her, if the motive of the act is to do honor to her, and the work is to be done in an appropriate manner.

RIGHT OF PRIVACY—DEATH.—A person's individual right of privacy dies with him, and any rights which survive pertain to the living only.

RIGHT OF PRIVACY—PROTECTING MEMORY OF DECEASED.—A privilege may be given the surviving relatives of a deceased person to protect his memory, but the privilege exists for the benefit of the living to protect their feelings and to prevent a violation of their own rights in the character and memory of the deceased. The right of privacy protected is that of the living, not that of the dead.

INJUNCTION—MENTAL INJURY OR DISTRESS.—The erection of a statue to the honor of a deceased woman will not be enjoined because of any alleged mental injury or distress to a surviving relative, grounded upon the idea that the action proposed in honor of his ancestress would have been disagreeable to that ancestress during her life. The plaintiff must show some right of his own violated, and that proof is not made by evidence that the proposed action of the defendant would have caused the deceased pain if she were living.

INJUNCTION—MENTAL INJURY OR DISTRESS.—The erection of a statue to a deceased person will not be restrained merely because a living relative's feelings may be injured. There must, in addition, be some reasonable and plausible ground for the existence of this mental distress and injury. It must not be the creation of mere caprice nor of pure fancy, nor the result of a supersensitive and morbid mental organization, dwelling with undue emphasis upon the exclusive and sacred character of the right of privacy.

INJUNCTION—ERECTION OF STATUE—CONSENT OF DESCENDANTS.—If the object of erecting a statue is to do honor to the memory of a deceased person, and is to be carried out in an appropriate and orderly manner, by reputable individuals and for worthy ends, the consent of the descendants of such deceased person is not necessary, and they have no right to prevent, for their own personal gratification, any action of the nature described.

INJUNCTION—ERECTION OF STATUE—MISTAKE IN CIRCULARS.—The erection of a statue or bust of a deceased woman by an association of individuals will not be enjoined, on the ground that the association, in a circular issued by it, represented the deceased to have been the founder of the Mount Vernon Association, formed to secure the preservation of the home of Washington, when, in fact, she was only a vice-regent from her state, if there is nothing to show that the misstatement was intentional and would not be corrected if attention were called to it.

INJUNCTION—ERECTION OF STATUE—JUXTAPOSITION OF STATUES.—The erection of a statue to the honor of a deceased woman as a representative of women philanthropists, will not be enjoined at the suit of her surviving relatives because an association of women propose to place the statue in the same room of a building on public grounds with that of a representative of women reformers, as this does not tend to show that the deceased philanthropist was in sympathy with or believed in the "woman's rights" movement.

INJUNCTION—ERECTION OF IDEAL STATUE.—The erection of an ideal statue, not intended as a likeness, for exhibition as the statue of a deceased woman who is chosen as the representative of a class of woman philanthropists, is not a fraud upon the public, and its exhibition will not be enjoined at the suit of surviving relatives, upon the ground that it is a fraud.

Action to restrain the defendants from making a statue or bust of the late Mrs. Schuyler, in any form, and from causing the same to be made or exhibited. Mrs. Schuyler was the aunt of the plaintiff and granddaughter of Major-General Alexander Hamilton. She died leaving no children. Her only immediate relatives living were certain nephews and nieces, an uncle and an aunt, all of whom approved of the commencement and maintenance of this action. The defendants, Hartley excepted, were

members of a voluntary and unincorporated association in New York city named "The Woman's Memorial Fund," and its avowed object was the completion of two sculptures to honor "Woman as the Philanthropist" and "Woman as the Reformer," to be placed on exhibition at the Columbian Exposition of 1893. In May, 1891, this association publicly announced that as the typical philanthropist, Mrs. Schuyler had been chosen as the subject of the statue. About that time, the association began to send printed circulars to that effect and to solicit subscriptions for the purpose of carrying out this project, and public announcement was made that a contract had been entered into with the defendant Hartley, a professional sculptor, for the execution of a statue of Mrs. Schuyler, to be placed on exhibition as stated. It was also announced that the association intended to place the statue on exhibition at the same time and place as a statue of Miss Susan B. Anthony, whom the association had chosen as the subject of the statue to be designated the "Representative Reformer." Mrs. Schuyler's husband and brother were living in New York city at the time that the plan for making the statue originated, but no application was made to either for his consent to the making of the statue, and neither of them ever authorized anyone to make it. The only brother died in 1889, and the husband in 1890. In May, 1891, the plaintiff first heard of the contemplated action of the defendants, and he, in behalf of himself and the other relatives of Mrs. Schuyler, requested the defendants to abandon the making of such statue and the circulation of subscription papers for the purpose of collecting money toward defraying the cost and expenses of procuring the statue. The defendants denied the right of the plaintiff to prevent the making of the statue or to prevent their soliciting subscriptions throughout the country for that purpose, and they continued to do so, even through the New York city papers. The court found that these acts had exposed the name and the memory of Mrs. Schuyler to adverse comment and criticism of a nature peculiarly disagreeable to her relatives, and had caused disagreeable notoriety, for which they were in no way responsible; that such comment had been made in the public prints and elsewhere; that annoyance and pain had been caused thereby to the plaintiff and to the immediate relatives of Mrs. Schuyler: that he and they had been greatly distressed and injured thereby and by the notoriety incident thereto; and that such notoriety and adverse comment and criticism were wholly due to the unauthorized acts of the defendants. It was found, as conclusions of law, that

the acts of the defendants constituted an unlawful interference with the right of privacy, and that the surviving relatives of the deceased were specially injured by the acts. There was, therefore, a judgment for the plaintiff. The defendants proved, upon the trial, that Mrs. Schuyler, in her lifetime, was a very charitable woman, and was a member of many private charitable institutions; that, in 1852, she was one of the founders of the School of Design for Women, in New York city, and one of its managers until it was adopted by the Cooper Institute; that some of the female defendants were members of the School of Design for Women, and had frequently met Mrs. Schuyler at its meetings, and were on terms of some intimacy with her, so far at least as her interest in and her attendance at the meetings of that association called for; that the "Ladies' Art Association" was founded about 1867, partly at the suggestion of Mrs. Schuyler, made to some of the defendants who were members of the School of Design for Women; that it was a respectable and well-known organization in New York city, in which Mrs. Schuyler evinced considerable interest during her life, and had for its object the helping of ladies to support themselves, and to give them adequate education in art and design; that the "Woman's Memorial Fund Association" was composed largely of members of the "Ladies Art Association"; that a public announcement was made of the fact that the statue in question would be placed after the Exposition in the rooms or studio of the "Ladies' Art Association," there to remain permanently; that Mrs. Schuyler was prominently identified with the United States Sanitary Commission during the Civil War; and that she was one of the vice-regents for the state of New York of the Mount Vernon Association, which was organized for the purpose of securing the preservation of the home of Washington. These facts were uncontradicted, and the court was requested by the defendants to find them. This request was refused, on the ground that the facts were immaterial, and some of the defendants appealed from a judgment for the plaintiff.

Charles M. Demond and Walter S. Logan, for the appellants.

James B. Ludlow and Augustus N. Hand, for the respondent.

442 PECKHAM, J. This action is of a nature somewhat unusual, and depends for its support upon an application of certain principles which are themselves not very clearly defined or their boundaries very well recognized or plainly laid down. Briefly described, the action is founded upon an alleged violation of what

is termed the right of privacy. The alleged violation of this right, so far as regards the plaintiff, consists of an attempt on the part of certain reputable women, among them the female defendants herein, without the sanction of the plaintiff or other immediate members of the family, to do honor to the memory of a woman who was the aunt of the plaintiff, and who, at the time of the commencement of this action, had been dead for fourteen years. A statue, of a most costly and meritorious kind, to be made out of appropriate material and by an artist of the first rank, was contemplated ⁴⁴³ as the means of doing this honor to the memory of the deceased relative of the plaintiff.

It may, perhaps, be somewhat difficult for the ordinary mind to perceive any reason for the plaintiff's distress arising out of this contemplated action by women of respectability, who are desirous of honoring the memory of a woman whom they regarded in life as a friend and benefactor of their sex. Objection has, however, been made to the carrying out of this project, and we must examine this record in order to see whether there is any evidence of a violation of this alleged right of privacy belonging to the plaintiff. In order to determine whether there has been a violation of the right, it is necessary to know something about the right itself and its proper limitations. It is not necessary, however, in the view which we take of this case, to attempt to lay down precise and accurate rules which shall apply to all cases touching upon this alleged right. If the facts in any case fail to furnish any clear or sure foundation for a reasonable man to claim that any injury to his feelings has been or would be caused by the action taken, or to be taken, by a defendant, then we can at least say, in such a case, that there has not been and cannot be any such real mental distress or injury as a court of equity ought to recognize as within judicial relief. For the purpose we have in view, it is unnecessary to wholly deny the existence of the right of privacy to which the plaintiff appeals as the foundation of his cause of action. It may be admitted that courts have power in some cases to enjoin the doing of an act, where the nature or character of the act itself is well calculated to wound the sensibilities of an individual, and where the doing of the act is wholly unjustifiable, and is, in legal contemplation, a wrong, even though the existence of no property, as that term is usually used, is involved in the subject.

The question in this case is whether there has been proved such a violation of the rights of the plaintiff, even under a most liberal

construction as to the extent of those rights, which a court of equity ought to take cognizance of.

⁴⁴⁴ We enter upon this examination with an admission, for the purposes of this case, that the plaintiff occupies such a relationship to the deceased that he might maintain an action to enjoin the painting of a picture or the making of a statue of the deceased which would be regarded as inappropriate by reasonable people, because the use for which it was destined or the place where it was to be kept was obviously improper, or because the thing itself, portrait or bust or statue, was not of that degree of merit, all the circumstances considered, which might reasonably and properly be insisted upon by those to whom the life and memory of the deceased were most dear. Many other cases can be imagined where the ulterior purpose of the individuals engaged in the matter would be so manifestly improper, if not illegal, that no statue or picture of a reputable individual, alive or dead, ought to be permitted to be made for such purpose. These are merely imaginary cases, alluded to only for the purpose of accentuating our ideas as to some of the circumstances in which courts might be called upon to act on the part of a living relative of one who was long since dead.

In the present case the grounds of the plaintiff's objection are not very many, and have been stated in the complaint and by the plaintiff on the witness stand. They are these: 1. The persons concerned in getting up the proposed statue were not the friends of the plaintiff's deceased aunt, and, as plaintiff alleged, did not know her; 2. They were proceeding with their plan without consulting with the plaintiff or other immediate members of the Schuyler-Hamilton family and without their consent to the making of any statue; 3. The circulars issued by or in behalf of the defendants contained a statement that Mrs. Schuyler was the founder of or the first woman in the enterprise for securing the home of Washington, and that this statement was inaccurate because a prominent woman in South Carolina was in fact such founder and justly entitled to the honor arising therefrom. This mistake, it was asserted, had caused adverse comment in the newspapers ⁴⁴⁵ as to the attitude of the family of plaintiff in permitting such a claim to be made when they must have known it was without foundation; 4. It was disagreeable to the plaintiff, because the making of such a statue would have been disagreeable and obnoxious to his aunt were she living. She had, as plaintiff said, a great dislike to have her name brought into public notoriety of any kind, as she was a singularly sensitive woman

and of a very retiring nature, anxious to keep her name from the public prints or newspapers; 5. That plaintiff's aunt had not been personally acquainted with Susan B. Anthony, and he was quite sure she had not sympathized with or approved the position taken by Miss Anthony upon the question of the proper sphere of woman and her treatment by the law, and it was disagreeable and annoying to have the memory of Mrs. Schuyler joined with principles of which she did not approve.

These are substantially all the objections taken by plaintiff regarding the proposed action of the defendants. The plaintiff, in his evidence, said he did not claim that the defendants, in any of their actions or in any of their published notices, threw any discredit, disgrace, or ridicule upon Mrs. Schuyler's memory, and he did not think they wished to do so in any way. The chief reason for bringing this action, the plaintiff avowed, was to establish a principle that the right of privacy should be respected, and he was willing to bring such an action for the purpose of maintaining that principle.

After taking all these objections into careful consideration, we cannot say that we are in the least degree impressed with their force. The first ground of objection, even if well founded in fact, is not of the slightest importance. Whether the defendants were friends or not of Mrs. Schuyler in her lifetime does not seem to us to have any legitimate effect upon the question. If the motive were to do honor to a good woman, and if the work were to be done in an appropriate way, the relations towards the deceased of those who proposed to render this mark of honor to her memory as one of ⁴⁴⁶ the benefactors of her sex, would be matter of very small moment, entitled to no consideration whatever. No surviving relative, male or female, would have, in our judgment, the least ground of complaint that an action, confessedly meant to do honor to the memory of a noble woman, was proposed by those who in her lifetime had not the honor of her personal acquaintance or friendship, but whose proposed action was nevertheless the outgrowth of admiration of her character as a friend and benefactor of the sex of which she was herself so great an ornament. It appears, however, that in truth some of the defendants were known to Mrs. Schuyler personally as members of the same association and interested in the same objects, and, although Mrs. Schuyler was undoubtedly more socially prominent than any of the defendants claim to be, yet there was enough personal intercourse between her and some of the defendants to

account for the affection in which her memory is held and for their desire to give some practical evidence of their feelings.

The second ground of objection, we think, is equally untenable. The fourth ground may properly be considered as a part of it. It is true that these defendants have assumed to take the preliminary steps leading to the making of the proposed statue without having consulted with or obtained the consent of the plaintiff or the other immediate relatives of the deceased. This may be regarded as the main objection, the others being but grounds for the refusal of any consent by plaintiff and his relatives, if such consent had been asked. The whole of the plaintiff's claim of the right of privacy in this case rests upon the lack of this consent. It is stated that Mrs. Schuyler was not in any sense a public character during her life, and consequently had not surrendered to any extent whatever her own right of privacy. This right, it is claimed, not having been surrendered by any act of the deceased in her lifetime, descends unimpaired to her immediate relatives as the proper representatives of her feelings and her rights. Whatever the rights of a relative may be, they are not, in such a case as this, rights which once belonged to the deceased, and ⁴⁴⁷ which a relative can enforce in her behalf and in a mere representative capacity, as, for instance, an executor or administrator, in regard to the assets of a deceased. It is not a question of what right of privacy Mrs. Schuyler had in her lifetime. The plaintiff does not represent that right. Whatever right of privacy Mrs. Schuyler had died with her. Death deprives us all of rights in the legal sense of that term, and, when Mrs. Schuyler died, her own individual right of privacy, whatever it may have been, expired at the same time. The right which survived (however extensive or limited) was a right pertaining to the living only. It is the right of privacy of the living which it is sought to enforce here. That right may, in some cases, be itself violated by improperly interfering with the character or memory of a deceased relative, but it is the right of the living and not that of the dead which is recognized. A privilege may be given the surviving relatives of a deceased person to protect his memory, but the privilege exists for the benefit of the living, to protect their feelings and to prevent a violation of their own rights in the character and memory of the deceased.

A woman like Mrs. Schuyler may very well in her lifetime have been most strongly averse to any public notice, even if it were of a most flattering nature, regarding her own works or position.

She may have been (and the evidence tends most strongly to show that she was) of so modest and retiring a nature that any publicity, during her life, would have been to her most extremely disagreeable and obnoxious. All these feelings died with her. It is wholly incredible that any individual could dwell with feelings of distress or anguish upon the thought that, after his death, those whose welfare he had toiled for in life would inaugurate a project to erect a statue in token of their appreciation of his efforts and in honor of his memory. This applies as well to the most refined and retiring woman as to a public man. It is, therefore, impossible to credit the existence of any real mental injury or distress to a surviving relative grounded upon the ⁴⁴⁸ idea that the action proposed in honor of his ancestor would have been disagreeable to that ancestor during his life.

We cannot assent to the proposition that one situated as the plaintiff in this case can properly enjoin such action as the defendants propose on the ground that as mere matter of fact his feelings would be thereby injured. We hold that in this class of cases there must in addition be some reasonable and plausible ground for the existence of this mental distress and injury. It must not be the creation of mere caprice nor of pure fancy, nor the result of a supersensitive and morbid mental organization, dwelling with undue emphasis upon the exclusive and sacred character of this right of privacy. Such a class of mind might regard the right as interfered with and violated by the least reference even of a complimentary nature to some illustrious ancestor without first seeking for and obtaining the consent of his descendants. Feelings that are thus easily and unnaturally injured and distressed under such circumstances are much too sensitive to be recognized by any purely earthly tribunal. A proposed act which a court will enjoin because it would be a violation of a legal right must, among other conditions, be of such a nature as a reasonable man can see might and probably would, cause mental distress and injury to anyone possessed of ordinary feeling and intelligence, situated in like circumstances as the complainant, and this question must always, to some extent, be one of law.

If the circumstances be such that it is to a court inconceivable that the feelings of any sane and reasonable person could be injured by the proposed act, then it is the duty of the court to say so and to refuse an injunction which would prevent its performance.

If the defendants had projected such a work in the lifetime of

Mrs. Schuyler, it would, perhaps, have been a violation of her individual right of privacy, because it might be contended that she had never occupied such a position towards the public as would have authorized such action by anyone, so long as it was in opposition to her wishes. The fact that Mrs. Schuyler ⁴⁴⁹ is dead alters the case, and the plaintiff and other relatives must show some right of their own violated, and that proof is not made by evidence that the proposed action of the defendants would have caused Mrs. Schuyler pain if she were living. A shy, sensitive, retiring woman might naturally be extremely reluctant to have her praises sounded, or even appropriate honors accorded her, while living, and the same woman might, upon good grounds, believe with entire complacency and satisfaction that after her death a proposition would be made and carried out by her admirers to do honor to her memory by the erection of a statue or some other memorial.

For these reasons, we are of the opinion that, regarding the facts thus far discussed, it was not necessary for the defendants to procure the consent of the plaintiff or other immediate relatives of the deceased. We think that so long as the real and honest purpose is to do honor to the memory of one who is deceased, and such purpose is to be carried out in an appropriate and orderly manner, by reputable individuals and for worthy ends, the consent of the descendants of such deceased person is not necessary, and they have no right to prevent, for their own personal gratification, any action of the nature described.

The third ground of objection is based upon a claim made in the circulars issued by defendants that Mrs. Schuyler was the founder of the Mt. Vernon Association, while in truth she was connected with it only as a vice-regent from this state. There is no assertion that this error of fact was intentional, and there could obviously be no motive on the part of the defendants to make any undue or ill-founded claim on behalf of their subject. A single line calling their attention to the fact would undoubtedly have caused an immediate rectification of the mistake, and, of course, the removal of any foundation for the slightest adverse comment from any source as to the conduct of the surviving members of this family in permitting such a claim to have been made on behalf of one of its deceased members.

This mistaken statement of the position of Mrs. Schuyler in ⁴⁵⁰ regard to the Mt. Vernon Association contained in the circulars is the only ground for adverse comment in the newspapers, or for the disagreeable notoriety complained of by the plaintiff.

If corrected, all ground of complaint of that nature would disappear. If not corrected upon application, the plaintiff would probably not be without a remedy which would prevent the circulation of such an untruth.

The fourth ground of objection has already been disposed of in treating of the second. The feelings of the deceased, if she were alive and confronted with such a proposition to do honor to herself, have no place in this action, which is founded upon the alleged violation of the plaintiff's own right of privacy.

The fifth ground is an equally vague and shadowy one. Whether Mrs. Schuyler sympathized with the work or the views of Miss Anthony we must say seems to us utterly foreign to the subject. There was no proposition looking towards the placing the statues of these two ladies together as representatives of the same ideas, or as in any way, even the remotest, united in the same works, or in inculcating the same principles in regard to the rights of women. The objection seems to rest wholly upon the proposition that these two proposed statues were to be exhibited in the same room of a building in the Chicago fair grounds—one as the representative of a class of women philanthropists and the other as the representative of a class of women reformers. The placing of the statues in the same room for exhibition by the same association does not, in our view tend in the slightest degree to confuse the identity of Mrs. Schuyler, or to lead in any way to the supposition that she was in sympathy with or believed in the correctness of the principles which have been advocated by Miss Anthony.

The fact, if it be a fact, that Mrs. Schuyler did not sympathize with what is termed the "Woman's Rights" movement is of no importance here. The proposed placing of the two statues would, if carried out, have had no tendency to show that Mrs. Schuyler did so sympathize. Many of us may, and ⁴⁵¹ probably do, totally disagree with these advanced views of Miss Anthony in regard to the proper sphere of women, and yet it is impossible to deny to her the possession of many of the ennobling qualities which tend to the making of great lives. She has given the most unselfish devotion of a long life to what she has considered would tend most for the benefit and practical improvement of her sex, and she has thus lived almost literally in the face of the whole world, and during that period there has never been a single shadow of any dark or ugly fact connected with her or her way of life to dim the lustre of her achievements and of her efforts. Although we may utterly fail to sympathize with these efforts or achievements, it

is plain enough that no one will have reasonable ground for objection to the placing of a bust of his or her own ancestor in the same room with the bust of such a woman and under such circumstances as were originally contemplated by these defendants. This ground of objection, however, time has itself rendered valueless.

One other ground has been argued before us upon which to sustain this injunction. It was urged that the proposed statue would be a fraud upon the public, because there was no portrait, likeness, or statue of Mrs. Schuyler accessible to defendants from which any possible likeness of the deceased could be secured. The idea of an actual likeness was early abandoned, and it was stated that the statue would be an ideal one and not a likeness. The court below has not found any fraud, and we are not of the opinion that any was shown.

While not assuming to decide what this right of privacy is in all cases, we are quite clear that such right would not be violated by the proposed action of the defendants. The plaintiff's cause of action is, we think, wholly fanciful. The defendants' contemplated action is not such as might be regarded by reasonable and healthy minds as in the slightest degree distressing or tending in the least to any injury to those feelings of respect and tenderness for the memory of the dead which most of us possess, and which ought to be considered as a proper subject of recognition and protection by civilized courts.

⁴⁵² It is, perhaps, needless, yet we will add that our decision furnishes, as we think, not the slightest occasion for the belief that under it the feelings of relatives or friends may be outraged, or the memory of a deceased person degraded with impunity by any person who may thus desire to affect the living. The rights of such persons will remain the same after as they were before our present decision, and will be wholly unaffected by it. We simply say that in this case the defendants have proposed to do nothing which ought to affect unpleasantly the mental condition of any sound, reasonable, and intelligent man or woman, and, therefore, an injunction ought to have been refused.

We have looked at the question of the appealability of the judgment, and are of the opinion that the court has jurisdiction. Nor do we think that the question is now merely an abstract one because of the fact that it was the intention of the defendants in causing the statue to be made to place the same on exhibition in one of the buildings at the Chicago exposition, now past and gone. That was only one of the purposes of the defendants.

They intended to retain the statue after the exhibition and bring it back to New York and place it in the studio of the Ladies Art Association, a place which, so far as the evidence shows, is appropriate for the purpose. This intention is not illegal and might be properly carried out but for this injunction.

Upon the whole, we are of the opinion that the plaintiff has made a mistake in his choice of this case as an appropriate one in which to ask for the enforcement of the right of privacy.

The judgment must be reversed as to the parties appealing and the complaint dismissed as to them, with costs.

All concur with Peckham, J. for reversal, except Gray, J., who reads for affirmance.

THE PRINCIPAL CASE seems to be the only one of its kind on record, and the decision of the court below authorizing an injunction against the erection of a statue is the only one cited on that point by the standard authors on injunctions.

ARMSTRONG v. LAKE CHAMPLAIN GRANITE COMPANY.

[147 NEW YORK, 496.]

DEFINITIONS.—THE WORD "ORE" SIGNIFIES a compound of metal and other substances.

MINES AND MINING.—GRANITE IS NOT A MINERAL ORE, and does not pass under a conveyance of "mineral ores."

MINES AND MINING—CONVEYANCE OF MINERALS.—If one deed conveys the "mineral ores" in a certain lot, and a second deed conveys the "minerals and ores" therein, the necessary inference from a comparison of the two deeds is that the latter deed was intended to convey rights not included in the prior grant.

DEEDS—EXTRINSIC EVIDENCE.—THE WORDS OF A DEED, unambiguous in themselves, cannot be controlled by proof that the parties used them with a definite and limited meaning, for the purpose of that particular instrument.

DEEDS—INTERPRETATION.—THE WORDS "MINERALS AND ORES," in a deed, cannot be controlled, in an action to determine the rights of the parties under the instrument as written, by evidence of the grantee's purpose in acquiring the property, or of his statements, made contemporaneously with the deed, that he had purchased the iron ore on the premises.

DEEDS—USAGE OF WORD "MINERALS."—IN A CONVEYANCE of mineral lands, the legal meaning of the word "minerals" cannot be changed by evidence that the word is understood in the locality, or "about there," to mean iron ores, without proof of any transaction based upon such usage, or that such usage was known to either of the parties.

MINES AND MINING.—CUSTOM IN A MINING CASE must be collected, not from what witnesses say they think the custom is, but from what is publicly done throughout the district.

MINES AND MINING—MEANING OF “MINERALS.”—The word “minerals” within a grant or reservation of mines and minerals includes not only metals and metal-bearing rock, but anything mineral in character which can be got by mining, and this would embrace granite.

DEEDS—MINES AND MINING—CONVEYANCE OF GRANITE.—The term “minerals and ores,” standing alone in a deed conveying “all the minerals and ores” on certain premises, includes the granite thereon.

DEEDS—MINES AND MINING—CONVEYANCE OF GRANITE.—If the words “minerals and ores,” in a deed purporting to convey “all the minerals and ores” on certain premises do not stand alone, but are connected with a context clearly indicating that the parties had in view only such minerals as are to be got by mining in the ordinary sense of that term, that is, by underground and not by open workings, granite on the premises does not pass, as it is not obtained by underground working. Hence, granite is not included in a grant of all the “minerals and ores [on premises] with the right to mine and remove the same; the right to sink shafts and sufficient surface to erect suitable buildings for machinery and other buildings necessary and usual in mining and raising ores; also the right of ingress and egress for mining purposes, and to make explorations for minerals and ores.”

Action to restrain the defendant granite company from quarrying granite on certain premises. There was a judgment in favor of the defendant, dismissing the complaint upon the merits, after a trial, and the plaintiff appealed.

Richard L. Hand, for the appellant.

Chester B. McLaughlin, for the respondent.

499 ANDREWS, C. J. This action was brought to restrain the defendants from quarrying granite upon lot 27, Split Rock tract, in Essex county. Both parties claim title to the granite. The plaintiff claims under two deeds from Philip S. **500 Baldwin**, the common source of title, to John Bridgford and others, one dated March 30, 1871, and the other May 18, 1871. By the first deed, which recites a consideration of eight hundred dollars, Baldwin conveyed to the grantees “all the mineral ores [on the tract], together with all needed ways and privileges for mining and raising and removing said mineral ores, excepting and reserving such mineral ores as were originally reserved by the state of New York, and reserving all other rights and interests in said lands save said mineral ores and the right to raise and remove the same.” By the second deed, which makes no reference to the first deed, but which recites the same money consideration, the grantor conveyed “all the mineral and ores [on the same premises], with the right to mine and remove the same; also, the right to sink shafts and sufficient surface to erect suitable buildings for machinery and other buildings necessary and usual in

mining and raising ores; also the right of ingress and egress for mining purposes, and to make explorations for minerals and ores, saving reservations to the state of New York." In June, 1890, the plaintiff, by conveyance to him, acquired the right vested in the original grantees of Baldwin under the deeds mentioned. In March, 1889, the defendant, as grantee of a prior corporation in which through mesne conveyances the title to the lands remaining in Baldwin after the conveyance to Bridgford and others in 1871 was vested, acquired such title. Before the conveyance to the defendant, and about the year 1880, a vein of granite three hundred to four hundred feet in width had been discovered on the premises. The land was thickly wooded and the granite discovered was overlaid by soil from four to six feet deep. Prior to the defendant's purchase, the vein had been uncovered to some extent, and some work had been done by the defendant's grantors in getting out granite for market. The defendant took immediate possession of the premises under its deed, and commenced active operations in developing the granite, and up to June, 1890, when the plaintiff acquired his alleged title, the defendant had expended, in opening the ⁵⁰¹ quarry, erecting buildings and machinery, and in necessary work for conducting the business, the sum of about thirty-five thousand dollars.

The determination of the controversy in this case depends upon the interpretation of the second deed from Baldwin to Bridgford and others of May 18, 1871. Under the deed of March 30, 1871, which conveyed only the "mineral ores" on the lot, it is plain that the granite did not pass. The word "ore" has a definite signification, and designates a compound of metal and other substance. Granite, neither in a popular or scientific sense, is a mineral ore. The second deed conveys the "minerals and ores," and also amplifies by words, if not in law, the mining privileges and the right to use the surface given by the first deed. There is no explanation of the circumstances which led to the giving of the second deed. There is nothing to show that it did not express the real intention of the parties. We think the necessary inference from the comparison of the two deeds is, that the second was intended to convey rights not included in the prior grant, and that the words "minerals and ores" cannot be cut down to the same meaning as "mineral ores" in the first deed, upon any theory that no new consideration was given for the second deed, or that the whole purpose of the second deed was to define more clearly than was done by the first deed the incidental mining privileges intended to be granted, and not to enlarge

the grant as to the kind of minerals granted. If the first deed has any importance in the case, it strengthens, rather than weakens, the position of the plaintiff.

The whole question, as above intimated, turns on the interpretation of the words "minerals and ores" in the second deed. In view of the conclusion we have reached, and to avoid possible misconceptions in the future, it is proper to state that in our opinion the evidence given and admitted on behalf of the defendant under objection by the plaintiff, that the purpose of Bridgford and his cograntees in securing the deeds of 1871 was to acquire the iron ore then supposed to exist on the premises, and of their statements, contemporaneously ⁵⁰² with the purchase, that they had purchased the iron ore on the lot, was incompetent to explain or confine the meaning of the words "minerals and ores" in the deed of May 18, 1871. The evidence would have been incompetent if it had related to the motives of the parties to the deed sought to be established by the oral statements or negotiations between them prior to or contemporaneous with its execution. The words of a deed, unambiguous in themselves, cannot be controlled by proof that the parties used them with a definite and limited meaning, for the purpose of that particular instrument. Such proof might, under some circumstances, be competent in an action between the parties to reform the instrument, but not in determining the rights of the parties under the instrument as written. The incompetency of the evidence received as to the motives of the original grantees and of their statements as to what they intended to purchase or had purchased is still more manifest in view of the fact that they were disclosed and the statements made to third parties not connected with the sale: See *Voorhees v. Burchard*, 55 N. Y. 98. The defendants were also permitted, under objection, to give evidence of witnesses who lived or had owned property in the Champlain valley, that the word "minerals" was understood "about there" to mean iron ores. It is unnecessary to determine in this case whether the usage or understanding in a particular district of the meaning of words used in a deed of mining property, which limits and controls their general meaning, is admissible for the purpose of fixing rights thereunder. It is sufficient to say that the evidence offered and received upon that subject in this case only went to the extent of showing that certain persons understood that the term "minerals," when used, did not include granite, but ores containing metals. The evidence was quite insufficient to establish a settled and recognized usage

which shall override the legal meaning of the word. It was not shown that any transaction had taken place based upon the alleged usage, or that such usage was known to either of the parties to the deeds of 1871. In a mining case (*Tucker v. Linger*, L. R. 21 Ch. Div. 18), Jessel, M. R., speaking of a custom relied upon in that case, said: "The custom must be collected, not from what witnesses say they think the custom is, but from what was publicly done throughout the district": See *Midland Ry. Co. v. Robinson*, L. R. 37 Ch. Div. 386, and remarks of the vice-chancellor in *Darvill v. Roper*, 3 Drew. 301.

Putting aside, therefore, the extraneous evidence received upon the construction of the words "minerals and ores" in the deed of 1871, the questions arise: 1. Whether, under a grant of "minerals," on specified premises, granite is included in the absence of limiting words; and 2. Whether, if comprehended in the general term, it is excluded from the deed of May 18, 1871, by reason of the context in connection with the fact that it can only be got by quarrying. It is plain that an owner of land who grants the minerals to another does not use the word as synonymous with mineral substances, because, if this meaning was attached to the grant, it would amount to a grant of the whole land, as the soil and all below it would be embraced in that description. The question of what are minerals within a grant or reservation of mines and minerals has been frequently considered by the English courts, and the almost uniform conclusion has been that the word includes not only metals and metal bearing rock, but anything mineral in character which can be got by mining. In one of the cases (*Earl of Rosse v. Wainman*, 14 Mees. & W. 859), which was affirmed (*Earl of Rosse v. Wainman*, 2 Ex. 800), the question arose under a reservation to the lord of the manor, in an inclosure act, of "all mines and minerals" lying within or under the common or waste lands inclosed by the act, and it was held that beds of building stone were within the reservation. Parke, B., in his opinion, said: "The term 'minerals' here used, though more frequently applied to substances containing metals, in its proper sense includes all fossil bodies or matters dug out of mines." In *Bell v. Wilson*, 1 Ch. App. 303, under a conveyance of land reserving to the grantor "all mines or seams of coal and other mines, metals or minerals," it was held that the reservation included freestone. *Hext v. Gill*, L. R. 7 Ch. App. 699, is⁵⁰⁴ an important case on the subject, because Mellish, L. J., in his opinion formulates as the result of the adjudged cases the principle upon which the cases proceed, and which has been followed and

applied in several subsequent cases. That was a case of a reservation in a private grant by the lord of a manor of "all mines and minerals within or under the premises," and the question was whether beds of china clay, the product of the disintegration of granite, not known to exist in the land at the time of the grant, were embraced within the reservation, and the court decided that they were. Mellish, L. J., said: "The result of the authorities, without going through them, appears to be this, that a reservation of 'minerals' includes every substance that can be got from underneath the surface of the earth, for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the court to give it a more limited meaning." The same principle was expressed in another form by Bowen, L. J., in the case of *Earl of Jersey v. Guardians*, L. R. 22 Q. B. Div. 555, following the case of *Hext v. Gill*, L. R. 7 Ch. App. 699, in which he said that the word applies to all substances of a mineral nature which have "a use or value of their own, independent of their being constituents of the soil." The question in that case was whether, under a reservation in an ordinary grant of "all mines of coal, culm, iron, and all other mines and minerals whatever, except stone quarries within and under," etc., brick, earth, and clay were reserved, and it was held that they were. Lord Romilly in *Midland Ry. Co. v. Checkley*, L. R. 4 Eq. Cas. 19, construing a reservation in an act for the compulsory taking of land for canals, of "all mines and minerals within and under the land," in which the question was whether the right to quarry paving stones was reserved, said: "Stone is, in my opinion, clearly a mineral, and, in fact, everything, except the mere surface which is used for agricultural purposes; anything beyond that which is useful for any purpose whatever, whether it is granite, marble, fire clay, or the like, comes within the word 'mineral,' when there is a reservation of the mines and ⁵⁰⁵ minerals from a grant of land. Every species of stone, whether marble, limestone, or ironstone comes in my opinion in the same category." We shall refer only to another English case, the latest on the subject (*Attorney General v. Welsh Granite Co.*, 35 Week. Rep. 617), decided in 1887, which held that granite was a mineral within a reservation of "mines and minerals." There are but a few American cases which we have found bearing on the subject. In *Moore v. Brown*, 16 N. Y. Supp. 592, 139 N. Y. 127, it was assumed, both in the supreme court and in this court, that garnet discovered in Essex county on state lands was a "valuable mine or mineral," and subject to a

claim under chapter 411 of the laws of 1890. In *Hartwell v. Camman*, 10 N. J. Eq. 128, 64 Am. Dec. 448, it was held that "paint stone," useful for grinding into paint, procured by mining passed to the grantee of "mines and minerals," although its existence was not known at the time of the grant, but copper mining had before the grant been to some extent prosecuted on the premises.

Upon the authorities we think we should not be justified in holding that granite was not embraced in a reservation or grant of "minerals" in the absence of qualification. It is no doubt true that this word in its more common application in a grant of "minerals" would be deemed to refer to metallic substances. This, perhaps, grows out of the fact that mining is to a great extent prosecuted for the purpose of obtaining gold, silver, iron, and other metals, and grants of "minerals" or reservations thereof in conveyances of public lands are most frequently made with reference to mineral bearing ores or deposits. But it would be an unwarrantable limitation of such a grant or reservation to exclude from its operation beds of coal or other nonmetallic mineral deposits of commercial value, or to confine it to such minerals as were known or supposed to be on the premises at the time. The grant or reservation of minerals in a deed contemplates substances to be severed and taken away from the premises, and it is difficult to suppose that the parties to such a deed intended to exclude from the grant any description of valuable mineral which ~~was~~ would come within the legal meaning of the word, which might thereafter be discovered. We are of opinion, therefore, that the words "minerals and ores," in the grant of 1871, standing alone, would include the granite upon the premises.

But these words do not stand alone, but are connected with a context which clearly indicates, in our judgment, that the parties had in view only such minerals as are to be got by mining in the ordinary sense of that term; that is, by underground, and not by open, workings. The grantor, Baldwin, owned the fee of the land. He did not part with his general title to the surface, but he granted special rights therein, for the purpose of effecting the grant of the "minerals and ores." He accompanied these words with a specification of the rights granted, that is to say, rights essential to and connected with usual mining operations, and in respect to the surface he granted "sufficient land to erect suitable buildings for machinery and other buildings necessary and usual in mining and raising ores." The evidence is, and the fact would

be sufficiently manifest in the absence of affirmative proof, that granite can only be obtained by open quarrying, to the destruction of the surface so far as the granite may be uncovered. We think the reasonable construction of the grant limits the rights of the grantee to minerals obtained by underground working, and as granite is not so obtained it did not pass under the conveyance of 1871. The principle of construction is stated by Turner, L. J., in a case already referred to, speaking of the question whether freestone was a mineral and included in the reservation in that case. He said it must be deemed included, unless "either that the freestone is not a mineral, or that, being a mineral, the nature or context of the deed shows that it was not intended to be included." The context of the deed here furnishes, we think, the evidence that granite was not intended to be included. It may be that if we followed some English cases the conclusion would be that the granite did pass, but that it could not be taken by open quarrying: *Bell v. Wilson*, 1 Ch. App. 303; *Hext v. Gill*, L. R. 7 Ch. App. 699. Instead of recognizing this barren right, we prefer ⁵⁰⁷ to place our judgment on the ground that under this grant no title to the granite passed at all.

We have been referred to several English cases where the right of open quarrying has been held to accompany a grant or reservation of mines and minerals. The cases generally have arisen on the construction of reservations contained in acts of Parliament of rights to landowners whose land has been compulsorily taken for public purposes or by public authority. In every case which has come to our attention involving the right of open quarrying, it has been sustained upon some special language in the act which indicated that the right of open quarrying was intended to be reserved: See *Midland Ry. Co. v. Checkley*, L. R. 4 Eq. Cas. 19; *Midland Ry. Co. v. Robinson*, 15 App. Cas. 19; 37 Ch. Div. 386; *Attorney General v. Welsh Granite Co.*, 35 Week. Rep. 617; *Earl of Rosse v. Wainman*, 14 Mees. & W. 859. In *Midland Ry. Co. v. Robinson*, 15 App. Cas. 27, Lord Herschell said: "In such agreements, in the absence of a distinct indication of the contrary intention, it is always to be assumed that the reserved mines are only to be worked in such manner as is consistent with the surface remaining undisturbed. And if this be true of minerals lying deep below the surface, it would be obviously out of question to permit it to be disturbed by winning minerals which can only be wrought by surface operations."

For the reasons herein stated the judgment below should be affirmed.

All concur.

Judgment affirmed.

MINES, MINERALS, AND CONVEYANCES—USAGE.—The term “minerals” in a grant includes *prima facie* every substance that can be got underneath the surface of the earth for profit. If the terms “mines and minerals” are used in a grant or exception, the word “mines” will not, *prima facie*, be held to be the governing word, so as to restrict the meaning which would otherwise be attached to the word “minerals.” The term “minerals” includes china clay, and the words “mines and minerals” in a grant will pass *paint* stone obtained by the ordinary means of mining, and found below the surface of the soil, and in strata distinct from the ordinary earth: See monographic note to *Lillibridge v. Lackawanna Coal Co.*, 24 Am. St. Rep. 555, on grants of minerals reserving the land, or of lands reserving the minerals, and the rights of the parties thereto. Minerals beneath the surface of land may be conveyed by deed distinct from the right to the surface: *Caldwell v. Fulton*, 31 Pa. St. 475; 72 Am. Dec. 760; *Lillibridge v. Lackawanna Coal Co.*, 24 Am. St. Rep. 544. Stone is a mineral: *Johnston v. Harrington*, 5 Wash. 73, 78. For differences of opinion, however, as to stone being a mineral, see note to *Dunham v. Kirkpatrick*, 47 Am. Rep. 698. An express grant of all minerals in land carries by necessary implication the right to open and work the mines, and to occupy so much of the surface as may be reasonably necessary for such purpose, but the owner of minerals and mining rights cannot so use his own as to unreasonably injure the owner of the surface or soil: *Williams v. Gibson*, 84 Ala. 228; 5 Am. St. Rep. 368; note to *Lillibridge v. Lackawanna Coal Co.*, 24 Am. St. Rep. 555. It sometimes becomes necessary to construe two separate deeds together in order to ascertain the true intention of the parties: *Moore v. Fletcher*, 16 Me. 63; 33 Am. Dec. 633; *Knight v. Dyer*, 57 Me. 174; 99 Am. Dec. 765. A custom or usage, to be admissible in evidence, must be proved to be known to the parties, or to be so general and well established that knowledge and adoption of it may be presumed, and it must be certain and uniform: *Baltimore Baseball Club v. Pickett*, 78 Md. 375; 44 Am. St. Rep. 304; *Southwestern Freight etc. Co. v. Standard*, 44 Mo. 71; 100 Am. Dec. 255. Mere opinions of individuals will not establish a custom or usage: *Marine Nat. Bank v. National City Bank*, 59 N. Y. 67; 17 Am. Rep. 205; *Southwestern Freight etc. Co. v. Standard*, 44 Mo. 71; 100 Am. Dec. 255; *Horan v. Strachan*, 86 Ga. 408; 22 Am. St. Rep. 471. A custom or usage inconsistent with a contract cannot be given in evidence to contradict it: *Baltimore Baseball Club v. Pickett*, 78 Md. 375; 44 Am. St. Rep. 304; *Boardman v. Spooner*, 13 Allen, 353; 90 Am. Dec. 196. Evidence of a usage is inadmissible to explain the language of a deed not ambiguous or equivocal: *Cortelyou v. Van Brundt*, 2 Johns. 357; 8 Am. Dec. 439.

NATIONAL BANK OF AUBURN v. DILLINGHAM.

[147 NEW YORK, 603.]

CORPORATIONS—PERSONAL LIABILITY OF TRUSTEES AND REMEDY TO ENFORCE IT.—A statute providing that the directors of a stock corporation creating, or consenting to the creation of, any debt of the corporation, unsecured by mortgage, in excess of its paid-up capital stock, "shall be personally liable therefor to the creditors of the corporation," imposes a liability upon the trustees, creating or assenting to debts in excess of the capital, to the extent of such excess, not for the benefit of any particular creditor, but for the benefit of all. This liability is, however, secondary, and can be resorted to only after the usual remedies against the corporation have been exhausted. It follows that it must be enforced in equity in a suit where all the creditors and the corporation itself are parties, or represented, where an accounting can be had, all the facts ascertained, and the equities adjusted.

CORPORATIONS—PERSONAL LIABILITY OF TRUSTEES.—An action at law by a single creditor to recover his own debt as a primary liability of the trustees cannot be maintained against the trustees of a stock corporation, who have disregarded a statute forbidding the creation of debts in excess of capital stock.

Action upon certain promissory notes. A demurrer to the complaint was overruled.

Nelson S. Spencer, for the appellant.

Charles I. Avery, for the respondent.

⁶⁰⁶ O'BRIEN, J. This action was brought to recover upon four promissory notes, aggregating twenty thousand dollars, made by the Auburn Woolen Company, a manufacturing corporation created under the act of 1848. The plaintiff brings the action in its own ⁶⁰⁷ behalf against the defendants, who are the trustees of the corporation, and who, it is claimed, are liable in an action at law for the amount of the notes, upon the ground that, before any of them were made, other debts had been created by the corporation which equaled and exceeded the amount of its paid-up capital stock, and that the trustees, by assenting to the making of the notes in this action, became liable under the statute to the plaintiff for the amount and interest. The corporation itself is not made a party, nor is it alleged that any judgment has been obtained against it on the notes, or any suit commenced for that purpose, or that it is insolvent, or that any proceedings for dissolution had been commenced. One of the defendants demurred to the complaint on the grounds, among others: 1. That there is a defect of parties, in that the other creditors of the company, and the company itself, are not parties to the action; and 2. That the complaint does not state facts sufficient to con-

stitute a cause of action. The courts below have overruled the demurrer and held that the action was well brought. On the argument in this court, the learned counsel for the plaintiff has insisted upon some technical objections to the consideration of the questions decided, based mainly upon the contention that the necessary facts do not appear upon the face of the complaint to enable the defendant to raise the questions by demurrer. The courts below disposed of the case upon the merits, and we think that the complaint was sufficiently comprehensive to enable the defendant to present all the questions by demurrer. The plaintiff's contention is that each creditor of such a corporation who holds a debt, created by the trustees or with their assent, in excess of the paid-up capital stock, may maintain actions at law against the trustees to recover such debt without any recourse to the corporation itself and without reference to any other creditor. The original statute which authorized the creation of this class of corporations imposed a liability upon the trustees in case they assented to the contracting of debts in excess of the paid-up capital stock, as will ⁶⁰⁸ be seen from the following provision: "If the indebtedness of any such company shall at any time exceed the amount of its capital stock, the trustees of such company assenting thereto shall be personally and individually liable for such excess to the creditors of the company": Laws 1848, c. 40, sec. 23.

In the recent revision of the statute, now known as the "stock corporation law" (Laws 1890, c. 564, as amended by Laws 1892, c. 688), this provision was repealed and the following section, upon which this action has been brought, was substituted in its place:

"Sec. 24. No stock corporation, except a moneyed corporation, shall create any debt, if thereby its total indebtedness not secured by mortgage shall exceed the amount of its paid-up capital stock, and the directors creating or consenting to the creation of any such debt shall be personally liable therefor to the creditors of the corporation. If bonds or other obligations of the corporation, secured by mortgage, are issued in excess of the amount authorized by law, or in violation of law, the directors voting for such overissue, or unlawful issue, shall be personally liable to the holders of the bonds, or other obligations illegally issued, for the amount held by them, and to all persons sustaining damage by such illegal issues for any damage caused thereby."

The demurrer in this case raises the question as to the true

construction of this section, the nature and extent of the liability, the proper procedure for enforcing it, and the necessary parties to such an action. It is a fundamental proposition in the plaintiff's contention that the liability is primary and contractual, and that an action may be maintained to enforce it in the same manner as if the trustees themselves owed the debt to the creditor. It is contended that the liability is the same as that of stockholders for debts created before the capital stock is paid in. It should be observed that the liability in that case is treated as that of partners, and that the statute continues and preserves that liability, notwithstanding ~~the~~ the creation of the corporation, until the capital stock is paid in. That is the theory upon which primary liability in that class of cases rests: *Corning v. McCullough*, 1 N. Y. 47; 49 Am. Dec. 287; *Rogers v. Decker*, 131 N. Y. 490.

A different kind of liability, however, arises when the obligation of the members of the corporation is determined by the perfect creation of an artificial person, capable in law of acting and contracting for itself. Then the primary or common-law liability of persons associated together in some enterprise as partners is terminated, and the liability of the trustees rests wholly upon the statute which creates the liability, in the nature of a penalty, for disobedience to its commands. The neglect of the trustees to file the report required by the statute, or the making of a false report, illustrates the nature of this peculiar penal liability: *Gadsden v. Woodward*, 103 N. Y. 242; *Wiles v. Suydam*, 64 N. Y. 173; *Merchants' Bank v. Bliss*, 35 N. Y. 412.

While it may not have all the characteristics of a penalty, as that term is commonly understood, yet the liability is a pure creation of the statute, has no foundation in contract nor any existence at common law: *Morawetz on Corporations*, sec. 908.

That is the nature of the defendant's liability in this case. The notes set out in the complaint are the debts of the corporation and not the debts of the trustees, though the latter are subjected to a certain limited liability in regard to them, for the reason that they have disregarded the statute which forbids the creation of debts in excess of capital stock. The possible liability of the trustees is measured by the excess of debts over and above capital stock, and, until the statutory limit is reached there is no liability whatever.

The most important question, however, is with respect to the parties who are entitled, in a proper case, to enforce this liability. The learned counsel for the plaintiff contends that the right of

action is given by the statute to creditors holding debts created in violation of its provisions, and to those alone. We think this is not the correct construction of the statute. The benefit of its provisions is given in terms to the "creditors ⁶¹⁰ of the corporation," and not to a part of them. The language includes all the creditors. Moreover, it cannot be supposed that the legislature intended to give to these words the restricted meaning which would confine the benefits of the statute to such creditors only as held debts created in violation of the provisions. Such a result would give to the latest creditor practically a preference over the earlier ones, since it would give him two funds to resort to. He would, of course, have the right to resort to the corporation, whose obligation he held, and besides he would have the right to resort to the personal liability of the trustees. It was the intention to limit the amount of unsecured debts which such a corporation might contract to the amount of its paid-up capital stock. This limitation was intended for the security of all the creditors. The creation of debts in excess of the capital affects all the creditors alike. It diminishes the value of every creditor's claim upon the corporate assets. It has precisely the same effect upon the earlier as upon the later creditor, and it would be manifestly unjust to confine the benefits of the penalty which the law imposes for disobedience of the statute to a few whose debts were contracted later in point of time. When the statute requires the trustees, creating or assenting to debts in excess of capital, virtually to put back into the corporate treasury a sum equal to such excess in certain contingencies, all the creditors have in equity and justice an equal claim upon the fund. The rule that in such cases equality is equity would be violated by allowing the later creditors to absorb this fund to the prejudice of the earlier ones.

We think that the fair construction of the statute is, that it imposes a liability upon the trustees creating or assenting to debts in excess of the capital to the extent of such excess, not for the benefit of any particular creditor, but for the benefit of all, and their liability is, in equity, a fund to which all the creditors may resort for the satisfaction of such debts as the corporation itself fails to pay, to be shared in by all in proportion to the debt remaining unpaid. It follows that it must be enforced in equity in a suit where all the creditors ⁶¹¹ and the corporation itself are parties, or represented, where an accounting can be had, all the facts ascertained, and the equities adjusted.

The liability is secondary, to be resorted to only after the usual remedies against the corporation itself have been exhausted. While there is no express direction to that effect in the statute, it is the general rule that it is to be implied from the nature of the liability (Morawetz on Corporations, sec. 883), in the absence of some provision clearly importing the contrary. This principle is clearly deducible from the cases in this court of which the case of *People v. Coleman*, 133 N. Y. 279, is an example, where the court said: "It is an essential and inherent characteristic of a corporation that it alone is primarily liable for its debts because it alone contracts them, except as that natural and necessary consequence of its creation is modified in the act of its creation by some explicit command of the statute which either imposes an express liability upon the corporators in the nature of a penalty, or affirmatively retains and preserves what would have been the common-law liability of the members from the destruction involved in the corporate creation. . . . The retained liability occasionally established is in the nature and a parcel of such original liability, as we had occasion to show in *Rogers v. Decker*, 131 N. Y. 490, but is retained by force of the express command of the statute, and in that manner saved from the destruction which otherwise would follow the simple creation of the corporation. Ordinarily, these individual liabilities exist upon other than common-law conditions, and make the corporators rather sureties or guarantors of the corporation than original debtors, since, in general, their liability arises after the usual remedies against the corporation have been exhausted."

In other cases it has been said that this immunity of the members of the corporation from personal liability, until all remedies against the corporation have been exhausted, is founded in reason and justice, and a very clear indication of a legislative intent to disregard it must be found before ⁶¹² the liability is held to be primary: *Hirshfeld v. Bopp*, 145 N. Y. 84; *Hardman v. Sage*, 124 N. Y. 25; *Huntington v. Attrill*, 146 U. S. 657.

The general policy of the law in this respect is expressed in the fifty-fifth section of the stock corporation law, which provides that no action shall be brought against a stockholder for any corporate debt until judgment has been obtained against the corporation and an execution returned unsatisfied. The directors are, of course, stockholders, and it is reasonable to assume that it was not intended to charge them with personal liability on any other conditions than apply to all the members of the corpora-

tion: 3 Thompson on Corporations, sec. 4327; *Handy v. Draper*, 89 N. Y. 334.

This view, with respect to the meaning of the statute and the manner of enforcing it, seems to us not only just and reasonable, but in accord with the great weight of authority. Statutes substantially identical have received construction in the supreme court, in the federal courts, and in the courts of sister states in accordance with the views herein expressed: *Honor v. Henning*, 93 U. S. 228; *Stone v. Chisolm*, 113 U. S. 302; *Merchants' Bank v. Stevenson*, 10 Gray, 233; *Anderson v. Speers*, 21 Hun, 568; *McClave v. Thompson*, 36 Hun, 365.

So far as the case of *Patterson v. Robinson*, 36 Hun, 622, 37 Hun, 341, sanctions the construction contended for by the plaintiff, it cannot be followed. With respect to that case it should, however, be observed that the reasoning of the learned judge is based largely upon the fact that the section of the manufacturing act which was under consideration, and which is quoted above, contained no prohibition upon the trustees against the creation of debts in excess of the capital stock. That is no longer true, since the section of the stock corporation law involved here does contain such a prohibition. That case was an appeal from a judgment against the trustees, and while it was affirmed, the decision was subsequently reconsidered on a reargument and a new trial granted upon other grounds, and ⁶¹³ when the case was in the second division of this court (*Patterson v. Robinson*, 116 N. Y. 193), it was disposed of on grounds that did not involve a construction of the statute. The complaint contains an allegation that, prior to the commencement of this action, the plaintiff was restrained by injunction from taking any proceedings against the corporation for the collection of the debt, but there are no allegations of fact which would enable us to say that the injunction was a valid legal obstacle in the way of a suit against the corporation, or that it was in force at the time this action was commenced. The bare fact that, at some time before this action had been commenced, an injunction was granted upon some ground or for some reason, as to which the complaint is silent, is not sufficient to excuse the omission to proceed against the corporation, the principal debtor. Aside from this point, however, the complaint would be defective in that it does not state the facts necessary in an action in equity for an accounting, and the proper parties are not before the court for that purpose. The allegations of the complaint and the prayer for relief determine the character of the action as one at law by a single creditor to recover its own

debt as a primary liability of the trustees. We think that such an action cannot be maintained, and that the demurrer should have been sustained.

The judgment of the general and special terms should be reversed, with costs, and the demurrer sustained, with leave to the plaintiff, within twenty days from the service of the order, to amend the complaint on payment of costs.

All concur.

Judgment accordingly.

CORPORATIONS—PERSONAL LIABILITY OF OFFICERS FOR INCURRING DEBTS IN EXCESS OF CAPITAL STOCK.—The creditors of a corporation whose officers have incurred indebtedness in excess of its capital stock cannot proceed against such officers until such creditors have first obtained judgment against the corporation. The liability of such officers is, like that of a surety, *stricti juris*, and does not attach so long as the debts can be made out of the corporation, and no action can be maintained against them until the corporation is in default: *Woolverton v. Taylor*, 132 Ill. 197; 22 Am. St. Rep. 521. It is not, however, a prerequisite to a bill in equity, by a single creditor, against officers for incurring excessive indebtedness that all of the debts be due: *Woolverton v. Taylor*, 132 Ill. 197; 22 Am. St. Rep. 521, showing that on a proper bill filed by a single creditor, the court has power to bring before it the corporation, all its officers who assented to the excessive indebtedness, as well as all its creditors, and ascertain the excess of the indebtedness over the capital stock, the amount of this to which each officer may have assented, and the extent to which the funds of the corporation may be resorted to for the payment of the debts, and also the number and names of the creditors, and the amount of their several debts, to determine the sum to be recovered of the officers and apportioned among the creditors. Statutes making the directors of a corporation liable for its debts in excess of the paid-up capital stock are penal in their nature and are to be strictly construed: See monographic note to *Hodges v. New England Screw Co.*, 53 Am. Dec. 651, discussing the relation between directors and corporation, its shareholders or creditors. Contra, *Woolverton v. Taylor*, 132 Ill. 197; 22 Am. St. Rep. 521. At any rate a clear case must be made out to enforce the liability. The prevailing doctrine is that the directors are trustees for the corporation and the shareholders, and also for the creditors of the corporation, so far as the capital stock and corporate assets are concerned; and the capital stock and assets of a corporation are regarded in equity as a trust fund for the payment of debts: Note to *Hodges v. New England Screw Co.*, 53 Am. Dec. 637, 650, 651.

CASES
IN THE
SUPREME COURT
OF
OHIO.

MOODY v. INSURANCE COMPANY.

[82 OHIO STATE, 12.]

INSURANCE—PRESUMPTION IN FAVOR OF ASSURED.—An unexpired policy of fire insurance, regularly issued and remaining uncanceled, is presumed to be valid. The insured is prima facie entitled to recover if a loss occurs and the steps necessary to establish it have been taken. The conditions precedent in such policy, performance of which plaintiff is required to plead, include only those affirmative acts necessary to perfect his right of action on the policy, such as giving notice and making proof of loss, furnishing the certificate of a magistrate, or other steps of like nature required by the terms of the policy.

INSURANCE—CONSTRUCTION OF POLICY.—Conditions usually contained in policies of insurance, providing that they shall be suspended, or the insurer relieved wholly or partially from liability, upon the happening of some event, or the doing or omission to do some act, are not conditions precedent, but matters of defense, which, together with their breach, must be pleaded and proved by the insurer.

INSURANCE—VACANT PREMISES.—To constitute occupancy of a dwelling-house within the meaning of a fire insurance policy, it need not be used continuously. The family may be absent for health, pleasure, business, or convenience for reasonable periods.

INSURANCE—VACANT PREMISES.—Conditions avoiding a policy of fire insurance because the premises become vacant or unoccupied should receive a strict construction, and, when ambiguous, be construed most strongly against the insurer.

INSURANCE — OCCUPANCY, WHAT CONSTITUTES. — A dwelling is not unoccupied, within the meaning of a fire insurance policy, merely because it has ceased to be used as a family residence, if household goods remain in it ready for use, and it continues to be occupied by one or more members of the family, or a tenant having access to the entire building for the purpose of caring for it, and it is cared for and some use made of it as a place of abode.

INSURANCE—VACANT PREMISES—INCREASE OF RISK. Under a statute regulating contracts of fire insurance, and providing "that, in the absence of any change increasing the risk without the consent of the insurer, and also of intentional fraud on the part of the

insured," the insurer shall be liable for the loss suffered and named in the policy, the insurer, to avoid liability for loss on the ground of a breach of a condition in the policy that he shall not be liable for "loss or damage in or on vacant or unoccupied buildings, unless consent for such vacancy or nonoccupancy be indorsed" on the policy, must allege and prove that such breach of condition has increased the risk, when there is no question of intentional fraud on the part of the insured.

INSURANCE—VACANT PREMISES.—The risk under a fire insurance policy is not necessarily, or *prima facie*, increased, by the property becoming vacant or unoccupied.

E. H. Fitch and F. R. Smith, for the plaintiff in error.

A. C. White, for the defendant in error.

¹⁷ WILLIAMS, J. 1. The policy of insurance upon which the plaintiff sought to recover in the action below provides, among its many conditions, that "no liability shall exist under this policy for loss or damage in or on vacant or unoccupied buildings, unless consent for such vacancy or nonoccupancy be indorsed hereon." The answer alleges that the house insured by the policy was burned while it was unoccupied; and, though that allegation was denied, the court required the plaintiff to take the burden of proving that the building was occupied. That action of the court is assigned for error, and presents the first question for consideration.

The court went upon the theory that the provision of the policy above quoted constitutes a condition precedent, the performance of which was put in issue by the denial of the averments of the petition. In an action on a policy of fire insurance, the plaintiff may plead generally, as was done in this case, the due performance of all the conditions precedent on his part, and, when the allegation is controverted, the burden is undoubtedly upon him to show such performance. But we do not understand the clause of the policy in question to be a condition of that kind. An unexpired policy of fire insurance, which has been regularly issued and remains uncanceled, must, in the absence of a showing to the contrary, be regarded as a valid and effective policy, upon which the assured is *prima facie* entitled to recover when the loss occurs and the steps necessary to establish it have been taken; and hence, the conditions precedent ¹⁸ in such a policy include only those affirmative acts on the part of the assured, the performance of which is necessary in order to perfect his right of action on the policy, such as giving notice and making proof of the loss, furnishing the certificate of a magistrate when required by the terms of the policy, and, it may be,

in some cases, other steps of a like nature. Those clauses, usually contained in policies of insurance, which provide that the policy shall become void, or its operation defeated or suspended, or the insurer relieved wholly or partially from liability, upon the happening of some event, or the doing, or omission to do, some act, are not, in any proper sense, conditions precedent. If they may be properly called conditions, they are conditions subsequent, and matters of defense, which, together with their breach, must be pleaded by the insurer to be available as a means of defeating a recovery on the policy; and the burden of establishing the defense, if controverted, is, of course, upon the party pleading it. This precise question has not heretofore received the consideration of this court, but it has been raised in other states under various clauses of insurance policies. In the case of *Lounsbury v. Protection Ins. Co.*, 8 Conn. 459, 21 Am. Dec. 686, the question was presented in an action on a policy of fire insurance, which provided "that the insurers would not be liable for loss or damage happening by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power; also, that if the building insured should be used, during the term of insurance, for any occupation, or for the purpose of storing therein any goods, denominated hazardous or extra-hazardous in the conditions annexed to the policy (unless otherwise specially ¹⁹ provided for), the policy should cease and have no effect." It was held these were not conditions precedent to the plaintiff's right of recovery, but were matters of defense to be taken advantage of by pleading. The court in that case say: "All these conditions, if such they may be called, are inserted in the policy by way of proviso, and not at all as conditions precedent. They are introduced for the benefit of the defendants, and they must be taken advantage of, if at all, by pleading." In *Newman v. Springfield etc. Ins. Co.*, 17 Minn. 123, it is held that: "Under a stipulation in a policy, that if the risk be increased by any means whatever within the control of the insured, the insurance shall be void, the assured is not to plead and prove affirmatively that it has not been thus increased, but if it has, it is a matter of defense to be alleged and proved by defendant." And in *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. 426, 59 Am. Dec. 192, Chief Justice Shaw lays down the rule in general terms, that if the insurers rely "either upon the falsity of a representation, or the failure to comply with an executory stipulation, it is upon them to prove it, and it is a question of fact for the jury in either aspect." The following among other cases hold the same doctrine: *Troy Fire*

Ins. Co. v. Carpenter, 4 Wis. 20; *Mueller v. Putnam Fire Ins. Co.*, 45 Mo. 84; *Insurance Co. v. Crunk*, 91 Tenn. 376; *Spencer v. Citizens' etc. Ins. Assn.*, 142 N. Y. 505; *American Fire Ins. Co. v. Sisk*, 9 Ind. App. 305.

Any other rule would be highly inconvenient, if not impracticable. The clause of the policy under which the defendant sought to be relieved from liability is but one of a great number of conditions, for the violation of any of which the insurer might also claim to be relieved; and if the issue raised by the denial that the plaintiff performed all the conditions precedent on his part imposed upon him the burden of proving there had been no violation of that particular clause, it also imposed upon him the burden of proving there was no breach of either of the other conditions, and, for want of such proof as to either, he must fail, although, in fact, neither was the subject of any real controversy. This would be an unreasonable requirement, not only operating as a hardship on the plaintiff, but in most cases unnecessarily prolonging the trial. Especially should the rule be as we have stated it, under our code system of pleading, a prominent object of which was to so simplify the issues that the evidence might be confined to the real matter of dispute, thus expediting the trial of causes and facilitating the business of the courts. The vacancy or want of occupancy of a building is as much an affirmative fact as its occupancy, and as capable of proof; and the burden upon that subject, under the issues in this case, was, we think, upon the defendant.

2. The court also erred in its direction to the jury. As we have seen, it was not incumbent upon the plaintiff to show the house was occupied, the burden being upon the defendant to prove that it was vacant and unoccupied. Beside, the evidence before the jury fairly tended to prove occupancy of the building within the meaning of the policy. It showed that the plaintiff, who was the owner of the property, occupied the building as a dwelling-house when the policy was issued, and until the following March, when he rented it and placed his tenant in possession, who continued ²¹ therein until the next spring. It was then let to another tenant who moved his household goods into it; and those used by his married daughter and son in law for housekeeping were also placed in the house. The goods were such as are generally used by a family for housekeeping. Members of both families occupied the house to a limited extent. They slept there occasionally, and did some work there, such as quilting. Some member of the family was there every day, sometimes

only once, but often twice a day, and the tenant and his family so used the property, had full control of it, and carefully watched and cared for it up to the time it was burned, though they usually slept and took their meals in a house near by, which belonged to the tenant.

What constitutes vacancy or nonoccupancy of a building is a question of law; but whether a building is vacant or unoccupied, or not, within the meaning of the law, is a question of fact for the jury. To constitute occupancy of a dwelling-house, it is not essential that it be continuously used by a family. The family may be absent from it for health, pleasure, business, or convenience, for reasonable periods, and the house will not, on that account, be considered as vacant or unoccupied. In the case of Imperial Fire Ins. Co. v. Kiernan, 83 Ky. 468, it is held: "That the condition in a policy on a house described 'as occupied as a family residence,' containing a condition that it shall become void if the house 'shall become vacant or unoccupied,' the words 'occupied as a family residence' must be regarded as but a representation as to the then use of the house, and the condition as but an undertaking by the insured that the house shall not be without an occupant during the time covered by the policy; ²³ and the condition is not broken or violated, or the policy become void, 'upon the house ceasing to be occupied' as a family residence, it continuing to be occupied by one person, who had access to the entire building for the purpose of caring for it." The same doctrine is declared in Richards on Insurance, section 56, and in May on Insurance, section 247, where the authorities on the subject are cited. No rule is better settled than that such conditions in policies should receive a strict construction, and, when ambiguous, be construed most strongly against the insurer, for the reason that they are prepared by, and inserted for the benefit of, the insurer.

The condition of the policy in the present case is not more specific or comprehensive in its requirements concerning the occupancy of the building insured than the one involved in the Kentucky case. It declares that no liability shall exist under the policy for loss or damage to an unoccupied building, but does not stipulate that the insured building shall be used as a dwelling, or require any particular mode of occupancy. Strictly construed, occupancy for any lawful purpose would satisfy the condition, and preserve the obligation of the policy. At all events it was not essential that the building should be put to all the uses ordinarily made of a dwelling, or to some of those uses all

of the time; nor that the whole house should be subjected to that use. Nor does it follow, as a matter of law, that a dwelling-house is to be considered as unoccupied, merely because it has ceased to be used as a family residence, where the household goods remain ready for use, and it continues to be occupied by one or more members of the family, who have access to the entire building for the purpose ²³ of caring for it, and who do care for it, and make some use of it as a place of abode.

Again, we think the court erred in the instruction given the jury for another reason. The policy was issued since the adoption of the act of March 5, 1879, "to regulate contracts of insurance of buildings and structures" (Rev. Stats., secs. 3643, 3644), which provides that "in the absence of any change increasing the risk without the consent of the insurer, and also of intentional fraud on the part of the insured, in case of total loss, the whole amount mentioned in the policy or renewal upon which the insurers receive a premium shall be paid, and, in case of a partial loss, the full amount of the partial loss shall be paid." The statute, being in force when the policy was issued, became a part of the contract of insurance, and controls its construction and operation. The condition of the policy in regard to the occupancy of the building is therefore so qualified by the statute that, in the absence of intentional fraud on the part of the insured, to make the change from occupancy to disuse or want of occupancy available as a defense, it must appear that the risk was thereby increased: *Insurance Co. v. Leslie*, 47 Ohio St. 409. It is well settled that the risk is not necessarily or prima facie increased by the insured property becoming vacant or unoccupied: *Biddle on Insurance*, sec. 654; *May on Insurance*, 247; *Richards on Insurance*, 166; *Residence Fire Ins. Co. v. Hannawold*, 37 Mich. 103; *Becker v. Farmers' etc. Ins. Co.*, 48 Mich. 610; *Lockwood v. Middlesex Mut. Assur. Co.*, 47 Conn. 553. And, therefore, when the insurer pleads such change as a defense to an action on the policy, the answer must allege that the risk was increased on account of it, unless the insured was guilty of fraud. No doubt the vacation ²⁴ or disuse of an insured building may in some cases materially increase the risk; in others it may not increase it any; and in some instances the circumstances may be such that the risk is lessened. Whether it is increased or not, in any case, must depend upon the situation and surroundings of the building, the use which had been made of it, the care taken of it, and all other circumstances, and is a question for the jury when put in issue. The second defense in the answer in this case

is defective, in that it fails to allege the risk was increased by the change resulting from the breach of the condition pleaded; it tendered no material issue. That defense being insufficient, and the plaintiff having given evidence of the performance of the conditions precedent on his part, he might properly have had the verdict, no claim being made that he had been guilty of any intentional fraud. For each of the errors pointed out, the judgment of the common pleas and of the circuit court will be reversed and the cause remanded.

Judgment accordingly.

INSURANCE—OCCUPANCY OF DWELLING—TEMPORARY ABSENCE.—Occupancy implies actual use of a dwelling-house as such, and an insurer has a right, under a policy employing such word, to the care and supervision of the insured premises involved in such an occupancy: *Limburg v. German etc. Ins. Co.*, 90 Iowa, 709; 48 Am. St. Rep. 468, and note. See, particularly, the extended note to *Moore v. Phoenix Ins. Co.*, 10 Am. St. Rep. 392.

INSURANCE—"VACANT AND UNOCCUPIED."—CONSTRUCTION OF: See the extended note to *Moore v. Phoenix Ins. Co.*, 10 Am. St. Rep. 390, 391.

POWELL v. KOEHLER.

[52 OHIO STATE, 103.]

WILLS—DISABILITIES TO CONTEST.—If, when a will is admitted to probate, the person entitled to contest is under two or more disabilities, his right to contest is not barred until the longest continuing disability is removed.

WILLS.—IF ONE HEIR IS UNDER DISABILITY AND THE OTHERS ARE NOT, and the former, because of such disability, remains entitled to contest a will, and brings a proceeding for that purpose, a judgment in his favor operates in favor of all the other heirs.

WILLS—STATUTE OF LIMITATIONS—REMOVAL OF DISABILITY.—If a person entitled to contest a will is under the two disabilities of infancy and absence from the state at the time his right of action accrues, his subsequent temporary presence in the state while he is yet an infant has the effect of removing his disability of absence from the state.

STATUTE OF LIMITATIONS.—EXCEPTIONS in statutes of limitation in favor of persons laboring under disability are strictly construed, and cannot be enlarged from considerations of apparent inconvenience or hardship.

STATUTE OF LIMITATIONS.—Absence from the state as a disability under the statute of limitations ends when the personal presence of the party in the state begins; and once ended by such presence, though for a temporary purpose only and of short duration, does not revive by subsequent absence, however permanent or long continued.

Action to contest the will of Miles W. Hank. After his death a child was born to him, for which no provision was made in his

will. This child died while not yet one year of age and before the will was admitted to probate. The plaintiffs in this action are the legal heirs of this child, and the action was commenced on the 1st of May, 1889. In January of the same year, the widow of Miles W. Hank, who was the sole beneficiary under his will, died, having first made a will in which she disposed of the property to the defendants in the present action. They in their answer pleaded that the action had not been commenced within two years after the will had been admitted to probate, nor within two years after any disability of the plaintiffs, or of either of them, had ceased. It was admitted, however, that one of the plaintiffs, Mary G. Powell, was, when the will was admitted to probate, an infant of the age of nine years only, and absent from the state; that she remained so absent up to the time of the trial, except that in the year 1880 she and her stepmother, when en route to the home of the latter in the state of Illinois, stopped in Ohio for a period of about twenty days. The jury were instructed as follows: "The facts in the case show that the plaintiff Mary G. Powell is the only one of the plaintiffs who was within the protection of the disability statute; that at the time the cause of action accrued she was under the protection of two disabilities, one of infancy, which long ago terminated, and absence from the state. It is a conceded fact that while still an infant, a nonresident, and absent from the state, and after the death of said infant, and after said will was probated, she, in control of a person standing in loco parentis to her, came within the state of Ohio for the purpose of passing through it to acquire a new residence in another state; that she remained in this state the period of twenty days, and then went from it and continued absent therefrom continuously up to the time named in the petition, but a greater period than the period of two years. The court, therefore, directs you, as a matter of law, that, upon her coming bodily within this state, although an infant and coming involuntarily, that the disability provided in the statute as to absence from the state was taken away from her; and a greater period having elapsed from the beginning of the running of the statute than two years, that she is not entitled under the law to maintain this action. It is your duty, under the direction of the court, to find affirmatively that the will is the will of Mr. Miles W. Hank. You will appoint one of your number foreman, and so sign the verdict." Verdict and judgment sustaining the will.

F. S. Hanselman and M. Stuart, for the plaintiffs in error.

C. Fillius and G. M. Tuttle, for the defendants in error.

¹¹⁷ WILLIAMS, J. The question in the case arises upon the instruction of the court to the jury. The chapter of the Revised Statutes relating to wills contains the provision that: "If no person interested shall, within two years after probate had, appear and contest the validity of the will, the probate shall be forever binding, saving, however, to infants and persons absent from the state, or of insane mind, or in captivity, the like period after the respective disabilities are removed": Rev. Stats., sec. 5933. And section 5866 provides that: "An action to contest a will or codicil shall be brought within two years after the same has been admitted to probate, but persons within the age of minority, of unsound mind, imprisoned, or absent from the state, may bring such action within two years after such disability is removed."

Where, at the time a will or codicil is admitted to probate a person who may contest it is under two or more of the disabilities mentioned in the statute, his right of action is not barred until the ¹¹⁸ expiration of the statutory period, after the longest continuing disability is removed; and, so long as the right of action is saved to any plaintiff, the action brought by him inures to the advantage of all persons interested with him in the estate, for the will, being an entirety, is wholly inoperative when set aside at the suit of any party, and the estate must then be divided and distributed under the law. It is conceded that Mary G. Powell attained the age of majority more than two years before the action below was brought, and that none of the other plaintiffs were within the saving clause of the statute; so that the legal question here is, whether, where a person is under the two disabilities of infancy and absence from the state when his right of action accrues, his subsequent temporary presence in the state, while he is yet an infant, has the effect of removing his disability of absence from the state.

The question has not heretofore received the consideration of this court, nor, so far as we have been able to discover, of the court of last resort of any of the states. It appears to be well settled, however, that exceptions in statutes of limitations in favor of persons under disability should be strictly construed, and never extended beyond their plain import. The rule is that in the absence of a saving clause the statute runs against all persons, whether under disability or not; and with such a clause it runs alike against all who cannot bring themselves clearly within some one of the excepted classes, and against those who can, according to the terms of the clause. The general provisions of the statute are restrained only so far as there are express words of

exception; and it is therefore incumbent on those who claim ¹¹⁹ the benefit of the exception to show that they are, in all particulars, within its descriptive terms and conditions. And, where the statute has created specific exceptions, all others must be deemed excluded. The courts are without authority to enlarge or change those specified, or establish others, though in particular cases the ends of justice might seem to be subserved if it were done. It was said by Chancellor Kent, in *Demarest v. Wynkoop*, 3 Johns. Ch. 129, 8 Am. Dec. 467, that: "The doctrine of any inherent equity creating an exception as to any disability, where the statute of limitations creates none, has been long, and I believe uniformly, exploded. General words in the statute must receive a general construction, and, if there be no express exception, the court can create none." And in *Amy v. Watertown*, 130 U. S. 320, it is declared to be the general rule respecting statutes of limitations that the language of the act must prevail, and no reason based on apparent inconvenience or hardship will justify a departure from it. True, in a few instances, courts have apparently made exceptions not found in the statute; but they are only such as arise from a state of war, or other imperative necessity, as when the courts are shut, or by act of law one party is forbidden to sue, or the other is rendered incapable of being sued. Persons within the saving provisions of the statute are not precluded from suing while the disability lasts. The time within which they may sue is simply extended for a definite period after the disability ceases, and when it ceases they stand upon the same footing as other persons. The statute begins to run against them from that time, and, once started, nothing can prevent the bar but suit ¹²⁰ brought within the prescribed period. The rule which is generally maintained in this country was announced by Lord Talbot, in *Belch v. Harvey*, 3 P. Wms. 287, in the following language: "The persons who are the subject of the proviso are not disabled from suing; they are only excused from the necessity of doing it during the continuance of the legal impediment; therefore, when that difficulty is removed, the time allowed for their further proceeding should be shortened. If they would excuse a neglect under the first part of the proviso, should they not do it upon the terms on which such excuse was given?"

Necessarily, a disability is removed, within the purview of the statute, when it no longer exists; that of absence from the state ends when the personal presence of the party in the state begins, and once ended by such presence, though it be but for a tem-

porary purpose and of short duration, the disability does not revive by subsequent absence, however permanent in its character, or long continued: *Faw v. Roberdeau*, 3 Cranch, 174. This is not disputed, when applied to adult persons of sound mind; but, it is contended, the rule should be different with respect to infants, who are under the control of those in whose custody they are placed, and incapable of binding themselves by their own acts, or by their consent to the acts of those having control over them; and, upon that ground, it is claimed Mary G. Powell's presence here, in company with her stepmother, did not terminate her disability of absence from the state, which theretofore existed. We find nothing in the statute which gives support to that position. Every person who is absent from the state when his cause of action accrues, whether of consenting ¹²¹ capacity or not, is included in the saving clause of the statute under consideration. The only fact made necessary to the creation of that disability is actual absence from the state; and, in the nature of things, the only fact essential to its removal, in any case, is the actual presence of the person in the state, no distinction having been made by the statute, either with respect to the disability, or its removal, on account of the age or capacity of the person, or other circumstance. It was undoubtedly competent for the legislature to have made the distinction; but having failed to do so, when the whole subject was before that body, we must conclude the omission occurred because such provision was deemed inadvisable; and it may have been so considered, for the reason that by the perpetuation of disabilities, resulting from a provision of that kind, the settlement and distribution of estates might be unreasonably delayed, while the general policy of our law favors the speedy settlement of estates and the repose of titles derived from them. At all events, the omission, if it be one, must be supplied by the legislative body, and cannot be by the courts.

Under an English statute of limitations, which saved to persons "beyond the seas" when their cause of action accrued a limited time after their return within which to sue, it was held, in the case of *Sturt v. Mellich*, 2 Atk. 610, that the statute run from the time the party was returned, and his going abroad again gave him no privilege, "for that was gone by his having once returned to the kingdom after his cause of action accrued." In the course of the opinion, Lord Chancellor Hardwicke remarked: "Suppose a creditor, both of nonsane memory and out of the ¹²² kingdom, comes into the kingdom, and then goes out of the king-

dom, his nonsane memory continuing; why, his privilege as to being out is gone, and his privilege as to nonsane will begin from the time he returns to his senses." The observation above quoted, while not necessary to the decision of the exact question involved, and merely illustrative of the point ruled, has been accepted by text-writers in this country as a correct statement of the law: Angell on Limitations, sec. 198; Wood on Limitations, sec. 6, p. 24. The English statute, like ours, makes no distinction, so far as the disability arising from absence is concerned, on account of the mental condition or age of the absent person; so that the rule stated by Lord Hardwicke is not less applicable to cases arising under our statute than to those under the one which was before him; and is, moreover, in accordance with what we regard as the proper interpretation of our statute.

It is claimed, however, that the two sections of the act we have been considering should be construed in connection with section 4989 of the Revised Statutes, which provides that: "If, when a cause of action accrues against a person, he is out of the state, or has absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the state, or while he is so absconded or concealed; and if, after the cause of action accrues, he depart from the state, or abscond or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought." The language "comes into the state," in the above section, it is said, imports an act of choice, involving ¹²³ capacity to choose, which should be accepted as indicating a legislative intent that a like act is necessary to the removal of the disability of absence under the other sections. It is not necessary to determine whether the language referred to has the effect suggested; for, granting that it has, the result claimed by no means follows. The section relates entirely to persons against whom a cause of action accrues, and prevents them from availing themselves of their absence or concealment as a means of defeating the action. The cases to which it applies are different in their nature from those covered by the other two sections, and required different language to provide for them; it therefore throws no light on the construction of the other sections.

Judgment affirmed.

The Disability of One of Several Parties to an Action or Proceeding.

Will Contests.—In the principal case, the opinion is expressed that if the right to contest a will remains in one of several heirs by reason of his disability, any proceeding brought by him and resulting in his

favor must necessarily inure to the advantage of the parties interested with him in the estate, though, being under no disability, their right to contest the will had terminated. The opinion of the court upon this subject may, however, be fairly regarded as a dictum, for the reason that its ultimate decision was founded upon the fact that the person who in that case claimed to be under a disability had had one of the disabilities removed, so that she was not entitled to maintain the proceeding in her own behalf, and, therefore, no action taken by her could result either in her own advantage or in that of her coplaintiffs. There are, in perhaps a majority of the states, proceedings authorizing the contesting of wills within a fixed time after their admission to probate, and further extending that time in favor of persons who, because of infancy or some other disability, are excused from making any contest until after the removal of their disability. It must have frequently happened, therefore, that contests have been instituted by persons still entitled to maintain such contest because of the disability of infancy, and that such contest, if successful, must result in annulling the will, either wholly or in so far only as the interests of the contesting party might be affected. Very singularly, we have been able to discover but one decision, in which the question was necessarily involved, determining whether or not, after certain of the heirs have lost their right to contest, they might take advantage of the contest prosecuted by another heir whose right to prosecute it has been continued in force by reason of some disability.

Proceedings for the revocation of the probate of a will may be divided into two classes: 1. Those in which all the parties entitled to contest are adults and the contest is filed within the time allowed by law, but is by or on behalf of one of the heirs only; and 2. Those in which some of the heirs are minors or laboring under some other disability and the other heirs are free from such disability, and the statute of the state allows those under disability a certain time after its termination within which to institute proceedings for the revocation of the will.

In the cases of the first class, while the decisions are not numerous, they tend to show that though the petition for the revocation of the will is instituted by one only of several heirs, yet if he is successful, the probate of the will must be set aside absolutely, and cannot be limited to his interest in the estate: *Curry v. Bratney*, 29 Ind. 195; *Estate of Freud*, 73 Cal. 555; *Clements v. McGinn* (Cal.), 33 Pac. Rep. 920.

As to cases of the second class, we have the dictum in the principal case, that any successful action by or on behalf of a person under disability must, if successful, inure for the benefit of the other heirs, though they have not been laboring under any disability. The statute under which this decision was made, so far as material to the question under consideration, is as follows: "An action to contest a will or codicil shall be brought within two years after the same has been admitted to probate, but persons within the age of minority, of unsound mind, imprisoned, or absent from the state may bring such action within two years after such disability is removed": *Ohio Rev. Stats.*, sec. 5886.

The statute of California upon the subject does not seem to be substantially different from that of Ohio. It is as follows: "If no person within one year after the probate of a will contest the same, or the validity thereof, the probate of the will is conclusive, saving to infants and persons of unsound mind a like period of one year after their respective disabilities are removed": *Cal. Code Civ. Proc.*, sec. 1333. In construing this section, the supreme court of California reached a conclusion in direct opposition to that announced in the principal case, the court saying: "We see no difficulty in avoiding the probate, so far as the interests of the contesting heir are concerned, and permitting it to stand so far as concerns the heirs who have lost their rights by lapse of time": *Samson v. Samson*, 64 Cal. 327. The court, in reaching and announcing this conclusion, seemed to have been much influenced by *Bailey v. Stewart*, 2 Redf. 227, which, in our judgment, was entirely irrelevant to the question under consideration.

Even in Ordinary Cases there is much conflict of decision, where it appears that several persons were originally entitled to enforce a cause of action, and that some of them have lost that right by operation of the statute of limitations, while others have been excepted from the operation of that statute by reason of their infancy or of some other disability. In considering the subject with respect to the rights and remedies of cotenants, we have heretofore said: "But some of the cotenants may be adults and others minors, or if all be adults, some of them may be under disability. In case one of the cotenants has been under some disability, and therefore is exempt from the operation of the statute, the effect of his exemption may be brought in question: 1. In actions in which he has joined with the other cotenants; 2. In actions brought by himself alone. Actions of the first class may be considered with reference: 1. To joint causes of action which, by the common law, were required to be jointly prosecuted; 2. To causes of action which, by common law or by statutory provisions, the cotenants were not required to join in prosecuting. A preponderance of the authorities, we think, sustains the general proposition that whenever a joint cause of action exists, and the statute of limitations is a bar to any of the plaintiffs, it is a bar to all: *Hardeman v. Sims*, 3 Ala. 747; *Perry v. Jackson*, 4 Term Rep. 516; *Robertson v. Smith*, Litt. Sel. Cas. 296; 12 Am. Dec. 304; *Floyd v. Johnson*, 2 Litt. 109; 13 Am. Dec. 255; *Settle v. Allison*, 8 Ga. 201; 52 Am. Dec. 393. 'It is now well settled that where several persons are entitled to an action, in order to avoid the effect of the statute of limitations, the whole of them must labor under the same disability': *Milner v. Davis*, Litt. Sel. Cas. 436. 'It seems to be a settled rule that all the plaintiffs must be competent to sue, otherwise the action cannot be supported. When once the statute runs against one of two parties entitled to a joint action, it operates as a bar to such joint action': *Marsteller v. McClean*, 7 Cranch, 158; *Allen v. Beal*, 3 A. K. Marsh. 554; 13 Am. Dec. 263; *Jordan v. McKenzie*, 30 Miss. 32; *Dickey v. Armstrong*, 1 A. K. Marsh. 39; *Wells v. Ragland*, 1 Swan, 501; *Barrows v. Nave*, 2 Yerg. 229. 'Whenever the statute of limitations is a bar to the recovery of one of the parties in such action, it operates against the whole, because the disability of one does not save the right of the others. The statute protects the rights of those who are incompetent to protect themselves; but, where some of the parties are competent, they ought to take care of the interests of all, by prosecuting the suit within time': *Riden v. Frion*, 3 Murph. 577. In this respect, the common law is in striking contrast with the civil law. According to Domat: 'If one that is major happens to have a right undivided with a minor, the prescription which could not run against the minor will have no effect against the major. Thus, for example, if a service of passage is due to a major and to a minor, for a ground which is common to them both, the one and the other having ceased to make use of this right during time sufficient to prescribe, the service which the minor could not lose by prescription will be preserved likewise for the major': Domat's Civil Law by Strahan, pt. 1, bk. 3, tit. 7, art. 5, sec. 5. While the civil law is lenient toward the major in circumstances which do not seem to entitle him to any special consideration, and solely because of an association which on his part is accidental, rather than meritorious, the common law, on the other hand, is unjust to a minor in circumstances which do not seem to justify unusual harshness, and solely on account of an association which, on his part, is fortuitous rather than culpable. But there are a number of American cases in full harmony with the civil law as stated in the foregoing quotation from Domat.

"Mr. Justice Cheves, in the case of *Faysoux v. Prather*, 1 Nott & McC. 298, 9 Am. Dec. 691, decided in 1818, stated that 'according to the decisions of our courts, where two or more are interested as coparceners, or joint tenants, or tenants in common, if one be under the disability of infancy, it saves the rights of the others from the effect of the statute.' In an early case in Connecticut, it is said that 'there can be no question but the rule of the common law on a joint suit is, that the

minority of one will save the rights of those of full age; for the recovery must be joint, and no one without the other can recover': *Sanford v. Button*, 4 Day, 311. There are also quite a number of decisions to the effect that where several parties to an action are required, within a specified time, to jointly prosecute some proceeding to obtain a review of a judgment or decree, and one of the parties is exempted from this requirement on account of certain disabilities, then all are so exempted: *Kennedy v. Duncan*, Hard. 3'5; *Wilkins v. Philips*, 3 Ohio, 50; 17 Am. Dec. 579; *Meese v. Keefe*, 10 Ohio, 362; *Sturges v. Longworth*, 1 Ohio St. 561. The authorities thus opposed to one another are all based upon the assumption that a joint right or a joint cause of action cannot be severed. Reasoning from this assumption, different courts have attained diametrically opposite conclusions. On one hand, it is said that because the action is necessarily joint, it must follow that whenever the statute extinguishes the cause of action as to one cotenant, it extinguishes it as to all. On the other hand, it is said, with equal force, that whenever a cause of action is necessarily joint, it must follow that the keeping of such cause alive as to one cotenant is keeping it alive as to all. And as considerations of inconvenience and hardship are apt to prevail over those general rules by which all systems of jurisprudence ought to be distinguished, it is natural that we should find decisions which, though emanating from courts professedly engaged in administering the common law, are totally irreconcilable with both the theories referred to in this section. These decisions are attempts to obtain a middle ground which shall be free, on the one side, from the manifest hardship of involving the minors in a common ruin with the majors, and, on the other side, of the equal injustice of conceding to the majors the peculiar advantages intended solely for the minors. In South Carolina, several joint plaintiffs sued in trover for the conversion of a slave. The defendant pleaded the statute of limitations, and the replication showed that one of the plaintiffs had been under some disability, and was not therefore barred by the statute. O'Neill, justice, delivered the opinion of the court of appeals, saying: 'I apprehend, too, that, notwithstanding the plaintiffs are joint, one may in trover recover, and the others fail, under the plea of the statute of limitations. The party having the benefit of the disability would be entitled to judgment for damages found for the conversion of his title. For the defendant who relies upon the statute, and thus succeeds in cutting off two out of three plaintiffs, is properly only a wrongdoer against the one to whom the statute does not apply. If the defendant and the plaintiff not barred by the statute, after the allowance of its bar against the adult plaintiffs, were even to be regarded as tenants in common, the defendant's plea of the statute of limitations would be such evidence of the assertion of an adverse claim as would amount to an ouster, upon which the minor would be entitled to recover': *Henry v. Means*, 2 Hill (S. C.), 332.

"A distinction has been claimed and allowed in several of the state courts between cases in which, when the cause of action accrued, some of the cotenants were free from disabilities, and cases in which all the cotenants were under disability when the cause of action accrued to them; and it has been held that in the last-named cases the statute does not commence running against any until all are freed from their disability. These decisions rest for their justification upon the peculiar language of the statutes of limitations under which they are made. These statutes so employ the plural word 'they' as to give much force to the idea that the legislators intended by the use of that word that a statute prevented from running by the joint or common disability of all should continue in abeyance until such disability was removed from all. The construction of one of these statutes, and the reasoning therefor, were thus given by the supreme court of Tennessee: 'If one of several, entitled to a joint action, be over the age of twenty-one years at the time the action accrues, the statute runs against all, although the others are infants; because "they" who are entitled to the action

were not under the age of twenty-one years, seeing one of them was not, and therefore none of them are within the saving. But if all the persons entitled to a joint action are within the age of twenty-one years at the time such action accrues, then the action is within the saving, until "they" who are entitled to it shall become of full age. As the word "they" in the former case includes all those entitled to the joint action, and one of them not being within the age of twenty one, all of them are excluded by the saving, so in the latter case, if all are within the age of twenty-one when the action accrues, and so are within the saving, all must continue within the saving so long as one of them remains under the age of twenty-one, for until then "they" have not attained "their" full age': *Shute v. Wade*, 5 Yerg. 9; *Masters v. Dunn*, 30 Miss. 268; *Herron v. Marshall*, 5 Humph. 443; 42 Am. Dec. 444; *Wells v. Ragland*, 1 Swan, 501; *Jones v. Henry*, 3 Litt. 48; *Riggs v. Dooley*, 7 B. Mon. 240; *Clay v. Miller*, 3 Monr. 146; *Seay v. Bacon*, 4 Sneed, 102; 67 Am. Dec. 601.

"We shall now consider actions of the second class, namely, those brought by the person under disability, without joining any of his cotenants. It appears from the authorities already considered that if the cause of action be a joint one—such a one that the failure to unite all the cotenants would prove fatal, if taken advantage of by proper plea—then such cause is either entirely barred by, or entirely saved from, the operation of the statute. In such cases, therefore, the cotenant under disability has nothing to gain by suing alone; for unless he can recover in conjunction with his cotenants he cannot recover at all. But in some states a cotenant, entitled to sue without joining his cotenants, may ordinarily, as against a stranger to the cotenancy, recover possession of the whole of the common property. The question frequently arises, Does the disability under which a cotenant has labored protect him from the statute as to his moiety alone, or does it secure him in the right, which he ordinarily has, to recover from a stranger the possession of all the lands of the cotenancy? The answer must be that he may recover his moiety and no more: *Pendergrast v. Gullatt*, 10 Ga. 224; *Bowyer v. Judge*, 11 East, 287; *Bryan v. Hinman*, 5 Day, 218; *Doolittle v. Blakesley*, 4 Day, 265; 4 Am. Dec. 218; *Stovall v. Carmichael*, 52 Tex. 383; *Peters v. Jones*, 35 Iowa, 512; *McFarland v. Stone*, 17 Vt. 165; 44 Am. Dec. 325; *Williams v. First Presbyterian Church*, 1 Ohio St. 478; *Wilder v. Mayo*, 23 Ark. 325; *Daniel v. Day*, 51 Ala. 431. So far, the effect of the statute upon his cotenants operates also against him. Where one of two coparceners was under a disability, and entered within twenty years after the removal of such disability, it was held that her entry could not operate in favor of the other coparcener who had not been under any disability: *Roe ex dem. Langdon v. Rowston*, 2 Taunt. 445. The rule that a cotenant saved from the operation of the statute cannot recover the whole of the lands of the cotenancy 'is founded on the proposition that when the statute has fully run, and has become effectual to bar an adverse title the disseisor acquires a new title founded on disseisin. He does not acquire or succeed to the title and estate of the disseisee, but is vested with a new title and estate, founded on, and springing from, the disseisin; and the title of the disseisee, if not wholly extinguished, has at least become inoperative in law, and is without a remedy to enforce it. The new title thus acquired by the disseisor must of necessity correspond with that on which the disseisin operated, as he could not acquire by disseisin a greater estate than that held by the disseisee. If the latter held only an undivided interest as tenant in common with another, the disseisor would acquire by disseisin a similar undivided interest; for it was only that on which the disseisin operated and took effect. The disseisor of one of several tenants in common acquiring a title by disseisin therefore becomes himself a tenant in common with the other cotenants; and hence, in an action by one or more of them against him for the possession, the recovery is limited to the particular interest of the plaintiff, and does not include the whole property': *Williams v. Sutton*, 43 Cal.

73. As the title of the cotenants not under any disability is extinguished from the operation of the statute, it follows that the cotenant not under disability cannot obtain any rights by a deed from them, nor through a partition to which they are parties. In some instances, an attempt has been made to evade the force of the statute by means of a suit in partition, in which lands adversely held for a period sufficient for the acquisition of title by prescription were set off to a cotenant whose minority saved him from the bar of the statute. But these attempts proved futile; and the cotenant was, in his recovery, confined to the moiety to which he was entitled, independent of the partition: *Wade v. Johnson*, 5 Humph. 118; 42 Am. Dec. 422; *Bronson v. Adams*, 10 Ohio, 135.

"While the state of the authorities is such as to admit of grave doubt as to whether, in case of joint actions, the disability of one cotenant operates for the benefit of all, or whether the want of disability in one operates to the detriment of all, yet this seems certain: that in the absence of peculiar statutory provisions, whenever the rights of cotenants may be secured by separate actions, and adequate means of redress are therefore within the reach of each, a cotenant not under any disability cannot avail himself of the disability of any of his cotenants: *Williams v. First Presbyterian Church*, 1 Ohio St. 495; *Bronson v. Adams*, 10 Ohio, 135. But the cause of action or the nature of the cotenancy may be such that the cotenants could have either joined or severed in the prosecution of their remedies. In such case, while it is generally, and we believe universally, conceded that the cotenants not under disability shall not derive any benefit from the disability of the minor cotenants, more doubt must be felt, after an examination of the authorities, upon the question whether, if a joint action be brought, a judgment may be entered against those barred by the statute and in favor of those against whom the statute has not run. But we think that a considerable majority of the authorities upon this question assert that, by electing to participate in a joint action, the plaintiff not barred by the statute has involved himself in a common fate with his coplaintiffs, and therefore that a judgment must be entered against all: *Sanford v. Button*, 4 Day, 312; *Keeton v. Keeton*, 20 Mo. 544; *Walker v. Bacon*, 32 Mo. 159; *Thomas v. Machir*, 4 Bibb, 412; *Dickey v. Armstrong*, 1 A. K. Marsh. 39; *Moore v. Armstrong*, 10 Ohio, 17; 36 Am. Dec. 63. But in Tennessee, upon a joint demise by tenants in common, although some of them are barred by the statute, the others may recover judgment for their moieties: *Barrows v. Nave*, 2 Yerg. 227. In Vermont, an administrator brought an action of ejectment for the benefit of several heirs. It appeared that some of these heirs were barred by the statute and others were not. And thereupon the court said that 'as this is not a case of joint tenancy—in which all must join in bringing suit—the rights of some may be barred and not those of others; as some might have conveyed their interest by deed, or be barred by estoppel; so, also, by the statute of limitations': *McFarland v. Stone*, 17 Vt. 175; 44 Am. Dec. 325": *Freeman on Cotenancy and Partition*, secs. 375-378.

NORRIS v. DAINS.

[82 OHIO STATE, 215.]

CORPORATIONS—CONVEYANCES IN NAME OF OFFICER.—

An assignment purporting to be made and signed by a certain person as treasurer of a corporation, to which the corporate seal is affixed, is not the act of the corporation. One having authority to act for another should act in the name of the latter.

T. C. Russell, for the plaintiff in error.

Grosvenor & Vorhees and E. A. Guthrie, for the defendant in error.

222 DICKMAN, C. J. The record shows that on April 25, 1864, Isaac Samuels, of Boston, in the state of Massachusetts, leased to John F. Augustus a tract of land situate in Meigs county and state of Ohio for a term of ninety-nine years. The lease was afterwards, on May 12, 1864, assigned by the lessee to the Scipio Iron and Coal Mining Company, a corporation duly organized, its successors and assigns, for the full term of the demise. On November 8, 1864, an instrument of writing was executed in the commonwealth of Massachusetts, purporting to be an assignment of this lease by **223** the Scipio Iron and Coal Mining Company, through George F. Baker as its treasurer, to George W. Norris, the plaintiff in error.

The only question presented for our consideration is, whether the court of common pleas erred in excluding from the jury as testimony the assignment claimed to have been made by the Scipio Iron and Coal Mining Company to George W. Norris, which was offered in evidence at the trial by the plaintiff. In other words, was the assignment in question the act of the Scipio Iron and Coal Mining Company?

It appears from a copy of the vote written under the assignment by the company that, at a directors' meeting held October 31, 1864, it was voted that the company lease to George W. Norris their property in Ohio for the unexpired term of their lease, and the treasurer of the company was authorized to execute any instruments which might be necessary in order to perfect the title of Norris to the same. We do not deem it necessary to consider how far the instrument executed by George F. Baker, as treasurer, though containing words of assignment, may, by virtue of its reservations, be construed as not conflicting with the authority given to lease. Suffice it that in the body of the instrument it is not the company that is made to assign the lease, but George F. Baker with the *descriptio personae* of treasurer.

The language of the instrument is: "I, George F. Baker, treasurer of the Scipio Iron and Coal Mining Company, . . . do hereby sell, assign, transfer, set over, and convey unto the said Norris, his heirs and assigns, the foregoing lease," etc. And in executing the assignment, it is "George F. Baker, ²²⁴ treasurer as aforesaid in behalf of said company," who sets his hand and seal of the company.

By section 4111 of the Revised Statutes of Ohio it is provided: "All deeds, mortgages, powers of attorney, and other instruments of writing for the conveyance or encumbrance of lands, tenements, or hereditaments situate within this state, executed and acknowledged, or proved, in any other state, territory, or country, in conformity with the laws of such state, territory, or country, or in conformity with the laws of this state, shall be as valid as if executed within this state, in conformity with the foregoing provisions of this chapter."

As the record discloses no proof of the law of Massachusetts as to whether the assignment by the Scipio Iron and Coal Mining Company was executed in conformity thereto, it is to be presumed that in that regard the law of Massachusetts is the same as our own. But, in the absence of such proof, we may have recourse to the decisions of that state, in aid of determining the principles of the common law which should govern as to the mode of executing deeds or other instruments of conveyance through the medium of an agent or attorney.

It must be conceded that in respect to the manner in which a deed must be executed by an agent, the law is extremely technical; and yet, in view of preserving the stability of judicial decisions, the rule *stare decisis* is not to be ignored. In the early leading case of *Combes*, 9 Coke, 76, it is explicitly said: "When any one has authority, as attorney, to do any act, he ought to do it in his name who gives the authority, for he appoints the attorney to be in his place, and to represent his person; and therefore the attorney cannot do it in his own ²²⁵ name, nor as his proper act, but in the name and as the act of him who gives the authority." This doctrine has been frequently recognized as law by the English courts, and it has also received the approval of the supreme court of Massachusetts.

In *Elwell v. Shaw*, 16 Mass. 42, 8 Am. Dec. 126, it was said by Wilde, J: "It does not appear that the authority of *Combes*' case, 9 Coke, 76, is at all shaken by more modern decisions. All concur in laying it down as an indispensable requisite to give validity to a deed executed by an attorney that it should be made

in the name of the principal." In this case the tenant, to maintain the issue on his part, read in evidence a letter of attorney from the demandant Jonathan Elwell to one Joshua Elwell. A deed executed by Joshua, conveying the demanded premises, proceeded thus: "Know ye that I the said Joshua, by virtue of the power aforesaid, in consideration, etc., do hereby bargain, grant, sell, and convey unto, etc. In testimony whereof, I have hereunto set the name and seal of the said Jonathan, this," etc., signed Joshua Elwell, and a seal. It was held that the letter of attorney and the deed of conveyance were insufficient in law to pass the fee from the demandant to the tenant.

In *Hutchins v. Byrnes*, 9 Gray, 367, it was objected that the assignment was not so executed by the treasurer as to be the act and deed of the corporation. The objection was not sustained, as the plaintiffs claimed to hold the mortgage by an assignment which purported in the body thereof to be from the corporation—the Bristol County Savings Bank. "The assignment," say the court, "was made in the name and as the act of the corporation, according to the rule laid down in ²²⁶ *Combes' case*, 9 Coke, 76, and always adhered to in England and in this commonwealth."

And in *Haven v. Adams*, 4 Allen, 80, where the mode of execution by the corporation was called in question, the objection was unavailing. In the body of the mortgage it was expressed to be the deed of the corporation, to which they had caused their seal to be affixed, and the name of their president to be signed. Chapman, J., in pronouncing the opinion, said: "The question in such cases is, whether the deed purports to be the deed of the principal, or the deed of the agent executed by him in behalf of the principal. In the first case, it is held to convey their property, because it is their deed; in the latter case, it does not convey their property, because it is his deed."

In Ohio there is no general statute prescribing the mode in which deeds of conveyance are to be executed by corporations. In *Sheehan v. Davis*, 17 Ohio St. 571, the deed sets forth that: "This indenture, made this second day of July, in the year 1855, between the Albany City Bank of the first part, and Charles Butler, of the city of New York, of the second part, witnesseth: That the said party of the first part, for and in consideration, etc., do grant, bargain, etc., unto the said party of the second part, and to his heirs and assigns forever," etc., concluding: "In witness whereof, the said party of the first part have caused their corporate seal to be hereto attached, and these presents to be signed by their cashier on the day and year first above written." It

was held that the deed of conveyance by the banking corporation was properly executed, but this court emphasized the fact that "in this case the deed throughout purports to be the deed of the corporation." The ²²⁷ deed did not, as in *Elwell v. Shaw*, 16 Mass. 42, 8 Am. Dec. 126, purport to be the deed of the attorney, but purported on its face to be the deed of the principal. For collation of other authorities in line with the foregoing views, see 1 Hare and Wallace's Leading Cases, 575; 4 Am. & Eng. Ency. of Law, 238-242; 5 Am. & Eng. Ency. of Law, 440, and cases cited.

Subjecting the assignment claimed to have been made by the Scipio Iron and Coal Mining Company to the plaintiff in error to the test of the cases we have cited, we do not think it can properly be held to be the act of that company, and it was therefore properly withheld by the court from the jury, when offered in evidence by the plaintiff.

Section 4110 of the Revised Statutes of Ohio provides that: "No deed of real estate executed by any person acting for another, under a power of attorney duly executed, acknowledged, and recorded, shall be held to be invalid or defective because he is named therein, as such attorney, as the grantor, instead of his principal; nor because his name, as such attorney, is subscribed thereto, instead of the name of his principal." But it cannot be claimed that the assignment under consideration in the case at bar was made under a power of attorney, executed, acknowledged, and recorded, as provided by the above section of the statutes.

It is suggested in argument in behalf of the defendant in error that the court will notice that the transcript of the record of the directors authorizing the lease, and which was made by George F. Baker as treasurer, is also certified by George F. Baker as clerk, thus showing the fraudulent character of the whole transaction. But the record does not profess to contain all the evidence introduced ²²⁸ at the trial, and does not present to our consideration a question of fraud. The judgment of the circuit court should, in our opinion, be affirmed.

Judgment accordingly.

AGENCY.—An agent is personally liable on a note signed in his name, though he adds thereto the designation "agent," unless from some portion of the note or paper upon which it is written the name of the principal appears: *Hobson v. Hassett*, 76 Cal. 203; 9 Am. St. Rep. 193, and note; *Tannatt v. Rocky Mountain Nat. Bank*, 1 Col. 278; 9 Am. Rep. 156, and note; *Tarver v. Garlington*, 27 S. O. 107; 13 Am. St. Rep. 628, and note.

CORPORATIONS—CONVEYANCE EXECUTED IN NAME OF AGENT.—A deed is admissible in evidence as the deed of the corporation, where it purports to be such, if signed by the trustees as trustees, and has the regular corporate seal attached: *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; 99 Am. Dec. 800, and note.

FULTON v. FULTON.

[22 OHIO STATE, 229.]

DIVORCE—DUTY OF MOTHER TO SUPPORT CHILD AWARDED TO HER.—If, at the time a divorce a vinculo is granted to the husband on account of the misconduct of the wife, the custody of their minor children is awarded to her without any order providing for their maintenance, he is not thereafter liable to her for necessities furnished by her for the support of such children, in the absence of proof of a request by him that such support should be provided, or of a promise by him to pay therefor.

W. B. Higby and W. A. Babcock, for the plaintiff in error.

L. A. Wilson, for the defendant in error.

224 **BRADBURY, J.** The defendant in error was divorced from the plaintiff in error in a suit brought by him for her aggression. She was awarded fifteen hundred dollars for alimony, and two small children, the fruit of the marriage, were by the decree placed in her custody, but no order was made respecting their maintenance.

She, living apart from the defendant in error, supported the two children, and the question to be determined is, whether she can maintain an action against him for board, clothing, etc., which she has furnished to them, in the absence of any proof of a request by him that the support should be provided, or of a promise to pay for it when provided. Upon this subject the court of common pleas charged the jury as follows:

"It is conceded that at the September term, 1886, the defendant obtained a decree of divorce from the plaintiff for cruelty to him; that the court gave her alimony in the sum of fifteen hundred dollars and the custody of the children till its further order, and that she has ever since had the children and boarded and clothed them. This casts upon the defendant the legal obligation to pay her what that board and clothing is reasonably worth.

"It makes no difference whether it was done with the defendant's consent or not, or at his instance ²³⁵ and request. Plaintiff's right to recover is not founded in the defendant's promise

to pay, either expressed or implied, but upon his legal duty to provide for his children; and the order of the court giving her the custody of the children, and the caring for them thereafter by the plaintiff, makes the defendant liable to pay the plaintiff what that board and clothing is fairly and reasonably worth."

To this portion of the charge the defendant excepted, and the question in issue between the parties was thus brought into the record. The defendant in error contends that this question is settled in her favor by the case of *Pretzinger v. Pretzinger*, 45 Ohio St. 452; 4 Am. St. Rep. 542. In that case this court held that: "The obligation of a father to provide reasonably for the support of a minor child, until the latter is in a condition to provide for his own support, is not impaired by a decree which divorces the wife a vinculo, on account of the husband's misconduct, gives to her the custody, care, and nurture of the child, and allows her a sum as alimony, but with no provision for the child's support." In that case, as in the one under consideration, no question arose respecting the rights of the child to reasonable support. In both instances the necessities had already been furnished by the divorced mother, and she was seeking reimbursement from the father. The contention, therefore, related solely to the relative duties of the father and mother of minor children, where the parents are living separate in consequence of a divorce a vinculo had between them, and the children had been awarded to the custody of the mother.

Where separation and divorce result from the ²³⁶ misconduct of the husband, *Pretzinger v. Pretzinger*, 45 Ohio St. 452, 4 Am. St. Rep. 542, asserts the primary liability of the father in a contest between him and the mother, and in such case the right of the mother to recover against the father for such reasonable necessities as she has furnished is established. That case is grounded in the principle that as the primary liability rests upon the father, he cannot, by his own misconduct, shift it to the mother, *Dickman, J.*, saying in reference to the natural duty resting on parents to support their children, that: "This natural duty is not to be evaded by the husband's so conducting himself as to render it necessary to dissolve the bonds of matrimony. . . . It is not the policy of the law to deprive children of their rights on account of the dissensions of their parents, . . . or to enable the father to convert his own misconduct into a shield against parental liability." Again: "There is evidently no satisfactory reason for changing the rule of liability, when, through ill-treatment or other breach of marital obligation, the husband

renders it necessary for a court of justice to divorce the wife, and commit to her the custody of her minor children": Pretzinger v. Pretzinger, 45 Ohio St. 458, 459; 4 Am. St. Rep. 542.

In the case before the court, however, the wife was the aggressor, and it is this feature by which it is to be distinguished from Pretzinger v. Pretzinger, 45 Ohio St. 458, 459, 4 Am. St. Rep. 542, for in that case the husband was in fault. It does not necessarily follow that, because a father cannot, by his own misconduct, shift from himself to the mother his primary liability to support his minor children, the mother cannot, by her misconduct, produce that result, at least to the extent of denying to her a right to ²³⁷ recover against him for expenses she has incurred for necessities for their support, in the absence of a request or promise by him in the premises.

The contest is between the parents. By the law of nature, the responsibility of each for the birth of children is equal; the moral obligation of nurture, protection, and reasonable support bears upon each according to his or her capacity to afford it. Schouler, in referring to this obligation, says: "This is said to rest upon a principle of common law; but perhaps it may be more reasonably referred to the implied obligation which parents assume in entering into wedlock and bringing children into the world": Schouler's Domestic Relations.

The common law, in an earlier stage of its development, stripped the wife of her personal property, transferred to the husband the income of her real estate, vested in him the right to her earnings, denied to her the power of contracting, and merged her legal entity into his; and, to compensate her for these disabilities, it absolved her from nearly every legal obligation and duty, including that of maintaining her children. Nor had she any legal control over them or right to their services. Even her widowhood did not restore this control or right, and this harsh doctrine was at one time recognized and applied by courts of deservedly high authority in this country. Thus, as late as 1812. it was held in Commonwealth v. Murray, 4 Binn. 487, 5 Am. Dec. 412, in respect of a widowed mother, that "an infant owes reverence and respect to his mother, but she has no legal authority over him, nor any legal right to his services."

²³⁸ Within the last half century, however, the harsh rules of common law respecting the property and domestic rights of married women have gradually yielded to more enlightened and humane notions, and consequently they have been greatly modified and ameliorated. The modifications and ameliorations

which affect her property rights are chiefly the result of legislation, but those affecting her domestic relations are as much due to those enlightened views which led to a more humane application of the rules of common law to that relation as to direct legislative action. And in many instances, legislative action enlarging her property and personal rights, have gradually led to the imposition of correlative duties, by the application of recognized principles of the common law.

The husband and father, while living with his family is its head, is entitled to the services of his minor children and is liable for their reasonable support: *Rev. Stats., secs. 3108-3110, 3113; Sharp v. Cropsey, 11 Barb. 224.*

Where, however, the husband is dead, the modern and better rule is that the mother is the head of the family and entitled to the earnings and obedience of her minor children: *Commissioners v. Hamilton, 60 Md. 340; 45 Am. Rep. 739; State v. Baltimore etc. R. R. Co., 24 Md. 84; 87 Am. Dec. 600; Ohio etc. R. R. Co. v. Tindall, 13 Ind. 366; 74 Am. Dec. 259; Furman v. Van Sise, 56 N. Y. 435; 15 Am. Rep. 441; Matthewson v. Perry, 37 Conn. 435; 9 Am. Rep. 339; Hammond v. Corbett, 50 N. H. 501; 9 Am. Rep. 288; Gray v. Durland, 50 Barb. 100.*

And whenever the mother is entitled to the obedience and services of her minor children, it would seem to follow, necessarily, that she should maintain them. Harsh and anomalous, indeed, a ²³⁹ rule of law must be that would give the earnings and custody of a minor child to a parent who was under no reciprocal obligation of maintenance. The duty of maintenance by the mother is asserted by Schouler's *Domestic Relations*, sec. 293, and *Mowbry v. Mowbry, 64 Ill. 383*. In *Dedham v. Natick, 16 Mass. 140*, the court say: "The mother, after the death of the father, remains the head of the family. She has the like control over the minor children as he had when living. She is bound to support them, if of sufficient ability, and they cannot, by law, be separated from her."

The cases, indeed, are rare, where a mother, having the ability, has declined to administer to the wants of her minor child. The law of nature is usually strong enough to secure this, and an appeal to municipal law is therefore seldom necessary. But if a widowed mother with ample possessions should decline to administer to the necessities of her destitute minor child, a rule of law that would allow this, and suffer her to abandon it to private or public charity, would be a reproach to any system of jurisprudence.

If she is not bound to maintain her child, then she should not be permitted to keep it in subjection to her authority, or receive the wages of its labor. The right to keep her minor children together under her roof and to control their persons implies the obligation to feed and clothe them; and the great weight of modern authority, as well as of reason, clothes her with those rights. It may be that the authorities do not speak with equal emphasis upon the question of her duty of support, as they do in reference to her right to the custody and services, of her children, but this should be attributed to the want of an occasion, and not to ²⁴⁰ the existence of any rule of law by which she can be vested with the control without the duty of maintaining her minor children.

Where a divorce a vinculo is decreed, the bonds of matrimony are dissolved, and the former husband and wife become as strangers to each other, and the former wife is relieved from all the disabilities and duties incident to coverture. If children were born of the marriage, the paternal relation remains, and the duties pertaining to it continue. The primary obligation of maintaining the children was on the husband and father—the foundation of this superior obligation rests upon the general fact that he is most capable of discharging it. His right, however, is to maintain his children in his own way and at his own fireside, where he can have the comfort of their society and the aid of their services. If, by his own misconduct the family relation is destroyed, and the welfare of the children render it necessary that they should be placed in the custody of the mother, he has no just ground to complain if he is compelled to maintain them in her home. However, even under these circumstances, if the mother has an ample fortune, and the resources of the father are comparatively limited, justice might require a modification of a rule founded upon the assumption of conditions which in the particular case did not exist.

And although the separation and divorce were caused by the misconduct of the mother, it may nevertheless be true that the obligation of the father to reasonably provide for his children will follow them into the custody of the delinquent mother, when circumstances require them to be placed in her custody. If, however, under such ²⁴¹ circumstances, it does so follow them, the reason and limit of this obligation of the father should be found in the necessities of the children. As to them, the natural obligation of protection, nurture, and maintenance press with equal force upon the parents. By the divorce a vinculo, the mother is as completely absolved from the marital relation as she

would be by death, and if, in the course of the proceedings which end in an absolute divorce, the minor children are put under her control, by her procurement or in response to her wishes, her direct obligation towards them, so long as she retains them, would seem to be founded upon as substantial considerations as if she were a widow. Their daily wants must be satisfied. Constant supervision may be necessary. Can their divorced mother, who has received them into her custody, abandon them in the one case and not in the other? We think not. By receiving them into her custody she should be held, as to them, to assume the obligations incident to that custody. If, under these circumstances, where her own misconduct has destroyed the family relation, and deprived the father of the custody and society of his children, she has in fact maintained her children, she has no claim, legal or moral, to demand reimbursement from the father. She has simply discharged a duty cast upon her by the plainest principles of natural justice, for the reason that the necessity for it arose from her own misconduct.

Judgment reversed.

DIVORCE—DUTY OF FATHER TO SUPPORT CHILD AWARDED TO MOTHER.—A decree of divorce granted to a wife, committing to her the care and custody of her minor child, entirely relieves the father from any legal obligation to support the child, except such as may be imposed on him by the original or any subsequent decree in the divorce proceedings: *Hall v. Green*, 87 Me. 122; 47 Am. St. Rep. 311, and extended note.

CLEVELAND LEADER PRINTING COMPANY v. GREEN.

[32 OHIO STATE, 437.]

JUDGMENTS.—OFFICE OF NUNC PRO TUNC ENTRY is to record some act of the court done at a former term, which was not then carried into the record, but it cannot be employed to secure, at a subsequent term, a performance by the court of some act which the applicant failed to have the court do at the term in which final judgment was rendered and entered.

JUDGMENTS—NUNC PRO TUNC ENTRY—JURISDICTION.—If the record of a court fails to show that it has acquired jurisdiction of the person of the defendant and the plaintiff has neglected at the hearing of the case to require the court to inquire into and adjudicate that question, the court cannot, at a subsequent term, inquire into its jurisdiction over the defendant, and, by a nunc pro tunc order, cause the record to state that the inquiry was made at the term when final judgment was rendered.

Action by Green against the Cleveland Leader Printing Company in which, at the term of court held January, 1891, judgment

was rendered for the plaintiff. The judgment was affirmed on appeal to the circuit court, and proceedings were then brought in this court to reverse both judgments. In October, 1894, this court, upon the motion of Green, dismissed the proceedings herein, on the ground of want of jurisdiction of the person of Green, the record failing to show the issuing of a summons, a waiver thereof, or an appearance in person. After the case was dismissed, the Cleveland Leader Printing Company obtained its reinstatement on the ground that it could obtain from the circuit court a nunc pro tunc order showing that Green waived service of process or personally appeared at the hearing of the case in that court. Plaintiff in error then obtained such order in January, 1895, against the objection of the defendant in error, and he now questions the regularity of the proceedings by which it was secured and prosecutes a writ of error to this court.

Prentiss & Vorce, and Squire, Sanders & Dempsey, for the plaintiff in error.

W. S. Kerruish and E. J. Blandin, for the defendant in error.

⁴⁸⁹ BRADBURY, J. This court, in October, 1894, held that the record of the circuit court did not show that that court had obtained jurisdiction of the defendant in error. That being true, the plaintiff in error had no standing in the court, for it could not, in the method it pursued, bring the defendant in error into this court, except through the circuit court, and it had wholly failed to bring him into that court. Upon a representation by the plaintiff in error that it was entitled to a nunc pro tunc order of the circuit court curing this omission, the dismissal was set aside to enable it to procure such order.

Thereupon the plaintiff in error applied to the circuit court for an order nunc pro tunc, which application was in the following terms: "And now comes the said The Cleveland Leader Printing Company, and says that said defendant, Arnold Green, appeared in this case in this court in the hearing of the same in person and by his attorney at the January term of this court, to wit, on the nineteenth day of June, 1891, but that the record in this case fails to sufficiently show such appearance, and the plaintiff asks that such deficiency may be supplied and the record corrected accordingly by the proper order of this court," etc.

The defendant in error moved the circuit court to require the application to be made definite and certain: 1. By setting forth the acts of defendant in error which were claimed to constitute

an appearance by him in the circuit court; 2. By stating ⁴⁹⁰ whether some finding, not before made by the court, was wanted, or whether the court was to ascertain some fact before found by it, but not recorded. This motion was overruled, to which ruling the defendant in error excepted.

Good practice doubtless requires that in such proceedings the party against whom relief is prayed should be apprised clearly of the character of the relief sought, as well as the facts and circumstances upon which the applicant rests his claim to such relief. This application, when tried by that test, is faulty; for it affords no notice to the defendant in error of any specific act or acts done, either by himself or by his counsel, that in law constitute an appearance in the circuit court, nor did it state with reasonable precision the relief sought. However, as the record discloses that no evidence was adduced when the motion was heard upon the facts, but that the court rested its findings thereon solely upon the recollection of two of its members, the defendant was not prejudiced by its refusal to make the motion definite and certain. The action of the court, resting as it did upon the recollection of its members, must have been the same whether the motion had been sustained or overruled.

The circuit court found that the journal entry, at the February term, 1891, "fails to show that the defendant in error appeared in person or by his attorney at the hearing of said cause, and it further appearing to the court by the personal knowledge of the court which heard said cause that said defendant in error did personally and by his attorney appear in said cause, and was present at the hearing of the same, it is therefore adjudged ⁴⁹¹ and ordered that the journal entry be, and the same is, hereby corrected and amended," etc.

This finding of the court, as well as in the motion asking the court to make the finding, it will be observed, does not show that at the original hearing in 1891 the attention of the circuit court was called to the question, or that it was then required to find the manner by, or the method in, which jurisdiction over the person of the defendant in error had been acquired. And if we may believe the sworn statements made by the defendant in error and his counsel, the fact is that no such finding was then requested by plaintiff in error or made by the circuit court.

If the defendant in error had been served with legal process, if he had formally entered his appearance in the proceedings, or if, in person or by counsel, he was present and participated in the hearing, jurisdiction over his person would have been thereby

acquired. In order to establish jurisdiction, the record should disclose at least some one of such acts. This it could not truthfully do, unless the court had first found that such action was had. This action, though usually formal, is absolutely necessary and must be made at the time the hearing is had. The fact of jurisdiction over the person of the defendant, and consequently the validity of a judgment for or against him, should not depend, as it did in the case under consideration, for over three years, upon the personal recollection of a judge or judges, unless there exists some strong necessity therefor.

Rights established by the judgments of judicial tribunals are generally regarded as resting upon the firmest foundations, and this mainly because of the confidence reposed in their inviolability. ⁴⁹² The power to affect their operation or change their import by nunc pro tunc orders should be exercised with caution and circumspection: *Hyde v. Curling*, 10 Mo. 363.

In some states the power is denied to the courts, unless their action is supported by written memorandum: *Hyde v. Curling*, 10 Mo. 359; *Limerick, Petitioners*, 18 Me. 183; *Belkin v. Rhodes*, 76 Mo. 643.

This view of the question was taken by this court in an early case. In *Ludlow v. Johnston*, 3 Ohio, 553, 578, 17 Am. Dec. 609, Judge Hitchcock uses the following language in this connection: "But to introduce parol testimony to prove the proceedings of a court of record, and then substitute this testimony for the record itself, would be a novel proceeding. It would be equally absurd as to sustain an action of debt upon bond, upon proof that the defendant promised to make such an instrument, . . . although the fact should be admitted that the instrument was never executed." In the cases since *Ludlow v. Johnston*, 3 Ohio, 553, 17 Am. Dec. 609, was decided, wherein this court has had occasion to consider questions concerning nunc pro tunc entries, such entries have been supported to some extent by written memorandum: *Bothe v. Dayton etc. R. R. Co.*, 37 Ohio St. 147; *Moore v. Brown*, 10 Ohio, 197; *Markward v. Doriat*, 21 Ohio St. 637; *Mitchell v. Thompson*, 40 Ohio St. 110; *Benedict v. State*, 44 Ohio St. 679.

Notwithstanding the rule which requires that the power to make nunc pro tunc entries should be used with circumspection, this court has been liberal in sustaining such orders where the power to make them exists: *Dial v. Holter*, 6 Ohio St. 228.

⁴⁹³ Whether a case might not arise in which this court would recede from the doctrine, before alluded to, announced by Judge

Hitchcock, in *Ludlow v. Johnston*, 3 Ohio, 553, 17 Am. Dec. 609, by declaring the necessity of some written memorandum to support a finding *nunc pro tunc*, we need not determine; nor are we required to reaffirm the doctrine of that case, because we rest the decision of this cause upon the ground that the circuit court had no jurisdiction to make the order in question.

The office of a *nunc pro tunc* entry, of the class under consideration, is to record some act of the court done at a former term, which was not then carried into the record, but it should not be employed to secure, at a subsequent term, a performance by the court of some act which the applicant failed to have the court do at the term in which a final judgment had been rendered and entered. Doubtless a court retains jurisdiction of its records, and may correct them so as to make them set forth whatever act the court performed in a cause at a prior term; but, in the absence of some statutory provision, its jurisdiction of the cause terminates with the term at which a final judgment is entered. Were the rule otherwise, the stability of judgments would be destroyed; they would be found, not alone in the records of the court, but in those records and the memory of the judge combined.

The authorities which support this view of the office of a *nunc pro tunc* order, of the class under consideration, are numerous. "After the close of the term, it is holden that the court can enter no order *nunc pro tunc*, unless one was actually made, and omitted to be entered": *Torbet v. Coffin*, 6 Ohio, 33; *Long v. Long*, 85 N. C. 417; *Limerick, Petitioners*, 404 18 Me. 183; *Nabers v. Meredith*, 67 Ala. 333; *Smith v. Hood*, 25 Pa. St. 218; 64 Am. Dec. 692; *Howell v. Morlan*, 78 Ill. 162-165; *Perkins v. Dunlavy*, 61 Tex. 241; *Whitwell v. Emory*, 3 Mich. 84; 59 Am. Dec. 220; *Gibson v. Chouteau*, 45 Mo. 171; 100 Am. Dec. 366.

We have seen that the order under consideration does not purport to find that the court did some act at a former term which was not recorded. Instead, it is an attempt to have the court, at a term in 1894, find a fact which it might have found at a term held three years before, if then required to consider it. No judicial action upon the question was then invoked, and when it was afterwards invoked, the cause had passed into final judgment and beyond the jurisdiction of the court, and its action was without authority.

Petition in error dismissed.

Spear, J., not sitting.

JUDGMENTS—ENTRY OF NUNC PRO TUNC.—When such entry is proper, when improper, and the effect thereof, are the subjects of the extended note to *Ninde v. Clark*, 4 Am. St. Rep. 828-834.

JUDGMENTS—AMENDMENT OF.—A court cannot alter, vary, or annul its final judgment after the close of the term at which it was rendered, except to correct clerical errors or omissions, or when the judgment is void on its face, either for want of jurisdiction of the subject matter or of the parties: *Carlisle v. Killebrew*, 91 Ala. 351; 24 Am. St. Rep. 915, and note.

JELKE v. GOLDSMITH.

[52 OHIO STATE, 499.]

AN ADMINISTRATOR DE BONIS NON may maintain an action to recover the assets of the estate wherever they may be found.

EQUITY—DECREES IN CHANCERY UNAIDED BY STATUTE, ARE IN PERSONAM only and do not execute themselves so as to transfer personality.

EXECUTORS AND ADMINISTRATORS—SALES BY, WITHOUT ORDER OF COURT.—An executor or administrator, when unrestrained by statute, has power to sell the personal assets of the estate, including notes, accounts, bonds, and mortgages, without an order of court, and a purchaser who buys from him in good faith, for full value, without notice of any bad faith or fraudulent intention on the part of the executor or administrator, although such intention exists, acquires a good title and is not required to see to the application of the purchase money.

Action to compel the delivery of notes and mortgages. C. A. Kebler, as the administrator of the estate of J. Robb, deceased, sold certain of his land to pay his debts. One parcel belonging to the estate was sold and conveyed to one Flanagan, who paid one-third of the purchase money in cash, and made and delivered to such administrator his two notes, secured by mortgage on the land purchased, for the remainder of the purchase price, both payable to such administrator. Long after the notes became due, Flanagan was unable to pay them, and the administrator indorsed, sold, and delivered them, together with the mortgage, to Jelke, who paid to the administrator therefor the full amount of the principal and interest. Kebler, as administrator, converted the money to his own use and died without accounting therefor to the estate. A. W. Goldsmith was afterwards appointed administrator de bonis non of the estate of Robb, and on March 26, 1888, began this action against Jelke to compel him to deliver up such notes and mortgage. All of the heirs and creditors of the estate of Robb were parties to the action wherein the order for the sale of the land purchased by Flanagan was made, and Jelke, at the time he purchased such notes and mortgage from the administrator, paid full value therefor and had no

notice of any bad faith or intended wrongful conversion of the proceeds by the administrator, nor was the transaction of such a nature as to charge him with such notice. Jelke prosecuted a writ of error from a judgment against him.

Paxton, Warrington & Boutet, for the plaintiff in error.

Harmon, Colston, Goldsmith & Hoadly, for the defendant in error.

⁵⁰⁹ BURKET, J. Plaintiff below, defendant in error here, complains in his motion for a new ⁵¹⁰ trial, because the court failed to state in its findings of fact that Charles A. Kebler, administrator, did not in any manner deliver or indorse the notes in question to the two trustees, and further because the court failed to state that said administrator had not accounted for the proceeds of said notes.

The bill of exceptions contains all the testimony, which is mostly documentary, and, taking the testimony together, there is no conflict, and nothing to require any weighing of testimony.

In view of all the testimony, the admissions in the pleadings, and the facts so far as found by the court, it clearly appears that Mr. Kebler held these notes as administrator until he sold them to the plaintiff in error in March, 1887, and that he failed to account for the proceeds of the notes and mortgage. So that in the disposition of the case these two facts will be regarded as established, as claimed by the defendant in error.

As to the claim of the plaintiff in error, that an administrator cannot maintain an action for the recovery of assets of the estate which have illegally passed into the hands of third persons from the former administrator, it is enough to say that the statutes have been materially changed since the case of *McCoy v. Gilmore*, 7 Ohio, 268, and that now an administrator de bonis non has the right to maintain an action for the recovery of the assets of the estate wherever the same may be found: *Rev. Stats.*, secs. 6020, 6214; *Curtis v. Lynch*, 19 Ohio St. 392; *Tracy v. Card*, 2 Ohio St. 431.

It is claimed by plaintiff in error that, by virtue of the decree in the court of common pleas referred to in the findings of fact in this case, ⁵¹¹ the title to the notes passed from the administrator, Kebler, and became vested in the two trustees named in said decree. It is further claimed by plaintiff in error that the sale of the notes by the administrator to Mr. Jelke was valid, and vested title in him. Both of these claims may be false, but both

cannot be true; because, if title vested in the trustees by virtue of the decree, no title remained in the administrator to be by him transmitted to Mr. Jelke.

No indorsement of the notes was made by the administrator to the trustees, and no delivery was made to them, either actual or constructive. Mr. Kebler held the notes and mortgage until March, 1887, and then indorsed the notes and assigned the mortgage, as administrator of the estate of James Robb, and sold and delivered them to Mr. Jelke, thus showing that he treated the notes and mortgage as being held by him in his capacity of administrator.

The whole record is consistent with this construction put upon the transaction by Mr. Kebler at the time of its occurrence, and there is nothing against it, unless it be a strained construction of the effect of the decree in the common pleas.

If it be true as found by the court, that on the eleventh day of March, 1887, the administrator indorsed, sold, and delivered the notes to Mr. Jelke, it must be also true that at that date the title and possession of the notes still remained in him, as he could not sell and deliver that which he had not. If he then had the title and possession, the same could not have been transferred to the trustees by virtue of the decree of February, 1885, unless they had in the mean time been retransferred to the administrator by the trustees, which is not claimed, ⁵¹² and of which there is no evidence whatever in the record. The irresistible conclusion is, that the title and possession remained in the administrator until March 11, 1887.

That the title did so remain in the administrator appears from this further consideration. At common law a decree acts in personam, and creates a right which may be enforced against the person by attachment and sequestration, but the decree does not execute itself. By statute in this state at an early day, it was provided the same as is now contained in section 5318 of the Revised Statutes, which reads as follows: "When the party against whom a judgment for a conveyance, release, or acquittance is rendered does not comply therewith by the time appointed, such judgment shall have the same operation and effect, and be as available, as if the conveyance, release, or acquittance had been executed conformably to such judgment."

It is by virtue of this statute that the decree of a court of equity is made, by its own vigor and operation, to transfer title to real estate from one party to another. In the absence of such statute, this court held in *Shepherd v. Commissioners of Ross*

County, 7 Ohio, 271, that a decree did not operate to transfer title to real estate.

It will be noticed that this statute applies only to decrees as to title to real estate, but decrees as to personality are left as at common law, aided, however, by our remedial statutes, and section 5490 of the Revised Statutes, which provides as follows: "When the judgment is not for the recovery of money or real property, it may be enforced by attachment, by the court which rendered the same, upon motion ⁵¹³ made, or by a rule of court upon the defendant; but in either case notice of the motion, or a service of a copy of the rule, shall be made on the defendant a reasonable time before the order of attachment is made."

Under this section, the most that can be claimed in this case is, that the trustees could have compelled the administrator, by attachment, to deliver the notes and mortgage in question; but until such delivery, the title to the notes and mortgage remained in the administrator.

That a decree in chancery, unaided by statute, is in personam only, and does not execute itself so as to transfer personality, is also shown by the following citations: *Mitchell v. Bunch*, 2 Paige, 606; 22 Am. Dec. 669; *Mead v. Merritt*, 2 Paige, 402; *Great Falls Mfg. Co. v. Worster*, 23 N. H. 462; *Wood v. Warner*, 15 N. J. Eq. 81; 2 *Daniell's Chancery Practice*, 1032; 1 *Spence's Equitable Jurisdiction*, 391; 1 *Eq. Cas. Abr.* 130.

Let us next examine the claim of plaintiff in error, that the sale of the notes and mortgage by the administrator to Mr. Jelke is valid and vested title in him.

The common law, as to powers of executors and administrators, is in force in this state, except as modified by statute: *O'Connor v. State*, 18 Ohio, 225; *Tracy v. Card*, 2 Ohio St. 431; *Curtis v. Lynch*, 19 Ohio St. 392.

At common law an executor or administrator has full power and authority to sell and dispose of all the assets of the estate, including notes, accounts, bonds, mortgages, and leases, without an order of court, when the sale is in good faith, and for purposes of the estate; and in such case the purchaser is not required to see to the proper ⁵¹⁴ application of the purchase money. Even though the sale on part of the executor or administrator is in bad faith, and with the intent and for the purpose of converting the proceeds of the sale to his own use, the purchaser will be protected in his purchase in case he acts in good faith and without notice of the bad faith and wrongful intention of the executor or administrator. A sale by an executor or administrator in

payment of, or as security for, his own debt, is sufficient notice to the purchaser that the transaction is not for the benefit of the estate, but for the executor or administrator individually, and such a transaction is always held collusive and fraudulent: 7 Am. & Eng. Ency. of Law, 288-299, and notes; 2 Williams on Executors, 7th Am. ed., 132, notes; *Carter v. Manufacturers' Nat. Bank*, 71 Me. 448; 36 Am. Rep. 338; *Duncan v. Jaudon*, 15 Wall. 165; *Field v. Schieffelin*, 7 Johns. Ch. 150; 11 Am. Dec. 441; *Smith v. Ayer*, 101 U. S. 320.

In this last case, which involved the right of the executor to pledge notes which came into his possession as executor, the court, on pages 326 and 327, say: "There is no doubt that, unless restrained by statute, an executor can dispose of the personal assets of his testator by sale or pledge for all purposes connected with the discharge of his duties under the will. And even where the sale or pledge is made for other purposes, of which the purchaser or pledgee has no knowledge or notice, but takes the property in good faith, the transaction will be sustained; for the purchaser or pledgee is not bound to see to the disposition of the proceeds received. But the case is otherwise where the purchaser or pledgee has knowledge of the perversion of the property to other purposes ⁵¹⁵ than those of the estate, or the intended perversion of the proceeds."

The case of *Duncan v. Jaudon*, 15 Wall. 165, cited above, was a case involving the right of a trustee to pledge stock (held by him in trust) as collateral security for a loan to himself for his own purposes. The right was denied. The court, on page 175, say: "The party taking such stock on pledge deals with it at his peril, for there is no presumption of a right to sell it, as there is in the case of an executor. In the former case the property is held for custody, in the latter for administration."

In the case of *Field v. Schieffelin*, 7 Johns. Ch. 150, 11 Am. Dec. 441, which was a case involving the right of a guardian of a minor to sell a note and mortgage which came into his possession as guardian, and payable to him as such, the syllabus is as follows: "A guardian having the legal power to sell or dispose of the personal estate of his ward in any manner he may think most conducive to the purposes of his trust, a purchaser who deals fairly has a right to presume that he acts for the benefit of his ward, and is not bound to inquire into the state of the trust; nor is he responsible for the faithful application of the money, unless he knew, or had sufficient information at the time, that the guardian contemplated a breach of trust, and intended to

misapply the money; or was, in fact, by the very transaction, applying it to his own private purpose." The chancellor, after reviewing the then cases on the subject, on page 160, says: "I have thus looked pretty fully into the decisions in the analogous case of a purchase from an executor of the testator's assets; and they all agree in this, that the ⁵¹⁶ purchaser is safe, if he is no party to any fraud in the executor and has no knowledge or proof that the executor intended to misapply the proceeds, or was in fact by the very transaction applying them to the extinguishing of his own private debt."

The case of *Strong v. Strauss*, 40 Ohio St. 87, is cited and relied upon by defendant in error. In that case a guardian sold notes made payable to himself as such guardian. The syllabus is as follows: "One who buys such notes bearing on their face the marks of a trust fund is put upon inquiry; and if he buys them from the guardian, under circumstances fairly indicating that they were sold against the interests of his wards, he gets no title from the guardian who misappropriates the proceeds of the sale."

It appears in the opinion of the court and facts of the case that the notes were sold long before maturity, for less than their face value, and under a statute of this state authorizing a sale only "when for the interest of the ward." The guardian acted in bad faith and sold the notes for purposes of his own, and not for the benefit of the wards. The court finds that the defendant, at the time he bought the notes, had sufficient warning to put him upon inquiry. The case, therefore, falls within the class of cases in which both seller and purchaser acted in bad faith, and in such cases the sale is always held invalid and collusive. In addition, the power of a guardian was limited by statute to sales "when for the interest of the ward." Of this statute the purchaser was bound to take notice, and see to the proper application of the money paid for the notes. The case is therefore not in conflict with the cases which hold that, at common law, such sales may be made when the ⁵¹⁷ purchaser acts in good faith without notice, but falls within the class of cases where there is bad faith, or a limitation of the power of sale by statute. Even in that case it is conceded that a sale in all respects fair would be valid, but that the purchaser would be bound to exercise a high degree of caution in purchasing notes representing trust funds.

Therefore, and in view of the unbroken line of authorities, the power and right of an executor or administrator, at common law, to sell the securities of the estate cannot be questioned.

How stood the law on this subject in this state at the time of the sale of the notes in question?

Under our statutes, an executor or administrator may sell the personal property of the estate at public sale without an order of court: Rev. Stats., sec. 6076.

By section 6074 of the Revised Statutes, the power of an executor or administrator to sell promissory notes, claims, demands, rights of action, bonds, and stocks belonging to the decedent at his death is taken away, except as to sale of desperate claims, and bonds and stocks necessary to be sold to pay debts, as provided in sections 6077 and 6080 of the Revised Statutes.

Until the amendment of section 6162 of the Revised Statutes, February 18, 1891 (88 Ohio Laws, 41), and which was further amended (89 Ohio Laws, 148), regulating and restricting the sale of notes taken by an executor or administrator for real estate sold by him, there was no statute in this state in any manner abridging the power of an executor or administrator to sell notes taken by him in the course of his administration of the estate, and payable to himself in his representative capacity; and therefore his ⁵¹⁸ powers of sale, as to such notes, were as ample as at common law, until February 18, 1891, when section 6162 was amended as above stated.

There was, therefore, no want of power in the administrator. Kebler, on March 11, 1887, to sell the notes in question in good faith for the purpose of the estate, or in bad faith for purposes of his own, provided the purchaser acted in good faith and without notice or knowledge of the bad faith and wrongful purposes of the administrator.

The petition avers that the sale of the notes by the administrator was in fraud of the rights of creditors and distributees, and for purposes of his own; but there is no averment that Mr. Jelke had notice or knowledge thereof, or in any way acted in bad faith. Neither do the facts found by the court in any way implicate Mr. Jelke in the wrongs charged against the administrator, and there is no testimony in the bill of exceptions from which notice or knowledge could be inferred. On the contrary, the utmost good faith on part of Mr. Jelke is conceded. He paid the full face of the notes and interest after their maturity, before there were any suspicions against the administrator; and at that time the transaction seemed to be to the advantage of the estate, as it served to realize the full amount of the notes, without the trouble and expense of a foreclosure of the mortgage or collection of the notes. Mr. Jelke, therefore, by his purchase acquired a

good and indefeasible title to the notes and mortgage in question. The transaction as to the purchaser of the notes should be viewed as it appeared at its date, and not as it may appear years thereafter, when others, whose sins cannot be charged against him, have gone wrong.

519 To compel Mr. Jelke to surrender the notes and mortgage to the same estate from which he purchased them in good faith and for full value, without returning to him his purchase money, would certainly be unconscionable, if not absolutely dishonest.

Inasmuch as the petition fails to charge bad faith on the part of the purchaser, or notice to him of bad faith on the part of the administrator, in the sale of the notes and mortgage, it fails to state a cause of action against the purchaser; and a judgment founded upon such petition should be reversed, and a general demurrer to the petition should have been filed and sustained.

The conclusion is, that the judgment at special term in favor of defendant below is right, not on the ground that the title to the notes and mortgage had vested in the trustees, but on the ground that the title had vested in Mr. Jelke.

With these views, it follows that the motions to make new parties were properly overruled, and that the judgment of the general term, reversing the judgment of the special term, should be reversed, and the judgment of the special term affirmed.

Judgment accordingly.

EXECUTORS AND ADMINISTRATORS—ACTION BY ADMINISTRATOR DE BONIS NON FOR ASSETS.—In order to realize the assets of the estate, an administrator de bonis non in those states which make the former representative render an account to him, may resort to all necessary actions: *Extended note to Potts v. Smith*, 24 Am. Dec. 387.

EXECUTORS AND ADMINISTRATORS—VALIDITY OF SALES OF WITHOUT ORDER OF COURT.—A sale by an executor without order of court, under a will containing no power to him to so sell, is void: *Huse v. Den*, 85 Cal. 390; 20 Am. St. Rep. 232, and note. An executor who sells the personalty of his testator without an order of court is guilty of its conversion and becomes responsible for its value with legal interest: *Estate of Radovich*, 74 Cal. 538; 5 Am. St. Rep. 466.

EQUITY—JURISDICTION.—The original and primary jurisdiction of the court of chancery was in personam merely: *Mitchell v. Bunch*, 3 Paige, 606; 22 Am. Dec. 669.

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COMMERCIAL NATIONAL BANK v. WHEELOCK.

[52 OHIO STATE, 584.]

JURY TRIAL—NEITHER PARTY ENTITLED TO, WHEN.—In an action raising the issue as to whether a deed in controversy was executed under duress of the grantor, neither party is entitled to demand a jury trial.

DEEDS—DURESS OR FRAUD.—A grantor in a deed regularly executed cannot assert rights contrary to its terms, on the ground that it was executed under duress, fraud, or undue influence, without first securing its reformation or cancellation by a decree in equity.

DEEDS, EXECUTED UNDER DURESS of the grantor, are voidable only, and not void.

Action to obtain possession of certain land. In April, 1885, Mrs. Wheelock filed her petition in the court of common pleas, alleging that in October, 1883, the Commercial National Bank was a creditor of the Cleveland Chair Company in the sum of not less than fifteen thousand dollars, that her husband, C. S. Wheelock, was a stockholder, director, and officer in said chair company; that the bank claimed that about three thousand six hundred dollars of such debt was evidenced by forged acceptances of the drafts of the chair company, and that such forgeries had been committed in part by her husband, who was arrested and indicted therefor at the instance of the bank, with the fraudulent intent of alarming and intimidating herself and her husband and of coercing her into the payment of said fifteen thousand dollars; that said bank, knowing of the insolvency of said chair company and its stockholders, threatened plaintiff that unless certain land, of the value of ten thousand dollars, owned by her, was conveyed to it toward the payment of the fifteen thousand dollars, the indictment would be prosecuted; that while overcome by fear and under duress, she executed to the bank a deed of said land, joined in by her husband, also acting under duress. She alleged that the deed was null and void; that she is the owner and entitled to the possession of said land unlawfully in the occupancy of said bank. The bank, answering, admitted all of the allegations of the petition, except that the deed was executed under duress, and as to this it alleged that it accepted her deed at her instance and request in full satisfaction of its claim against the chair company and surrendered all evidences of such debt. On the trial, the plaintiff demanded, but was refused a jury trial, and judgment was rendered in favor of the bank. Mrs. Wheelock prosecuted a writ of error to the circuit court, and that court reversed the judgment of the court of common pleas for error in refusing to plaintiff a jury trial.

and in holding that she was not entitled to try her right to possession, until she had first set aside the deed given by her to defendant. The bank then prosecuted a writ of error to this court.

J. H. Hoyt, A. St. J. Newberry, and A. C. Dustin, for the plaintiff in error.

Prentiss & Vorce, for the defendant in error.

⁵⁴⁸ SHAUCK, J. That Mrs. Wheelock did not, in her amended petition, pray for the cancellation of the deed does not aid in determining whether the issues were triable to a jury or not. The execution of the deed was alleged in the petition, and, if it was an impediment to her recovery at law, it followed either that she was entitled to that relief upon the facts alleged and without a specific prayer therefor, or that her petition did not state a cause of ⁵⁴⁹ action. In either view, upon that assumption, the judgment of the court of common pleas should have been affirmed.

The contention of her counsel is, that Mrs. Wheelock's legal title to the land remained unaffected by her deed, in view of the circumstances of its execution, and that, the deed being utterly void, she might recover possession by an action at law. But little reliance should be placed upon observations extracted from opinions and text-books, where only the validity and binding character of contracts is considered, and where, without technical precision, the terms "void" and "voidable" are used as equivalents.

It is suggestive that the combined industry of court and counsel have failed to discover a case in this state in which the grantor, having capacity to contract, in a deed executed in conformity to the provisions of the deeds act, has been permitted to assert rights contrary to its terms without first securing its reformation or cancellation by a decree in equity, to be obtained upon the allegations and the degree of proof there required, and upon such terms as may be imposed conformably to the doctrines of equity. Suits in equity for the cancellation of deeds in cases of fraud, undue influence, and incapacity are familiar in our practice. The constant exercise of the powers of courts of equity in cases of this character has not been by chance or caprice, since the rule has been uniformly held that courts of equity do not act, except to grant relief where the powers of courts of law are inadequate. The force of the inference to be drawn from this familiar course of practice is not diminished by *Westerman v. Westerman*, 25

Ohio St. 500, or *McVeigh v. Ritenour*, 40 Ohio St. 107, since ⁵⁵⁰ it is not the grantor, but his creditor, who, according to the doctrine of those cases, may treat a fraudulent deed as a nullity, and the decisions are placed upon the provision of the statute, that every grant made to defraud creditors "shall be deemed utterly void and of no effect": Rev. Stats., sec. 4196. Indeed, it is well settled that, notwithstanding the comprehensive terms of this statute, such deed is, as against the grantor, effective to convey his interest, and that he cannot avoid it by any form of proceeding, either at law or in equity.

Nor is the question affected by the numerous cases in which deeds have been held to be void because of fraud not limited to the purposes for which they were executed or procured, but extending to the very execution of the instruments. They are cases where, in contemplation of law, the deeds were not executed.

It is the settled policy of the state, as indicated by a uniform course of practice in its courts, and by repeated decisions of this court, that instruments of this solemn character, executed in conformity to the provisions of the deeds act, shall not be set aside or defeated of their natural purpose, except upon proper allegations which are supported by evidence of a clear and convincing character. The mere preponderance of evidence, which is sufficient to determine the verdicts of juries in civil actions, is not sufficient: *Potter v. Potter*, 27 Ohio St. 84; *Ford v. Osbourne*, 45 Ohio St. 1.

"The distinction between the terms 'void' and 'voidable,' in their application to contracts, is often one of great practical importance; and whenever entire technical accuracy is required, the term ⁵⁵¹ 'void' can only be properly applied to those contracts that are of no effect whatsoever, such as a mere nullity, and incapable of confirmation or ratification": *Terrill v. Auchauer*, 14 Ohio St. 80.

The distinction suggested between deeds that are void and those that are voidable only is usually regarded as determining the necessity for the interposition of a court of equity. Applying it here, it would seem to justify the ruling of the court of common pleas, since it is not doubted that Mrs. Wheelock's deed was capable of ratification.

But it is said that the judgment of the circuit court was controlled and justified by *Cresinger v. Welch*, 15 Ohio, 156; 45 Am. Dec. 565. It was there decided that if an infant conveys land, and, after attaining his majority, conveys the same land to

another, such subsequent conveyance is a disaffirmance of the former, and the grantee in the subsequent deed may maintain ejectment. That case is distinguished from the present case upon clear grounds. The deed against which the title of the subsequent grantee prevailed was the deed of one who was without power to contract. The theory of the case is that the deed was, when executed, ineffectual to pass title because of the want of capacity of the grantor to contract, and that it so remained until effect should be given to it by ratification. In this case Mrs. Wheelock had capacity to execute the deed, and it was effectual to convey the title, subject to her right to avoid it in a proper suit because of the circumstances under which it is alleged to have been executed.

Duress is but the extreme of undue influence, and there appears no reason why a deed, voidable because of its exercise, should not be canceled in ⁵⁵² the same manner and subject to the same conditions that are imposed in courts of equity in suits to avoid deeds obtained by fraud or undue influence.

The consideration of other questions argued by counsel is unnecessary.

Judgment of the circuit court reversed, and that of the common pleas affirmed.

CONTRACTS EXECUTED UNDER DURESS—VALIDITY OF. A contract of sale obtained by duress is void as against the party on whom such duress is committed, consideration or no consideration, because it lacks the assent of the forced vendor: *Belote v. Henderson*, 5 Cold. 471; 98 Am. Dec. 432, and note. Duress will avoid a contract at law or in equity: *Central Bank v. Copeland*, 18 Mo. 305; 81 Am. Dec. 597, and note with the cases collected, discussing the effect of duress on deeds or contracts obtained under.

MORGAN v. HUDNELL.

[32 OHIO STATE, 552.]

ANIMALS—LIABILITY OF OWNER.—The owner of a domestic animal is not in general liable for an injury committed by it while in a place where it rightfully may be, unless it is shown that the animal was vicious in the particular complained of, and that the owner had notice of such vicious propensity.

ANIMALS—LIABILITY OF OWNER FOR TRESPASSES OF.—If a domestic animal breaks into the close of another, and there damages the real or personal property of one in possession, the owner of the animal is liable without reference to whether such animal is vicious, or whether such viciousness was known to the owner.

TRESPASS—RIGHT OF COTENANT TO MAINTAIN.—One of several cotenants in possession, holding by separate contracts, may

maintain an action in trespass, when the damage for which he seeks to recover is to his own individual property, rightfully in the close by virtue of his contract.

TRESPASS—RIGHT OF COTENANT TO MAINTAIN ACTION. A cotenant of a pasture field may, without making his cotenants parties, maintain trespass against the owner of an animal which breaks into the pasture and injures an animal belonging to such cotenant, and rightfully therein.

Trespass for the unlawful killing of Hudnell's horse by a horse belonging to the plaintiff in error. Judgment for the plaintiff and defendant prosecuted a writ of error to this court.

Mayo, Yapple & Phillips, for the plaintiff in error.

J. C. Entrekin, for the defendant in error.

554 SPEAR, J. The contention of the plaintiff in error is that the charge of the court is wrong, and that there should have been no recovery in favor of Hudnell, because: 1. The owner of domestic animals cannot be held liable for injuries committed by them, unless the owner has notice of their vicious propensities; and 2. The plaintiff below, not being in possession of the lot where his horse was being pastured, could not maintain an action of trespass.

Undoubtedly, it is settled law that the owner of a domestic animal is not in general liable for an injury committed by such animal while in a place where it rightfully may be, unless it is shown that the animal was vicious in the particular complained of, and that the owner had notice of such vicious propensity.

But we regard it as equally well settled that if the animal breaks into the close of another, and there damages the real or personal property of one in possession, the owner of the trespassing animal is liable, without reference to whether such animal was vicious, and without reference to whether such propensity was known to the owner, for the law holds a man answerable, not only for his own trespass, but for that of his domestic animal. The ⁵⁵⁵ natural and well-known propensity of horses, as well as other cattle, is to rove, and the owner is bound to confine them on his own land; so that, if they escape and do mischief on the land of another under the circumstances where the other is not at fault, the owner ought to be liable: *Beckwith v. Shordike*, 4 Burr. 2092; *Angus v. Radin*, 5 N. J. L. 815; 8 Am. Dec. 626; *Dolph v. Ferris*, 7 Watts & S. 367; 42 Am. Dec. 246; 3 Black's Commentaries, 211.

The question, then, in this case, is whether or not Hudnell was in possession of the pasture field in such sense as to authorize him

to maintain the action. It is the duty of this court to give such construction to the record as will sustain the judgment of the court below if it can be reasonably done.

Looking to the bill of exceptions we find that the plaintiff "had the right to keep the horse in question in Houser's pasture field on pasture," and "paid a certain price per month for such right." That is, Hudnell, the plaintiff, was keeping the horse there; Houser, the owner of the land, was not keeping the horse there. It does not appear that he was keeping any animal there. Other persons who had like right with plaintiff had their horses in the same field on pasture. It does not appear that Houser reserved any right to use the field for his own stock, nor for the stock of others. Indeed, the circumstances are consistent with the idea that Houser had, for the time these contracts remained in force, given up the possession to those who had thus hired the pasture. In this view they were, then, the owners of the growing herbage. The rule that tenants so in possession may maintain trespass against even the owner of the fee ⁵⁵⁶ seems to rest on reason and abundant authority: *Crosby v. Wadsworth*, 5 East, 602; *Tompkinson v. Russell*, 9 Price, 287; *Clap v. Draper*, 4 Mass. 266; 3 Am. Dec. 215; 1 Addison on Torts, 371, 372. It would follow from this that, had damage to the herbage been the ground for complaint, the tenants might have maintained a joint action for trespass.

If the conclusion just stated is justified, and we think it is, the only question remaining is as to the right of one of several tenants in possession, holding by separate contracts, to maintain an action in trespass, where the damage for which he seeks to recover is to his own individual property rightfully in the close by virtue of his rental contract. That the damage is to personalty will not, according to the authorities, stand in the way of a recovery. True, such damage is treated by many authorities as an incident, and in the nature of aggravation. But this distinction seems to have arisen from a desire to preserve the common-law form of action, and at the same time not deny the injured party a remedy. The old action for trespass *quare clausum fregit* was strictly an action for damages to the land following an unlawful entry, and hence could not be resorted to for the purpose of a recovery for damages to personalty only. But forms of action not being important in this state since the adoption of the code, we need not be embarrassed by any such distinction. The question in every case is, not what is the proper form of action, but has the party a right of action.

Upon this phase of the inquiry we do not find authorities. But, upon principle, why should not one of several tenants in common have such an action? Had he been in exclusive possession no doubt would exist. Why should the mere fact that ⁵⁵⁷ others are interested in the growing herbage bar a recovery? They are not concerned in the special damage suffered by plaintiff, and, holding, not by virtue of a joint contract, but by separate several contracts, are not necessary or proper parties. It cannot prejudice the defendant that others having the same right of pasture do not join in the action, for they have no concern with it. If the claim were for damage to the herbage, the case would be different, inasmuch as it might be urged that the defendant's entire liability should be determined in one action, and hence all should be parties. In Virginia and Vermont it is held that even in that case one alone may maintain the action, though it appears that the trend of authority is the other way. Probably the latter view would prevail in this state. And yet, if it were attempted to recover in one action for damages to the real estate suffered by all and for damages to the personalty of one alone, a vexed question of misjoinder would arise, because all the parties would not be interested in each ground of action. To hold, therefore, that one tenant could have no standing to recover for damages to his personalty, save by joining with him the other tenants, is practically to refuse him any relief whatever. And this would, in effect, be to say that the law will take cognizance of a claim for damages to real estate, though it may amount only to a few cents, and refuse a hearing to a claim for destruction of personal property under like facts which may reach hundreds of dollars. It would be to say further that a party suffering injury to his personalty by an animal trespassing upon premises of which he has sole possession may be made whole, but, if it happens that the possession is shared by others, he is without remedy. Such a result would ⁵⁵⁸ cast discredit on the power of the law to work out justice.

To deny the right of the injured party to maintain action for damage to his separate personalty upon any of the grounds referred to would, we think, be to interpose a technicality for the purpose of defeating justice. It is the duty of courts, as we understand it, to override mere technicalities, where they stand in the way of doing justice between man and man.

Stated in brief, the case is this: The plaintiff's horse was in a close where the owner, having rightful enjoyment, had a right to keep him; he had a right in the field; the defendant's horse,

by breaking the fence which his landlord was bound to maintain, became a trespasser, and, while thus unlawfully invading the close as a trespassing animal, inflicted the damage to plaintiff's property. For such wrong we think the law should, and does, afford a remedy.

In this view the charge of the court was right, and the judgment will be affirmed.

ANIMALS—LIABILITY OF OWNERS OF, FOR TRESPASSES COMMITTED BY.—An owner of animals is answerable for their trespasses: *Van Leuven v. Lyke*, 1 N. Y. 515; 49 Am. Dec. 346, and note. Trespass lies against the owner of cattle which escape into the lands of another, even though against the will of the owner: *Forsythe v. Price*, 8 Watts, 232; 34 Am. Dec. 465. Cattle doing damage on another's land might be distrained at common law, or the owner was liable in trespass: *Halladay v. Marsh*, 3 Wend. 142; 20 Am. Dec. 678. The owner of a bull is liable to an action of trespass *quare clausum fregit* for damage done by the animal in breaking into the field of another and killing a horse: *Dolph v. Ferris*, 7 Watts & S. 367; 42 Am. Dec. 246, and note. See, also, the notes to *Evans v. McDermott*, 60 Am. Rep. 605; *Laverone v. Margianti*, 10 Am. Rep. 270, and the extended note to *Tonawanda R. R. Co. v. Munger*, 49 Am. Dec. 251.

COTENANCY—ACTIONS AGAINST THIRD PERSONS—PARTIES.—A tenant in common of personal property may separately maintain an action for a wrong done to it, if his cotenants refuse to join with him as plaintiffs and they are nonresidents: *Peck v. McLean*, 36 Minn. 228; 1 Am. St. Rep. 665, and note.

RAILWAY COMPANY v. SALZMAN.

[52 OHIO STATE, 558.]

RAILROADS—DUTY TO SICK PASSENGER.—A railroad company is bound to take such reasonable care of passengers who become sick after entering its cars as is fairly practicable with the facilities at hand, without unreasonable delay of the train or discomfort to the other passengers.

RAILROADS—DUTY TO PASSENGER ASSISTING SICK PASSENGER.—A railway passenger who is assisting in the care of a sick person on the train, by direction or permission of those in charge, is entitled to at least ordinary care on their part for his protection from injury.

Action to recover for personal injuries. On April 26, 1887, plaintiff, Salzman, and his wife together with a number of brother Odd Fellows and their wives went on an excursion train from Bryan, Ohio, to Toledo to attend a dedication of an Odd Fellows' temple. This train consisted of four passenger coaches coupled together, with a locomotive in front, and after the train had started a caboose car was attached to the rear end of the train as a protection thereto and for the use of the trainmen.

The platform of the caboose was several inches lower than that of the passenger coach, and the space between the two platforms was from twelve to fifteen inches. On the return trip from Toledo to Bryan, Salzman and his wife were seated in the rear passenger coach. The train had not gone far before a passenger by the name of Shawley, who occupied the seat immediately in front of Salzman, was taken sick and was suffering from scrotal hernia. A doctor by the name of Rostel, who was on the train, was called to attend the sick man, but was unable to reduce the hernia in the seat where the sick man was. He said that it would be necessary to find a place where the sick man could be placed on his back and his clothing removed. The conductor on the train was then called, and said that there was a caboose on the rear end of the train having seats at the side, and also a cot, where they could take the man when they arrived at the next station. As the train began to slow down for the next station, Dr. Rostel and Messrs. Campbell, Salzman, and Elliott picked the sick man up and started toward the rear end of the car. The brakeman on the train requested them to take plenty of time and not to come out on the platform until the train had come to a full stop. When the train stopped, the brakeman opened the door and told the men carrying Shawley that they could come on. On the part of the railroad company, it is claimed that the brakeman then immediately crossed over and down the caboose step to the ground, then between the caboose and passenger platforms, and held up his lantern to light the way across, and, as the men came out on the platform, called out to them to look out and be careful in stepping across; that this warning was heard by all of the men engaged in carrying Shawley, including Salzman; that although the latter heard the notice and warning, he mistook or misunderstood it, and, in stepping, stepped short and between the two platforms, falling and injuring himself. Salzman claims that, upon the request of the conductor, he assisted in carrying the sick man into the caboose; that the platform was not sufficiently lighted to enable him to cross over in safety; that the warning given came coincident with his attempt to step across the platform and between the cars; that he had no notice or knowledge of the condition of the step, and that there was a sudden jerk of the car by the engine just as the step across was being made. Verdict and judgment for the plaintiff in the court of common pleas, affirmed in the circuit court, and petition in error by defendant to this court.

E. D. Potter and C. A. Bowersox, for the plaintiff in error.

F. H. Hurd, C. H. Masters, and C. S. Bentley, for the defendant in error.

⁵⁶² **BURKET, J.** This case was tried to a jury three times, and three judgments rendered in favor of the plaintiff below. The case was three times before the circuit court, and twice before this court. The second judgment in the common pleas was reversed by the circuit court, on the ground that the verdict was not sustained by sufficient evidence, and that judgment of reversal was affirmed by this court.

It is claimed now by plaintiff in error that the evidence upon which the last verdict in the common pleas was rendered is substantially the same as that upon which the second verdict was rendered, and, as the circuit court found that the second verdict was not sustained by sufficient evidence, it should have found that the last verdict was not sustained by sufficient evidence, and that failing to so find is error.

The defendant in error claims that the evidence in the last trial was much stronger in his favor ⁵⁶³ than at the second trial, and that the last verdict is sustained by sufficient evidence.

Be that as it may, the circuit court affirmed the last judgment, and thereby said that the evidence was sufficient to sustain the verdict. Even conceding that the evidence in the second and third trials was the same, the rule is that the last judgment controls. The circuit court may have concluded that its former judgment was wrong, and in this last judgment concluded to right the wrong. This court, not being required to weigh the evidence, did not examine the evidence, when this case was here the first time, to see whether the circuit court was right or wrong as to the verdict not being sustained by sufficient evidence; neither do we now weigh the evidence to ascertain whether the last verdict was sustained by sufficient evidence. The judgment of the circuit court on that question is usually final.

The charge of the court excepted to is as follows: "If the jury find, from the evidence, that the plaintiff, pursuant to the direction or request of the conductor of defendant's train, attempted to assist in the carrying of Mr. Shawley from the passenger coach to the caboose, and that, in so doing, he used reasonable care, and was injured by reason of exposure to a danger of which he was not aware, and of which the servants of defendant, if exercising only reasonable care, would have known of, and

either protected him from or gave him timely and adequate warning of, then in that case, defendant is liable for the injury resulting from exposure to such danger."

On part of plaintiff in error, it is urged, in support of the exception to this part of the charge, ⁵⁰⁴ that the conductor had no control over Mr. Salzman to order him to do anything in aid of the sick man; that as Mr. Salzman was not bound to obey the orders of the conductor in that regard, whatever he did was purely voluntary on his part, and that he assumed all the risks incident to his voluntary acts, and that the conductor had no authority to bind the company in giving orders as to the sick man.

On part of defendant in error, it is urged that there is no difference in the obligation of the company, whether the removal of the sick man was undertaken by the direction and order of the conductor, or simply by his permission; that the duty devolved upon the company to take reasonable care of the sick passenger on its train, and that when other passengers assisted the officers of the train in the performance of that duty, the company owed to such assisting passengers the obligation of ordinary care to prevent injury to them.

If no duty devolved upon the company to take reasonable care of the passenger who became sick on its train, then neither the order, direction, or permission bound the company, because such order, direction, or permission was not within the scope of his employment, and not in the line of his duties.

The case, therefore, turns upon the question whether or not a duty devolves upon a railroad company to take reasonable care of passengers who become sick after entering its cars.

In travel by ship, care and medical attendance are always provided by the company, as one of the necessities of the journey. In travel by rail, no such necessity exists, and therefore a railroad company is under no obligation to furnish hospitals ⁵⁰⁵ on wheels, or physicians or nurses to attend the sick on their journeys. But without hospitals, and without physicians and nurses of their own, still much can be done to alleviate the pains and aches of a sick passenger. While the train is in motion, the passenger is utterly helpless as to aid, except from those on the train. His fellow passengers owe him no duty, except humanity. The alternative is presented of being cared for by his fellow passengers, by the company, or to writhe in pain and sickness until relieved by death, or the end of his journey. By taking passage and paying his fare the relation of carrier and passenger is established between the company and himself, and as he is under the

control of the company for many purposes, and debarred by the rapid movement of its trains from receiving aid from the outside world, it would seem to follow, as a necessity of the situation, that those who have received his money, and are thus rapidly transporting him, should assume the obligation of taking reasonable care of him, in case of sickness while on the train. This obligation is on the company, not only for the benefit of the sick person, but also for the comfort, and sometimes the safety, of the other passengers. A sick person, by his cries and moans, may so annoy the other passengers as to require his removal to a separate apartment, or from the train. In case of small-pox or cholera, or other contagious disease, the comfort and safety of the other passengers would demand the early removal of the afflicted passenger from the train. The company would, in such case, be charged with the duty of removal, and reasonable care thereafter, until the afflicted person could be otherwise cared for: *Atchison etc. R. R. v. Weber*, 33 ⁵⁰⁸ Kan. 543; 52 Am. Rep. 543; *Conolly v. Crescent City R. R. Co.*, 41 La. Ann. 57; 17 Am. St. Rep. 389.

It is therefore clear that the company owed a duty to the sick passenger, and was under obligation to take reasonable care of him—such care as was fairly practicable with the facilities at hand, without unreasonable delay of the train, or discomfort to the other passengers.

The defendant in error, assisting in the care of such sick person by direction or permission of those in charge of the train, was entitled to at least ordinary care on their part for his protection from injury. There was, therefore, no error, as against the defendant below, in the part of the charge excepted to.

In fact, the charge throughout was much more favorable to plaintiff in error than to defendant in error.

There was also an exception to another part of the charge, but, when taken in connection with the whole charge, there was no error.

The verdict, nine thousand one hundred dollars, seems large, but if too large, a remittitur should have been ordered by the court of common pleas or the circuit court.

After the amount of a verdict, in an action not founded on contract, has had the sanction of a jury, and both the common pleas and circuit courts, this court will not usually interfere to reduce the amount.

Judgment affirmed.

RAILROADS—DUTY TO SICK OR INFIRM PASSENGERS.—A railroad company is not bound to receive on its cars a passenger who is so physically infirm as to be unable to care for himself unless he has an attendant, but if a person whose inability to care for himself is apparent or made known to the company's servants and renders special care necessary is actually accepted as a passenger without an attendant, the company is negligent if it does not exercise the degree of care commensurate with the responsibility it has assumed: *Croom v. Chicago etc. Ry. Co.*, 52 Minn. 296; 88 Am. St. Rep. 557, and note. See, also, *Foss v. Boston etc. R. R.*, 66 N. H. 256; ante, p. 256, and note.

RAILROADS—DUTY TO PERSONS ASSISTING SICK PASSENGER.—Where a passenger is sick and in so enfeebled a condition as to require assistants to carry him from the station to a seat in the train upon which he has secured a passage, the railroad company, having agreed to carry him knowing his condition, must allow the assistants a reasonable time to leave the train as it would have been had they been passengers on the train: *Louisville etc. R. R. Co. v. Orunk*, 119 Ind. 543; 19 Am. St. Rep. 443.

CASES
IN THE
SUPREME COURT
OF
RHODE ISLAND,

KILTON v. ANDERSON.

[18 RHODE ISLAND, 188.]

EXECUTORS AND ADMINISTRATORS.—AN ADMINISTRATOR WITH THE WILL ANNEXED is simply an executor under another name.

EXECUTORS AND ADMINISTRATORS.—THE OFFICE OF ADMINISTRATOR WITH THE WILL ANNEXED CEASES when the will is set aside, in the same way that the office of an executor would cease.

EXECUTORS AND ADMINISTRATORS—DIRECTORY STATUTE.—A statute providing that the refusal of the executor named in a will to accept his trust shall be communicated in writing to the probate court is merely directory.

EXECUTORS AND ADMINISTRATORS—DECLINING TO ACT.—If an executor neglects or refuses to file, in writing, a notice of his refusal of the executorship, as provided by statute, he cannot be compelled to do so, but his failure to comply with the statute does not deprive the court of the power to act, when such refusal has been clearly signified.

Assumpsit. On plea in abatement.

Stephen A. Cooke and Louis L. Angell, for the plaintiff.

John T. Blodgett, for the defendant.

188 STINESS, J. This suit is brought by the plaintiff, as administrator of the estate of Jane Kilton, late of Coventry, deceased. The defendant pleads in abatement that the plaintiff is not administrator upon said estate, but that Caleb G. Bates is the administrator. By the agreed statement of facts, it appears that an instrument in writing, purporting to be the last will and testament of Jane Kilton, was admitted to probate, whereupon, the executors named having declined to accept the executorship,

the court of probate of Coventry appointed said Bates administrator with the will annexed. Subsequently, on appeal, the probate of said instrument was set aside, and since then, on a proper petition duly filed and notified, letters of administration upon the estate of said Jane Kilton were granted to the plaintiff, her sole heir at law and next of kin. The question, therefore, is whether Caleb G. Bates, administrator with will annexed, continued to be the administrator upon the estate after the will was set aside. In *Scott v. Monks*, 16 R. I. 225, it is stated ¹⁸⁷ that for all the general purposes of administration an administrator with will annexed is simply an executor under another name. Consequently his powers and tenure of office cannot be more extensive than those of an executor. There can be no question that the office of an executor ceases upon the setting aside of the will under which he acts, and it follows that the office of an administrator with will annexed must cease under the same circumstances. The only decided case upon this point of which we are aware is *Smith v. Stockbridge*, 39 Md. 640, where it is held that if a will is void, the administration granted with the will annexed, upon an ex parte application, must also be void. The facts in that case were somewhat different from this case, in that, the probate of the will not being in solemn but in common form, the parties in interest were not notified; but we do not see that the principle is different. In this case, although the plaintiff, the sole party in interest, had notice of the proceeding for the probate of the will and the granting of letters testamentary or of administration as an incident thereto, and was present and took part in that proceeding to the extent of objecting to the will and of claiming his right, as next of kin, to administer upon the estate, yet a court of probate must necessarily act upon different grounds in appointing an administrator with the will annexed from what it would in appointing an administrator upon an intestate estate. In the latter case, a widow or next of kin, being suitable persons, have the right to the administration: Pub. Stats., c. 184, sec. 4; *Johnson v. Johnson*, 15 R. I. 109; *Murray v. Angell*, 16 R. I. 692. But this right cannot be considered where the estate appears to be testate and not intestate. For this reason we think that the next of kin should not be precluded from his right to administer by reason of the finding by the court of probate that there was a will, when it ultimately turns out that there was no will. We think this is a sufficient reason to support the opinion that the office of administrator with will annexed ceases, when the will is set aside, in the same way that the office of an executor

would cease. Objection to the appointment of Bates is also made by the plaintiff, on the ground that ¹³⁸ the executors named in the will did not give notice in writing of their refusal of the executorship, as provided in the Public Statutes, chapter 183, section 4. Such a provision is evidently directory. If an executor neglects or refuses to file the writing, he cannot be compelled to do so, and hence his failure to comply with the statute should not deprive the court of the power to act, when such refusal has been clearly signified. Provisions requiring applications to be in writing were held by this court to be directory in *Robbins v. Taft*, 12 R. I. 67, and this one is so for a stronger reason. Moreover, the nominated executors are not here claiming their right, nor does it appear that they have ever done so. The objection is without validity.

Plea overruled.

EXECUTORS AND ADMINISTRATORS—REFUSAL TO ACT.—

An administrator with the will annexed, or an executor, cannot be compelled to accept the office, and may refuse to act. The exclusive right to administer will be deemed to have been waived, if letters are not applied for by the party preferred within the period prescribed for such purpose by the statute. Renunciation should be in writing and entered of record, as a mere parol renunciation does not amount to a waiver of the right. After the privilege has been waived or renounced it, of course, becomes the duty of the court to appoint the one, or one or more of a class, having the next right to administer, if there be such: *Woerner's American Law of Administration*, secs. 234, 243, 244.

LUTHER v. MEDBURY.

[18 RHODE ISLAND, 141.]

ARBITRATION AND AWARD—RESORT TO AVERAGE.—

Under an agreement that if two arbitrators named are unable to agree they shall choose a third, and that the decision of any two of these shall be binding, no other mode of procedure can be adopted. Hence, if, instead of choosing a third, the two named each marks down a sum, and they report the average as their award, the resort to average, as well as the violation of the terms of submission, makes the award invalid, and it will be set aside in an action of debt brought thereon.

Charles H. Page and Franklin P. Owen, for the plaintiff.

Edward C. Dubois, for the defendant.

¹⁴¹ *MATTESON*, C. J. This is an action of debt on an award. The case was heard by the court, jury trial being waived.

The agreement of submission named two arbitrators, and pro-

vided that in case they were unable to agree they should choose a third, and the decision of any two of these should be binding upon the parties. The two arbitrators named were unable to agree upon an award, but instead of choosing a third arbitrator, not wishing to be put to the trouble of hearing the case the second time, entered into an agreement by which each was to mark the sum he thought ¹⁴² the plaintiff ought to recover, and that the sums so marked should be added and the amount divided by two, and that the sum thus ascertained should be returned as their award. Accordingly, one of them marked five hundred dollars and the other one thousand dollars, which sums were then added and the amount divided by two. The result, thus obtained, seven hundred and fifty dollars, was returned as their award, and is the award in suit.

The arbitrator who marked five hundred dollars testifies that he would have adhered to that amount, that being in his judgment the sum properly recoverable by the plaintiff, had it not been for the agreement, by which he felt himself bound.

The method of reaching a conclusion adopted by the arbitrators has been held sufficient to vitiate a verdict, since it precludes the verdict from representing the judgment of the jury: *Harvey v. Rickett*, 15 Johns. 87; *Forbes v. Howard*, 4 R. I. 364. The reason applies with equal force to an award. The parties to a submission are entitled under it to the judgment of the arbitrators, and if the method pursued by them precludes the exercise of their judgment, the parties do not get that for which they have stipulated: *Morse on Arbitration and Award*, 165; *Brown v. Bellows*, 4 Pick. 179.

Moreover, in the present case, the submission provided that in case the arbitrators named in it were unable to agree they should choose a third. They were, therefore, not at liberty to adopt any other mode of procedure.

For these reasons we are of the opinion that the award must be set aside and judgment rendered for the defendant for his costs.

AWARD.—Courts will set aside an award for irregularity of the arbitrators in their proceedings: See monographic note to *Jocelyn v. Donnel*, 14 Am. Dec. 754, 755, on the causes for which an award may be impeached. An award must conform to the submission: *Johnson v. Noble*, 13 N. H. 286; 38 Am. Dec. 485; and an award is void if the arbitrators exceed their powers: *Stewart v. Cass*, 16 Vt. 663; 42 Am. Dec. 534. The power of setting aside an award or entering judgment thereon is very analogous to the power exercised by the court in granting or refusing a new trial after a verdict: See monographic note to *Brush v. Fisher*, 14 Am. St. Rep. 518, on the validity of an award, and it is held that the amount of a verdict is improperly made up, and will be set

aside, where each juror names a certain sum, and the aggregate of the sums specified is divided by the number of the jury, if each juror agrees to be bound by the result. But the verdict will be allowed to stand where they have not so agreed: *Village of Ponca v. Crawford*, 23 Neb. 662; 8 Am. St. Rep. 144, and note.

PEARCE v. RICKARD.

[18 RHODE ISLAND, 142.]

WILLS.—THE WORD “ISSUE” in a will, if there is nothing to restrict the meaning of the word to children, is a word of purchase and not of limitation, and includes all descendants in being at the time the terms of the will become operative.

DISTRIBUTION—WHEN TO BE MADE PER CAPITA.—If personal estate is bequeathed to a trustee for the use and benefit of a female relative during her life, and at her death the trust fund to be paid, transferred, and delivered to her issue then alive, the trust fund is to be distributed per capita among her children and grandchildren who were alive at her death.

PARTITION—SALE AND DIVISION OF PROCEEDS.—If specific property bequeathed by will cannot be conveniently divided among those entitled thereto, as where eighteen shares of bank stock are to be divided among eleven children, it should be sold and the proceeds distributed.

Debt on an award.

James Tillinghast and Theodore F. Tillinghast, for the plaintiff.

Thomas C. Greene, Edwin Aldrich and Robert W. Burbank, for the respondents.

¹⁴³ **TILLINGHAST, J.** This is a bill in equity for instructions as to the distribution of certain personal estate bequeathed to the complainants' testator by one Mary E. Helme, in trust for the benefit of Sarah C. Rickard, for her life, and at her decease to be paid, transferred, and delivered over to "the lawful issue of the said Sarah C. Rickard, then alive."

The bill sets out that Mary E. Helme, formerly of the city of Providence, in this state, died there, leaving a last will and testament dated January 1, 1844, which was, on the thirtieth day of January, 1846, admitted to probate by the municipal court of said city, and now remains of record there and in full force, by which, among other things, she bequeathed to said Edward D. Pearce, senior, the sum of one thousand dollars, in trust, in the following language, viz:

"Third. I give, devise, and bequeath to Edward D. Pearce of said Providence the sum of one thousand dollars in special trust

for the use and benefit of my relative, Sarah C. Rickard, wife of George Rickard of said Providence, for him the said Edward D. Pearce to invest in permanent bank or other stock, or in such other manner as he may deem prudent, and to superintend and collect the income and profits of the same, and, after deducting all taxes and expenses from the income and profits of said trust property, to pay over the balance as often as once in each year to said Sarah C. Rickard, upon her sole and separate receipt therefor, and for her sole use and benefit for and during her natural life; and at the time of her decease the said Edward D. Pearce shall pay, transfer, and deliver over the said trust property then remaining to the lawful issue of the said Sarah C. Rickard then alive."

The bill further sets out that said Edward D. Pearce, Sr., accepted said trust, and, at the time of his death, on ¹⁴⁴ the twentieth day of January, 1883, held the said trust property invested and standing in his name as trustee in ten shares of the capital stock of the National Pacific Bank of Pawtucket, and eight shares of the capital stock of the Fifth National Bank of said Providence, and that said stocks have come to the possession of the complainants as executors of his will, and are held by them under and for the purposes of said trusts. That said Sarah C. Rickard died on the sixteenth day of November, A. D. 1891, having had and received all of the income of said trust property during her life as provided in the said will of Mary E. Helme, and leaving as her lawful issue at her death James H. Rickard, Sarah H. Randall, George S. Rickard and Elizabeth Estelle Rickard, her children and grandchildren, four children of the said James H. Rickard and three children of the said George S. Rickard, and that these, her said four children and seven grandchildren were all of the issue of the said Sarah C. Rickard who were living at the time of her death. That the complainants are desirous that said trusts should be executed and said trust property divided out and distributed as provided therein, but questions have arisen as to how the same shall be done, and whether said stocks shall be transferred directly into the names of the said issue of Sarah C. Rickard, or shall be sold and the proceeds thereof divided among said issue, and in either event in what proportions the said issue are entitled to the same. The bill prays for instructions in the premises.

The answer of the respondents, Jonathan C. Randall, Sarah H. Randall, his wife, and Elizabeth E. Rickard, admits the allegations contained in said bill, and claims that the intention of the

testatrix, Mary E. Helme, was that the issue of Sarah C. Rickard, upon the decease of said Sarah, should take the trust estate in said bill mentioned per stirpes, and not per capita, and that therefore they, being each one of the four children of said Sarah C. Rickard living at her decease, are entitled to have and receive one-fourth each of said trust fund, and were so entitled at and upon the death of their said mother, Sarah C. Rickard, under the said will of said ¹⁴⁵ Mary E. Helme. Said James H. Rickard and George S. Rickard have entered no appearance in the case.

The answer of the other respondents, viz., James H. Rickard, George W. Rickard, Alice B. Rickard, Mary E. Rickard, Alexandria Rickard, Everett B. Rickard, and Hortense Rickard, the same being the grandchildren of said Sarah C. Rickard, and all being minors and appearing by their guardian ad litem, Thomas C. Greene, Esq., simply submits their rights and interests in the matters in question to the care and protection of the court.

The main question raised by the pleadings, therefore, is whether the word "issue," as used in the clause of said will above quoted, should be restricted to the children of said Sarah C. Rickard, all of whom, it is to be observed, are still living, or should be construed to include her said grandchildren also.

There is some conflict of judicial authority regarding the signification of the word "issue" when used in a will, where nothing appears to limit the legal import thereof, some authorities holding that in such case the word is synonymous with child or children, while others hold that it is a word of purchase and not of limitation, and hence includes all the descendants in being at the time the term becomes operative.

The cases in England upon this subject are very unanimous in support of the doctrine that the word "issue," unconfined by any indication of intention, includes all descendants, and that intention is required for the purpose of limiting the sense of that word, restraining it to children only: *Leigh v. Norbury*, 13 Ves. Jr. 340; *Cook v. Cook*, 2 Vern. 545; *Bernard v. Montague*, 1 Mer. 422, 434; *Hayden v. Wilshire*, 3 Term Rep. 372; *Hockley v. Mawbey*, 1 Ves. Jr. 143, 150; *Davenport v. Hanbury*, 3 Ves. Jr. 257; *Carter v. Bentall*, 2 Beav. 551; *Freeman v. Parsley*, 3 Ves. Jr. 421; *Slater v. Dangerfield*, 15 Mees. & W. 263; *Pope v. Pope*, 14 Beav. 591, 594; 11 Am. & Eng. Ency. of Law, 870, tit. "Issue Includes Descendants," and cases cited. See, also, 1 Jarman on Wills, 89; 2 Williams on Executors, 999; 2 Redfield on Wills, 2d ed., 35, et seq.

¹⁴⁶ And while the latter English cases seem to manifest a bias on the part of the courts against so broad a construction of the word "issue," by ingrafting a great number of exceptions upon said rule, and by seizing upon very slight indications of an intention on the part of the testator to limit the meaning of said term, yet we find no English case which assumes to lay down a doctrine contrary to the general rule as above stated.

In this country, while the decisions are not so uniform as those in England in support of said rule, yet the decided preponderance of authority is in favor thereof.

The case of *Wistar v. Scott*, 105 Pa. St. 200, 213, 51 Am. Rep. 197, is a good illustration of the class of cases which adopts said rule. In that case, after devising "Prospect Hill" lot to his daughters Catharine and Sarah, "for and during all the term of their natural lives and the life of the survivor of them," the testator disposed of the estate in remainder in the following words: "And from and immediately after the decease of the survivor of them, I give the same up to the male issue, then living, of my said son Richard, their or his heirs and assigns in fee; but if no such issue shall then be living, in such case I give the same unto all the children of my said daughters Catharine and Sarah and my son Richard, their heirs and assigns, in equal parts, according to the number of them." In construing this provision of the will, the court said: "The word 'issue' in a will *prima facie* means the same as heirs of the body, lineal descendants indefinitely, and is to be construed as a word of limitation; but the *prima facie* construction gives way if there is anything on the face of the will to show that the word was intended to have a less extended meaning, and to be applied to children only, or, as in this case, to lineal descendants of a particular class in being at a specified time: *Slater v. Dangerfield*, 15 Mees. & W. 263. The phrase, 'male issue of my son Richard then living,' is a descriptio personarum, designating the class of persons to whom the remainder in fee was given upon the termination of the particular life estate; and the question is, Who composed that class when the survivor of testator's two daughters died, ¹⁴⁷ September 21, 1866—in other words, who, according to the true interpretation of the will, were the male issue of testator's son Richard living at that time? When, as in the present case, the word is manifestly used as descriptive of the devisees, and is also restricted to such issue as shall be living at a specified time, it is always construed as a word of purchase, embracing all lineal descendants of the person named in being at the time so specified, unless it

clearly appears from the context that the testator intended otherwise: See, also, *Robbins v. Quinliven*, 79 Pa. St. 333, 335; *Weehawken Ferry Co. v. Sisson*, 17 N. J. Eq. 475, 484, 486; *Ward v. Stow*, 2 Dev. Eq. 509; 27 Am. Dec. 238; *Weldon v. Hoyland*, 4 De Gex, F. & J. 564; *Jackson v. Jackson*, 153 Mass. 374; 25 Am. St. Rep. 643; 2 *Williams on Executors*, 1197, and note 1198; *Hawkins on Wills*, 87, tit. "Issue"; *Jarman on Wills*, ed. 1881, p. 101. In Massachusetts it is provided by statute that "the word 'issue,' as applied to the descent of estates, shall include all the lawful lineal descendants of the ancestor": *Mass. Pub. Stats.*, c. 3, sec. 3.

The court of appeals of New York, while manifesting considerable dissatisfaction with the construction put upon the word "issue" by the English courts, and an inclination to look for something in the context of the testator's will which will take the case out of the rule aforesaid, yet recognize the binding force of the adjudged cases as to the primary meaning of said word: See *Palmer v. Horn*, 84 N. Y. 516, 518, and cases cited.

The counsel for the two of the children of said Sarah C. Rickard has cited, amongst others, the last-named case, and also the case of *Taft v. Taft*, 3 *Demarest*, 86, in support of his contention that the word "issue" should be limited to children. The first-named case is against him, while the last, though fully sustaining his position, and, so far as we are able to ascertain, not having been overruled, yet as it professes to follow *Palmer v. Horn*, 84 N. Y. 516, while in fact it decides precisely to the contrary thereof, we do not think it entitled to very much weight. The surrogate evidently misconceived the purport of *Palmer v. Horn*, 84 N. Y. 516, and while following ¹⁴⁸ the spirit thereof, clearly mistook the letter, as in that case the court found from indications in the will that the testatrix used the term "issue" as synonymous with children, and that by the word "children" she had herself interpreted the word "issue."

Taft v. Taft, 3 *Demarest*, 86, was decided by the surrogate of Kings county in 1885. The surrogate of New York county, in 1883, on the contrary, in *Murray v. Bronson*, 1 *Demarest*, 217, in a very elaborate opinion, in which he reviewed at length the English and American decisions bearing upon the proper construction of the word "issue," fully recognized the binding force of the rule hereinbefore adopted. The rule contended for by the counsel for said children of Sarah C. Rickard, has been adopted in Kentucky, where in *Moore v. Moore*, 12 B. Mon. 655, it was

held that "issue, in common parlance, and as used generally by the community signifies immediate descendants—children."

That decision was evidently based upon the authority of Chancellor Kent (see 4 Kent's Commentaries, 278), who says: "The word 'issue' may be used either as a word of purchase or limitation, but it is generally used by the testator as synonymous with child or children." Chancellor Kent was evidently opposed to the English rule of construction as above set out, on the ground that it tended to defeat the intention of the testator.

Judge Redfield, in his excellent work on the Law of Wills (see pt. 2, p. *363), takes the same ground, and strongly argues in favor of following the lead of Chancellor Kent, in breaking away from the English decision, and, as he says, "redeeming it [the law] from a perversion under which it has long labored, and which has already produced infinite injustice, and unless abandoned will be liable to produce an incalculable amount in the future."

But while recognizing the importance which should be attached to these eminent authorities, yet we feel that the rule of construction, in cases of this sort, has become too well ¹⁴⁹ settled to be disturbed by judicial decision, even if we were disposed to take the view adopted by Chancellor Kent. For it is of the utmost importance that, in a matter so vital to the interests of the people at large as the distribution of testate estates, there should be uniformity of decision in interpreting the ordinary language used in wills.

But the said children of Sarah C. Rickard contend that the construction of said bequest most consistent with the intention of the testatrix is to allow them to share equally in the fund to be distributed, to the exclusion of the more remote descendants, i. e., the grandchildren. And this, not only upon the authorities, but upon the broad and fundamental principle of carrying out the most probable intention of the testatrix.

We have no means of ascertaining the intention of the testatrix as to the disposition of said trust fund after the death of the life tenant, except as disclosed by said bequest, which simply provides that at the time of her decease, "said Edward D. Pearce shall pay, transfer, and deliver over the said trust property then remaining to the lawful issue of the said Sarah C. Rickard then alive." There is certainly nothing in this language which shows an intention to restrict the meaning of the word "issue" to children, and hence the primary signification of said term, as above set forth, must prevail.

But it is further contended that whenever the gift to issue is

in any way substitutional in its nature, or issue are to take in a representative or quasi representative way, "issue" means children, to the exclusion of more remote descendants.

It is doubtless true that where the gift to the issue is substitutional, they take per stirpes and not per capita. That is to say, where issue are pointed out in the will to take with reference to the share of the parent, they take by way of substitution: *Minchell v. Lee*, 17 Jur., pt. 1. p. 727; *Dexter v. Inches*, 147 Mass. 324. But, as we have already seen, there is nothing in the will before us to show an intention on the part of the testatrix that the grandchildren of said Sarah C. Rickard should not share equally with her children ¹⁵⁰ in the distribution of said trust fund. Moreover, a substitutional taking, or a taking per stirpes, strictly speaking, can only occur in case of the death of the stirpes, or stock; and in the case at bar all of the children of said Sarah were living when said gift over took effect. There is therefore no room for the application of the rule contended for, even assuming that it would apply had one of the children of said Sarah deceased in her lifetime leaving children.

We therefore decide that the grandchildren of said Sarah C. Rickard are entitled to share per capita with her children in the distribution of the trust fund in question. As it is evident that the specific property bequeathed by the will under consideration cannot be conveniently divided amongst those entitled thereto, we advise that the same be sold by the complainants, and the proceeds thereof distributed in accordance with this opinion.

WILLS—ISSUE—DISTRIBUTION.—The word "issue," when used in a will, without any qualifying words or circumstances, comprehends all persons in the line of descent from the ancestor, and has the same meaning as "descendants": *Soper v. Brown*, 136 N. Y. 244; 32 Am. St. Rep. 731. It is to be construed either as a word of limitation or of purchase, as will best effectuate the intention of the testator, gathered from the whole instrument; but where the word evidently includes grandchildren, as well as children, of a devisee, it means only those children and grandchildren alive at the time of the testator's death: *Parkhurst v. Harrower*, 142 Pa. St. 432; 24 Am. St. Rep. 507. Under a gift to "issue," where the word is used without any terms in the context to qualify its meaning, the children of the ancestor and the issue of such children, although the parent is living, as well as the issue of deceased children, take in equal shares per capita, and not per stirpes, as primary objects of the disposition: *Soper v. Brown*, 136 N. Y. 244; 32 Am. St. Rep. 731. The law of succession to estates of intestates is treated at length in a monographic note devoted to that subject in *In re Ingram*, 12 Am. St. Rep. 81-113.

HACKETT v. HACKETT.

[18 RHODE ISLAND, 155.]

BURIAL RIGHTS—REMOVAL OF REMAINS.—A widow, and not the next of kin, has the right to control the burial of her deceased husband, dependent, however, upon the peculiar circumstances of the case, or the waiver of such right by consent or otherwise. If her right has not been waived, she may remove the body, after interment, to another place of sepulture.

George J. West, for the plaintiff.

Daniel R. Ballou and Frank H. Jackson, for the respondent.

155 STINESS, J. This is a bill in equity to compel the respondent to return the body of her late husband, Thomas F. Hackett, to the grave where it was buried, and from which she has removed it without consent of the complainant, the father and next of kin of said Thomas F. Hackett. The deceased was the owner of a burial lot, one of **156** a family group, in St Mary's Roman Catholic Cemetery in the village of Crompton, where he was buried, with the acquiescence of the respondent, his widow. About six months afterward she caused the body to be exhumed and buried in the Riverside Cemetery in the city of Pawtucket. The respondent claims that she was justified in doing this: 1. Because her husband had requested her not to permit his body to be buried in a Roman Catholic cemetery, but in a Protestant cemetery; 2. That she did not consent to his burial in St. Mary's Cemetery, but, being overcome with grief, and with physical prostration from nursing her husband in his last sickness, she yielded, under protest, to the demand of his relatives for the burial aforesaid, so far as to offer no resistance thereto, on account of their threats to take forcible possession of the body and of her aversion to the disgrace of any strife over his remains; 3. That as the widow of said Thomas F. Hackett she has the right to control the place of burial; and that she has not surrendered this right.

Upon the first and second grounds set up in the answer we did not hear testimony, preferring first to consider the third ground, in which the widow claimed the right to control the place of burial, as against the next of kin, which might be decisive of the case. We come, then, to the question whether the right to control the burial of a deceased husband is in the widow or in the next of kin. In *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667, it was held that while no one can be considered as the owner of a dead body, in any sense what-

ever, yet there is a quasi property in the custodian, in the nature of a trust for the benefit of all who have an interest in it, which the court will regulate. In that case, a widow removed the remains of her husband, which, with her consent, had been buried in his own lot and there had rested about thirteen years. The court held that as the complainant, a daughter, was then the owner of the burial lot which had been invaded, and so was the custodian of the remains, they should be restored to the place from which they were taken. There are other cases of this sort, where the question has arisen as to the right of the next of kin, after ¹⁵⁷ burial; notably the cases of *Wyncoop v. Wyncoop*, 42 Pa. St. 293; 82 Am. Dec. 506, with notes; Report of Hon. S. B. Ruggles, 4 Bradf. 503; *Renihan v. Wright*, 125 Ind. 536; 21 Am. St. Rep. 249. In *Bogert v. Indianapolis*, 13 Ind. 134, where the question was whether the city or the next of kin should have control of an interment, the court decided in favor of the next of kin. In all these cases general expressions were used by the courts to the effect that the next of kin had rights exclusive of all others. Such expressions were appropriate to the case under consideration, but are not to be taken as authority upon the question which is now before us. In *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667, and *Wyncoop v. Wyncoop*, 42 Pa. St. 293. 82 Am. Dec. 506, the right of a widow to remove the remains of her husband, against the will of the next of kin, was denied upon the ground of her consent and long acquiescence in the burial; but those cases do not decide that the next of kin had a superior right to that of the widow at the time of the burial. The third conclusion of Mr. Ruggles, in his report cited above, is: "That such right, in the absence of any testamentary disposition, belongs exclusively to the next of kin." But in a note to *Weld v. Walker*, 130 Mass. 422, 39 Am. Rep. 465, in 14 American Law Review, volume 1, new series, page 62, it is said that Mr. Ruggles added a note to the original report, in explanation of the term "next of kin," stating that it was not employed for the purpose of denying or questioning the legal right of a surviving husband to bury his wife's remains, or to reinter them if disturbed. In *Snyder v. Snyder*, 60 How. Pr. 368, the right to select a place of burial was awarded to a son, instead of the widow. The son was born of a former marriage; and the widow was a second wife, who had been married to the deceased but four years, with no children, and the last two years of his life had been spent in a lunatic asylum. The widow desired the remains to be buried in a lot owned by her father, and the son

desired to bury them in a lot owned by the deceased at his former home, in Connecticut, by the side of his first wife and deceased children. Under these circumstances the court decided in favor of the son. The judge giving the opinion concluded with these words: "I mean to ¹⁵⁸ recognize the fact that circumstances may exist which should give the widow the preference over the son, but in this case I think the claim of the son is to be preferred." We know of no case that denies to a husband, who was not separated from his wife, the right to select the place of burial. Even in case of a separation, the husband has been held liable for the expense of interment, which had been incurred by a relative of the wife without his knowledge or consent: *Ambrose v. Kerrison*, 10 Com. B. 776. In *Durell v. Hayward*, 9 Gray, 248, 69 Am. Dec. 284, the court assumes "the indisputable and paramount right, as well as duty, of a husband to dispose of the body of his deceased wife by a decent sepulture in a suitable place": See, also, *Cooney v. Lawrence*, 11 Pa. Co. Ct. 79. But if, as a rule, where there have been no discordant relations, a husband has the right to bury his wife, why should not the widow have the same right with reference to his remains? A woman is naturally quite as sensitive in such a matter as a man. It would be quite as great a shock to her to have the body buried against her wishes as it would be to a man. Hers is a relationship closer than that of kindred for it is the teaching of Holy Scripture: "A man shall leave father and mother and shall cleave to his wife, and the twain shall be one flesh." The chances of complications by remarriage are no greater in her case than in that of a man, and the reasons which give the right to the husband are equally applicable to her. It would be a shock to the sensibilities of humanity to say that the reasonable wishes of a wife in regard to the burial of her husband should not be entitled to paramount respect, when such a right would be accorded to him. It is useless to say that a married woman cannot make a contract, for as a widow she is under no disability and the funeral expenses are a preferred charge on the husband's estate. This is not a question of contract, nor of liability, but of sentiment and propriety. In no case is it an absolute right, but, as this court has already said, "a sacred trust for the benefit of all who may, from family or friendship have an interest in it," which should be properly administered; and, as we now say, primarily administered ¹⁵⁹ by the wife, due regard being had to the circumstances of the case. As remarked by the court in *Scott v. Riley*, 16 Phila. 106: "A legal right of this character should be based upon natural affec-

tion, or moral obligation. It should accomplish the object in a becoming manner." It is also added that to give this right to the next of kin takes from the widow the right to bury her dead and gives it to kindred, who, perhaps, had no affection for her husband and very little of his blood in their veins. It also gives the right to classes, which might lead to unseemly contentions. In 10 Albany Law Journal, 70, reference is made to the Secor case, heard in the supreme court of Kings county, the report of which we have not been able to find. It was a suit by a widow to enjoin a son from removing the remains of his father, which had been buried by the widow without dissent, to a lot purchased by the son for a family burial place, pursuant to instructions from his father and partly with his own money. The court granted the injunction against the son. Mr. Justice Pratt remarked: "Those bound by the closest ties of love to the deceased while he was alive should render these sacred rites, and they ought not to be left to others."

For these reasons, we are of the opinion that, as a general rule, the primary right to control the burial of a husband should be with the widow, in preference to the next of kin, dependent, however, upon the peculiar circumstances of the case or the waiver of such right by consent or otherwise. In all the cases, the matter of consent is a controlling element, where the body has been buried. In the present case, it is claimed that there was simply non-resistance, coupled with a protest, on account of threats and fear of a disgraceful scene, but no consent by the respondent. If consent obtained by coercion, or by an undue advantage taken of one's physical and mental prostration, be sufficient to vitiate a mere contract, for a stronger reason should it be so in a case which touches far more keenly the feelings, privileges, and comfort of one bereaved by death. So in *Weld v. Walker*, 130 Mass. 422, 39 Am. Rep. 465, under precisely similar allegations, a husband was allowed to remove the body of his wife, after burial, from a lot owned by members of her family to a lot owned by himself. In the present case, as we have heard no testimony, the question of consent must stand for hearing.

BURIAL RIGHTS.—A widow has the right to the custody of the body of her deceased husband for the purpose of preservation, preparation, and burial, and may maintain an action against anyone who mutilates or destroys it: *Larson v. Chase*, 47 Minn. 307; 28 Am. St. Rep. 370, and note. In *Wynkoop v. Wynkoop*, 42 Pa. St. 293, 82 Am. Dec. 506, it is held that a widow has no right to or control over the body of her deceased husband after the interment, and that the disposition of the

remains of a deceased person after burial belongs thereafter exclusively to his next of kin. To this case is appended an exhaustive monographic note on the rights and duties of relatives and others respecting bodies of the dead.

STATE v. FITZSIMON.

[18 RHODE ISLAND, 236.]

INDICTMENT—JOINDER OF OFFENSES.—At common law, several felonies or misdemeanors could be joined in several counts of the same indictment, but a felony and misdemeanor could not be so joined.

INDICTMENT—JOINDER OF FELONY AND MISDEMEANOR. By virtue of statutory provisions, two offenses committed by the same person, though one is a felony and the other a misdemeanor, may be included in the same indictment, where they are of the same general nature, and belong to the same family of crimes, and where the mode of trial and nature of punishment are also the same.

INDICTMENT FOR FELONY—CONVICTION OF LESSER OFFENSE.—At common law there could not be a conviction of a misdemeanor on an indictment for a felony; but, by virtue of statutory provisions the jury may, on an indictment for felony, convict of any lesser offense included therein.

INDICTMENT—BURGLARY AND ASSAULT TO RAPE—JOINDER.—The offenses of burglary and an assault with an intent to commit rape are not cognate offenses, and cannot be joined by separate counts in the same indictment.

TRIAL, WHEN NOT "FULL, FAIR, AND IMPARTIAL."—A party who has been forced to defend himself, on the same indictment, against two inconsistent and widely different offenses, can hardly be said to have had a "full, fair, and impartial trial."

NEW TRIAL—INDICTMENT—MISJOINDER OF COUNTS.—On petition for a new trial, a defendant charged with crime may insist both that the court erred in its rulings of law and that the verdict was against the evidence. He may, therefore, take advantage of the misjoinder of counts in the indictment against him.

RAPE—EVIDENCE AS TO CHASTITY.—In a prosecution for an assault with intent to commit rape, the character of the woman as to chastity may be attacked, but specific acts of unchastity with other men than the defendant cannot be shown.

ASSAULT TO RAPE—WOMAN'S STATEMENTS AS PART OF RES GESTÆ.—In a prosecution for an assault with intent to commit rape, what the woman said about the affair immediately after its occurrence is a part of the res gestæ and is admissible evidence against the man.

BURGLARY—DISTINCT OFFENSES—EVIDENCE.—If the evidence in a burglary case shows that the defendant twice entered the house on the same night within a space of two hours, it is not error to refuse to rule that this constituted two separate burglaries, and that the prosecuting officer should be compelled to elect upon which one he would go to the jury. Even if the breakings were separate and distinct felonies, evidence of the second breaking is competent to show the whereabouts of the defendant during the night in question.

Indictment for burglary. On defendant's petition for a new trial.

Robert W. Burbank, attorney general, for the state.

George J. West and Patrick J. McCarthy, for the defendant.

²³⁶ **TILLINGHAST, J.** One of the principal reasons urged by the defendant in support of his position for a new trial is the joinder in the indictment of a count for assault with intent to commit rape with a count for burglary, whereby he alleges that he was embarrassed and prejudiced in his trial, the court below refusing to compel the attorney general to elect upon which of said counts he would go to the jury. At the common law, the general rule of practice was to allow several felonies, or several misdemeanors, ²³⁷ to be charged in several counts of the same indictment, but not to allow of the joinder of a felony with a misdemeanor: 2 Hale's Pleas of the Crown, 173; Rex v. Fuller, 1 Bos. & P. 180; Rex v. Benfield, 2 Burr. 980; 1 Chitty's Criminal Law, 208, 209; Storrs v. State, 3 Mo. 9; Scott v. Commonwealth, 14 Gratt. 687, 694; Harman v. Commonwealth, 12 Serg. & R. 69, 70. Nor could there be a conviction of a misdemeanor on an indictment charging a felony: Rex v. Cross, 1 Ld. Raym. 711; 2 Hawkins' Pleas of the Crown, c. 47, sec. 6. The reason for this rule, as stated by Paxon, J., in Hunter v. Commonwealth, 79 Pa. St. 503, 505, 21 Am. Rep. 83, "was that persons indicted for misdemeanors were entitled to certain advantages at the trial, such as the right to make a full defense by counsel, to have a copy of the indictment and a special jury, privileges not accorded to those indicted for a felony": See, also, State v. Smalley, 50 Vt. 736, 749. By the passage of the statute of 7 William IV, and 1 Victoria, chapter 85, section 11, known as "Lord Denman's act," however, which makes it lawful for the jury, in case of felonies committed against the person, to acquit the defendant of the felony, and find him guilty of a constituent misdemeanor, said rule was practically abrogated, and it is to be presumed, therefore, that the reason on which it was based no longer exists: See Regina v. Bird, 2 Den. C. C. 99. Later English statutes and decisions have still further modified the rigor of the common law in regard to the matter now under consideration: See Stephen's Digest of Criminal Procedure, 178-181; Ferguson's case, Dears. C. C. 427. The common-law rule first above referred to, that a felony and a misdemeanor should not be joined in the same indictment, was based upon substantially the same reasons as the rule which prohibited the conviction for a misdemeanor under an indict-

ment for felony. It cannot be contended, however, that the reason of said rule, even if it were still in force in England, has any application in those states, where, like our own, the defendant in any indictment whatsoever is not only entitled to the assistance of counsel, who are furnished and paid by the state if he is too poor to furnish his own, but ²³⁸ where he may testify in his own behalf, call witnesses at the expense of the state, if need be, and have every privilege and facility possible for making a full and complete defense. Indeed, as said in *Hunter v. Commonwealth*, 79 Pa. St. 503, 21 Am. Rep. 83, "by the merciful provisions of our criminal law, the higher and more atrocious the crime, the more numerous are the safeguards thrown around the accused, and the more jealously does the law guard every legal right to which he is entitled." The practice has always been in this state, on an indictment for felony, to allow the jury to convict of any lesser offense included therein (See Pub. Stats., c. 248, sec. 23), and also to allow of the joinder of a count for misdemeanor with a count for felony, where the offenses are cognate, such as larceny and the receiving of stolen goods, and rape and an assault with intent to commit rape: *State v. Hazard*, 2 R. I. 474; 60 Am. Dec. 96. And whether, in case of such joinder, the attorney general shall be compelled to elect upon which count he will ask for a conviction rests in the discretion of the trial court: Wharton's Criminal Pleading and Practice, 9th ed., secs. 294-297, and cases cited; *State v. Maloney*, 12 R. I. 251; *State v. Bell*, 27 Md. 675, 677; 92 Am. Dec. 658; *Wall v. State*, 51 Ind. 453, 454. An examination of the decisions in other states upon the question of the joinder of counts for felony and misdemeanor in the same indictment shows that while they are by no means uniform, yet that such practice is generally allowable in all cases, "except where the offenses charged are repugnant in their nature and legal incidents, and the trial and judgment so incongruous as to deprive the defendant of some legal advantage": *Henwood v. Commonwealth*, 52 Pa. St. 424. In other words, the general rule is, that felonies and misdemeanor forming part of the development ²³⁹ of the same transaction may be joined in the same indictment: Wharton's Criminal Pleading and Practice, secs. 285-294 and cases cited; *Harman v. Commonwealth*, 12 Serg. & R. 69; *Commonwealth v. McLaughlin*, 12 Cush. 612; 10 Am. & Eng. Ency. of Law, 599 c, and cases cited in note 4; *State v. Lincoln*, 49 N. H. 464; *Stevens v. State*, 66 Md. 202; *Staeger v. Commonwealth*, 103 Pa. St. 469, 472. In *Cawley v. State*, 37 Ala. 152, 153, Walker, C. J., says: "After an elaborate and care-

ful review of the authorities, we feel safe in announcing the conclusion, that two offenses committed by the same person may be included in the same indictment, where they are of the same general nature and belong to the same family of crimes, and where the mode of trial and nature of punishment are also the same."

The first question which arises in the case at bar then, is this: Are the offenses of burglary and an assault with an intent to commit rape cognate offenses? We do not think they are. Burglary is the breaking and entering the dwelling-house of another in the night-time with intent to commit a felony therein, whether the felonious intent be executed or not: Russell on Crimes, 6th Am. ed., 786; 4 Blackstone's Commentaries, 227; while an assault with intent to commit rape is merely a statutory misdemeanor, entirely distinct from and having no necessary connection with the first-named crime. Nor are said offenses so related that the greater necessarily includes the less, as is the case in murder, which includes manslaughter, and in rape, which includes an assault with intent to commit rape: Commonwealth v. Thompson, 116 Mass. 346. Moreover, our statutes recognize a marked distinction between burglary and assault with intent to commit rape, by classing the former with "offenses against private property," and the latter with "offenses against the person": Pub. Stats., cc. 240, 242. We have been referred to no case in which such a joinder as the one now before us has ever been allowed, and a somewhat thorough examination of the authorities satisfies us that none can be found. For a full discussion of the general question involved, see ²⁴⁰ Archbold's Criminal Pleading and Practice, 8th ed., 292-300, and cases cited; Gilbert v. Georgia, 65 Ga. 449; State v. Hooker, 17 Vt. 658; Rex v. Gallo-way, 1 Moody C. C. 234; Young v. The King, 3 Term Rep. 98; People v. Tweed, 5 Hun, 353; State v. Boise, 1 McMull. 189; Kane v. People, 8 Wend. 203; Cook v. State, 24 N. J. L. 843; Commonwealth v. Doherty, 10 Cush. 52; Crowley v. Commonwealth, 11 Met. 575, 579; Campbell v. People, 109 Ill. 565; 50 Am. Rep. 621; Stevick v. Commonwealth, 78 Pa. St. 460, 463; 1 Bishop on Criminal Procedure, secs. 199-213, and cases cited.

We are aware that the case is not before us on a motion in arrest of judgment, although it appears from the record that such a motion was made in the court below, and overruled; and that exception was duly taken to said ruling. We think, however, that under the broad provisions of our statute relating to new trials (see Pub. Stats., c. 221, sec. 2), the defendant may be

permitted to take advantage of so incongruous charges as those contained in this indictment, on a petition like this. For it can hardly be said that a party has had a "full, fair, and impartial trial," who has been forced to defend himself, on the same indictment, against two inconsistent and widely different offenses. Moreover, under our practice, on a petition for new trial the petitioner may proceed at once, as he has done in this case, on the two grounds that the court has erred in its rulings and that the verdict is against the evidence: *Elliott v. Benedict*, 13 R. I. 463, 467.

We do not think the court erred in refusing to allow the defendant to offer evidence of intimacy on the part of the woman assaulted with other men than the defendant. While the character of the prosecutrix for chastity may be attacked by the defendant in a case of this sort, we do not think that specific acts of improper conduct with other men can be shown: 1 *Greenleaf on Evidence*, 13th ed., sec. 54, and cases cited in note 1; *Regina v. Holmes*, 12 Cox C. C. 137; *McCombs v. State*, 8 Ohio St. 643; *State v. Foshner*, 43 N. H. 89; 80 Am. Dec. 132; *State v. Knapp*, 45 N. H. 148; ²⁴¹ *Wharton's Criminal Law*, sec. 1151. In civil cases growing out of an alleged indecent assault, it has been held that both the character of the woman assaulted for chastity, as well as specific acts of unchastity, may be shown in defense: *Mitchell v. Work*, 13 R. I. 645.

The court did not err in permitting the state to prove what the prosecutrix said to a person in the house about the affair immediately after its occurrence, as it was clearly part of the res gestae: *State v. Murphy*, 16 R. I. 528; *McCombs v. State*, 8 Ohio St. 643; *Rex v. Clarke*, 2 Stark. 241; *State v. Patrick*, 107 Mo. 147, 163-168. While the evidence submitted on the part of the state tends to show that the defendant did in fact enter the house at two different times on the night in question, yet, as it also tends to show that both of said entries were made in pursuit of but one purpose, to wit, the commission of a felony, and that his design being frustrated on his first entry by being frightened away by the inmates of the house, he re-entered about two hours later, the court did not err in refusing to rule that this constituted two separate burglaries, and that the attorney general should be compelled to elect upon which one he would go to the jury: See *Bishop's New Criminal Law*, sec. 793. But even if the second breaking could be properly regarded as a distinct and separate offense from the first, it was nevertheless competent evidence as tending to show the whereabouts of the defendant during the

night in question. And especially is this true, when, as in this case, the two breakings, if such there were, were only separated in point of time by the brief space of about two hours: *People v. Mead*, 50 Mich. 228. As there must be a new trial of the case for the reason first above given, we express no opinion as to the sufficiency of the evidence to warrant a conviction on either of said counts.

Petition granted.

INDICTMENT—JOINDER OF OFFENSES—ELECTION.—Under the common-law rule, where there can be no conviction for misdemeanor on an indictment for felony, counts for felony and misdemeanor should not be joined; but where, on an indictment for felony, a conviction for a misdemeanor is allowable, counts for felony and misdemeanor, growing out of the same transaction, and of the same general nature and course of trial, may be joined: See monographic note to *Ben v. State*, 58 Am. Dec. 250, on charging two or more offenses in the same indictment. So several distinct felonies may be charged in the same indictment, when all relate to the same transaction, and admit of the same legal judgment, and, as a rule, the prosecution will not be required to elect on which count it will proceed in such case: *State v. Houx*, 109 Mo. 654; 32 Am. St. Rep. 686. The state may be required to elect upon which count of an indictment it will claim conviction, only when distinct felonies not of the same character are charged in different counts in the same indictment: *Baker v. State*, 25 Tex. App. 1; 8 Am. St. Rep. 427. Election will not be compelled where the indictment does not designate a particular act, and there is evidence on the part of the prosecution tending to show more than one act. The principle of election is applicable only when there is evidence of separate and distinct transactions: *Black v. State*, 83 Ala. 81; 3 Am. St. Rep. 691. It is, however, a matter of discretion with the court, and wherever the joinder of distinct offenses, growing out of different transactions, in one indictment, though allowable as a matter of law, tends to embarrass the prisoner, and confound him in his defense, the court ought to require an election, not only where distinct felonies are charged, but where misdemeanors are joined, or misdemeanors and felonies: See monographic note to *State v. Bell*, 92 Am. Dec. 663, on when the prosecutor may be required to elect on which of several counts of an indictment he will proceed. The prosecutor is not compelled to elect, unless it appears that more than one offense is charged in the indictment: *Engleman v. State*, 2 Ind. 91; 52 Am. Dec. 494. Upon an indictment for a crime, the defendant may be convicted of the lesser degrees thereof included therein: *People v. Abbott*, 97 Mich. 484; 37 Am. St. Rep. 360; *Whilden v. State*, 25 Ga. 396; 71 Am. Dec. 181. See monographic note to *Whitford v. State*, 5 Am. St. Rep. 899, on merger of crimes.

RAPE—EVIDENCE—RES GESTÆ.—In prosecutions for rape, the general character of the prosecutrix for chastity may be impeached, but specific acts of sexual intercourse by her with third persons cannot be shown: Note to *People v. Hartman*, 42 Am. St. Rep. 111; *Rice v. State*, 35 Fla. 236; 48 Am. St. Rep. 245, and note; *People v. McLean*, 71 Mich. 309; 15 Am. St. Rep. 263. In cases of rape, anything which the woman said or did about the affair immediately afterward is admissible as original evidence, whether she testifies or not: *Castillo v. State*, 31 Tex. Cr. Rep. 145; 37 Am. St. Rep. 794. This point is discussed in detail in the monographic note to *Smith v. State*, 80 Am. Dec. 371, on rape.

BALDERSTON v. NATIONAL RUBBER COMPANY.

[18 RHODE ISLAND, 338.]

FACTORS.—ADVANCES ARE moneys paid by the factor to his principal on the credit of the goods consigned, and in anticipation of the debt which will become due to the principal upon the sale of such goods.

FACTORS.—AN ADVANCE by a factor does not have the effect of creating a present indebtedness against the consignor.

FACTORS—LIEN—ADVANCES.—A factor must enforce his lien for advances against the property in his hands before he can claim payment from his principal, the consignor of the property.

FACTORS—DEL CREDERE AGENT.—A factor who sells under a del credere commission is liable as a principal debtor to the consignor, and may be sued in *indebitatus assumpsit*, if he does not pay the sale debt when due.

FACTORS—DEL CREDERE AGENT.—If a factor, selling under a del credere commission, receives goods from his principal and makes monthly advances, pursuant to agreement, up to eighty per cent of the market value of the goods consigned for sale, he is not entitled, upon the principal becoming insolvent and making an assignment for the benefit of his creditors, to receive from the assignee a dividend upon the whole amount of the advances made and unpaid from the proceeds of goods sold, at the time of the assignment, but only on the balance, if any, that is due after crediting the net proceeds, when sold, of the goods on hand at the date of the assignment.

Bill in equity to establish the plaintiffs' right to a dividend from the assignees of the National Rubber Company, and for an account. The National Rubber Company had become insolvent and had made an assignment for the benefit of creditors.

Joseph C. Ely, for the plaintiffs.

Francis Colwell, Walter H. Barney, and Samuel Norris, Jr., for the respondents.

³³⁸ **TILLINGHAST, J.** By agreement of the parties, this case is submitted to the court, on the following questions of law, viz: "1. Whether, under the agreement between the complainants ³³⁹ and the respondent corporation, annexed to the bill as Exhibit A, the complainants are or not entitled to receive from the assignee of the National Rubber Company a dividend upon the whole amount of the advances made by them to said rubber company and unpaid from the proceeds of goods sold at the time of the company's assignment, or only on the balance, if any, that might thereafter be found to be due after crediting the proceeds when sold of the goods on hand at the date of the assignment of said rubber company; 2. Whether or not the failure of the complainant, John C. Balderston, to include said advances from said complainants as an indebtedness of said rubber company in the

returns made by said company under the manufacturing corporations law of the state of Rhode Island, and signed by him as president and director of said company, estops said complainants from making any claim for advances as a then present indebtedness from said company to said complainants, in light of the following:

"In the answer of the respondent it is alleged that said John C. Balderston, one of the complainants, was a director of the National Rubber Company, and as such director signed annual returns of said company's affairs, as required under the provisions of the manufacturing corporations act, so called (Pub. Stats., c. 155), which returns as alleged in said answer did not include in the statement of the company's indebtedness said advances of the complainants, made under their said agreement, and the respondents claim that said failure to set forth said advances in said returns as indebtedness of said rubber company estops said complainants from making any claim for said advances as a then present indebtedness from said rubber company to said complainants.

"The complainants now assert, in the way of explanation of said returns, that the method pursued by said rubber company in making calculation for the same was as follows: That the officers of the rubber company deducted from the amount of merchandise in the hands of the complainants the amount ³⁴⁰ of said advances thereon, and treated the balance, with other personal estate of the rubber company, as the aggregate amount of its personal assets, the complainants further asserting, and the defendants for the purpose of this hearing admitting, that mode to be the usual mode pursued by the officers of said company and the mode usually pursued by corporations in said state of Rhode Island.

"Said allegations of the respondents in the answer as to said returns, however made up, are not deemed material by the complainants, and it is understood that said allegations as set forth in said answer, and said assertions and explanations made by said complainants, as hereinabove set forth, are admitted by the parties hereto only for the purpose of this hearing, and for no other purpose, and without prejudice to proving to the contrary in the later stages of this case if material.

"And all further questions, including the state of accounts between parties, shall be reserved until the above questions of law have been heard and determined."

The agreement above referred to is as follows:

"Memorandum of an agreement between the National Rubber Co., and Balderston & Daggett, made this second day of April, A. D. eighteen hundred and eighty-four.

"First. The National Rubber Company are to consign all their production of boots and shoes to Balderston & Daggett for sale and returns, with the following exceptions: 1. Said National Rubber Co. are to have the liberty to sell or consign goods to foreign countries, except to the British provinces of North America. 2. They are to have the liberty to retail boots and shoes from their factory at Bristol.

"Second. The National Rubber Co. are to pay Balderston & Daggett five per cent upon the net amount of their sales as a commission and guaranty, and also interest upon any sums which they may owe them, at the rate of six per cent per annum, or such other rate as may, from time to time, in writing be agreed upon to be a fair rate, taking the market value of money into consideration.

"Third. The National Rubber Co. agree to deliver the goods ³⁴¹ at the warehouse of Balderston & Daggett in Boston, or in New York (if it is agreed that a branch shall be established there), free of expense to Balderston & Daggett.

"Fourth. Balderston & Daggett agree to receive on consignment the production of the National Rubber Co. in boots and shoes, as contemplated in the first article, and to use their best exertion to sell the same to the best advantage and to account to the National Rubber Co. for the same at the price that they shall obtain for them, and to charge as commission and guaranty five per cent, and from time to time to advise what kinds and styles of goods are necessary to be made in order to have the stock well assorted.

"Fifth. Balderston & Daggett agree to advance to the National Rubber Co. at least fifty thousand dollars per month, upon the basis of eighty per cent of the market value of the boots and shoes consigned by them to Balderston & Daggett at the rate of interest hereinbefore named.

"Sixth. It is understood that such goods as are usually sold as clothing and placed on the clothing list, as for instance lumbermen's pants with boots, and 'Baptismal pants,' are not consigned exclusively to Balderston & Daggett.

"Seventh. This agreement is to continue in force for the term of five years from the first day of April, 1884, unless sooner terminated by the dissolution of the firm of Balderston & Daggett, or by the long continued incapability of both of said general

partners to attend to the business thereof. It is also provided that this contract shall terminate on the first day of April or first day of October, whichever shall first occur next after the death of either general partner in said firm, whether said firm be then dissolved or not.

"Eighth. The prices for which the boots and shoes consigned to Balderston & Daggett by the National Rubber Co. are to be sold are to be fixed by the National Rubber Co., from time to time, upon consultation with Balderston & Daggett, and having due regard to the prices at which other leading manufacturers are selling their boots and shoes of equal quality.

"In witness whereof the parties hereto have set their hands ³⁴⁹ and affixed their seals the day and year first herein mentioned.

NATIONAL RUBBER CO.,		[L. S.]
A. O. Bourn,	}	A committee appointed
Nahum Chapin,		for the purpose of making
By Thos. G. Carson,		this agreement.
BALDERSTON & DAGGETT.		[L. S.]"

The first question which logically presents itself for our consideration under the stipulation of the parties to the suit is this, viz: What was the legal effect of the memorandum agreement above recited? In order to intelligently determine this question it will be useful to inquire: 1. What sort of an agreement it was; 2. What were the objects sought to be accomplished thereby; and 3. What were the respective rights of the parties thereunder.

1. What sort of an agreement was it? It was an agreement to sell goods for the defendant corporation, under a *del credere* commission.

2. What were the objects sought to be accomplished thereby? On the part of the defendant corporation they evidently were: 1. To secure a reliable market for its goods; and 2. To provide for a definite and steady income therefrom by way of advances thereon, to enable it to successfully carry on its operations and meet its current expenses; while on the part of the plaintiffs the object evidently was to secure the control and sale of the defendant's product, and thereby obtain the commissions agreed upon.

3. What were the respective rights of the parties thereunder? The plaintiffs were entitled on the one hand: 1. To have consigned to them the entire product of said corporation, with certain specified exceptions, with the right to sell and dispose of the

same at the prices to be fixed, from time to time, by the said corporation upon consultation with the plaintiffs, and to receive therefor a commission of five per cent on the net amount of such sales; and 2. To receive interest on any sums which the said corporation might owe ³⁴³ them, at the rate of six per cent per annum, or such other rate as might from time to time be agreed upon.

The said corporation, on the other hand, was entitled to receive from the plaintiffs, by way of advances, at least fifty thousand dollars per month, upon the basis of eighty per cent of the market value of the boots and shoes consigned, to fix the prices at which the same should be sold, upon consultation as aforesaid, and to hold said plaintiffs personally liable for all goods sold by them. The relations which the parties sustained to each other under this agreement were those of principal and factor, and the law applicable to such relations must therefore control in the interpretation thereof. As to the general rules which obtain, and the general rights of the parties which arise under an agreement of this sort, there is but little divergence of judicial authority, said rules and rights, from the great importance of the subject matter involved, having long since become firmly imbedded in the commercial law of the land. But as to particular rights and obligations growing out of the relations aforesaid, and notably as to the rights of the factor regarding advances made by him, the authorities are not entirely harmonious, one line of cases holding substantially that an advance creates a debt *eo instanti* on the part of the consignor, as for so much money lent to him at his request, while another line holds that an advance does not create a debt in the first instance, it being the duty of the factor to first look to the goods consigned for his advancements and commissions, and, if they are insufficient, that then he may have recourse to the consignor to make up the deficiency. In short, the authorities are at issue upon the simple question as to whether the factor *may* enforce his lien for advances, etc., against the property in his hands before looking to the consignor therefor, or whether he *must* enforce it before so doing. Amongst the cases which maintain the former doctrine are *Beckwith v. Sibley*, 11 Pick. 482; *Upham v. Lefavour*, 11 Met. 174; *Dolan v. Thompson*, 126 Mass. 183; *Burrill v. Phillips*, 1 Gall. 360; *Peisch v. Dickson*, 1 Mason, 9; *Mertens v. Nottebohm*, 4 Gratt. 163; while amongst those which maintain the latter are *Gihon v.* ³⁴⁴ *Stanton*, 9 N. Y. 476; *Hoy v. Reade*, 1 Sweeny, 626; *Corlies v. Cumming*, 6 Cow. 181; *Frothingham v. Everton*, 12 N. H. 239;

Kraft v. Fancher, 44 Md. 204. See, also, **Edwards on Bailments**, sec. 366; **Edwards on Factors and Brokers**, secs. 18, 86, and cases cited. We are strongly inclined to the opinion that the better reason, if not indeed the weight of authority, is with the last-named cases. It is not reasonable to suppose that the parties to the agreement before us contemplated that the advances made in pursuance thereof should constitute a present indebtedness on the part of the consignors, for which an action might at once be maintained. What are "advances"? They are moneys paid by the factor to his principal on the credit of the goods consigned, and in anticipation of the debt which will become due to the principal upon the sale of such goods. The ordinary use of the term indicates moneys paid before, or in advance of, the proper time of payment. To "advance" is to "supply beforehand," "to loan before the work is done or the goods are made": **Powder Co. v. Burkhardt**, 97 U. S. 110. As well stated in **Gihon v. Stanton**, 9 N. Y. 476, "an advance is something which precedes; and, of course, there is something to follow. As applied to the payment of money, the term implies that the parties look forward to a time when the money will be due to the recipient. A debtor who voluntarily pays his debt before it is due is said to advance it. Can he recover it back? An advance by a factor is a transaction somewhat similar. It is a prepayment; a mere anticipation of the avails of the goods consigned; and no more creates a debt, in the first instance, than an advancement of a father to his son in anticipation of his expected inheritance, creates a debt. It is true, that if the property proves insufficient to reimburse the factor for his advances, the law, in the absence of any agreement to the contrary, implies an undertaking to make up the deficiency": In **Hoy v. Reade**, 1 Sweeny, 626, the court, in speaking of an advance, said: "It is, in fact, a prepayment on account of a debt anticipated by both parties to arise to that or a greater amount from the consignor to the consignee, out of the performance by the consignee of a ²⁴⁵ contract existing between them. It necessarily results that, before the consignee can call on the consignor to pay back any portion of this prepayment, he must show the performance of this contract, and that his indebtedness arising thereout did not, as was anticipated, amount to the prepayment." That the law as thus stated is well founded in reason, and, indeed, well-nigh indispensable to the successful prosecution of manufacturing and commercial enterprises, is evident from the results which might follow from the adoption of the rule contended for by the plaintiffs. For, if an advance by a

factor has the effect of creating a present indebtedness against the consignor, the latter is liable at any moment to be called upon to repay the amount advanced, and, failing so to do, to render his property liable to be attached, and his whole business stopped, if not destroyed, while, at the same time, the goods which have been probably produced in part by virtue of the advances are in the hands of the factor, and presumably entirely sufficient to compensate him for all his advances. Take the case in hand. The plaintiffs agreed to advance fifty thousand dollars per month upon the basis of eighty per cent of the market value of the boots and shoes consigned to them. Before they could be called upon to make the first advance of said sum, the defendant corporation must have placed in their hands and possession goods of the value of sixty-two thousand five hundred dollars. The plaintiffs, on the one hand, by such transaction took a vested interest in all of said goods to the amount of fifty thousand dollars, while the defendant corporation on the other received fifty thousand dollars, practically by way of prepayment thereon. Now is there any sense or justice in saying that, notwithstanding the fact that the plaintiffs were thus secured for said advance, they could immediately turn around and sue the defendant corporation therefor? We think not. For, as stated in the defendant's brief: "To treat such advances as a present debt which could be recovered back immediately would be an absurdity, for the anomalous condition would then be presented that, while the factor could sue for the advances and recover them back, he would thereby at once render himself liable under his contract for the advances therein agreed to ³⁴⁰ be made in the proportion indicated. If he were in advance, he could sue for such advances; if he recovered them he could be sued for not being in advance." But even resting the case solely on the manifest construction of the agreement the plaintiffs have no claim to recover their advances; and for the simple reason that, in the making thereof, they only fulfilled their part of the contract in this respect. And now to allow them to recover for said advances, before performing the remainder of said contract devolved upon them, viz., to sell said goods, would be to permit them to undo what, under said contract, they not only did, but were legally bound to do.

Again, the plaintiffs were selling said goods under a *del credere* commission. And while the nature and extent of a factor's obligation under such a commission have been much disputed, the later English, together with some American, authorities, holding that he is liable as a surety merely, yet the decided

preponderance of authority in the United States is to the effect that one who sells under such a commission "is liable absolutely as a principal, and that if the debt be not paid when due, indebtedness *assumpsit* will lie against him at once for the amount": *Mechem on Agency*, sec. 1014, and cases cited in note 1; *Wolff v. Koppel*, 2 Denio, 368, 370; 43 Am. Dec. 751; *Lewis v. Brehme*, 33 Md. 426-433; 3 Am. Rep. 190. In a note to section 278 of *Edwards on Bailments*, the law is thus clearly stated: "The effect of a commission *del credere* is, in several particulars, to place the factor in new relation as to his principal. It is true he is the debtor, but the principal still retains the right, at any time before payment, to resort to the purchaser as collateral security. It is a rule for the protection of the principal. A general factor may wait to receive instructions as to the mode of remitting the net proceeds, and is not liable to an action until a default on his part in remitting or paying the proceeds according to the orders of his principal: *Ferris v. Paris*, 10 Johns. 285. The only difference between a factor acting under a *del credere* commission or without one is as to the sales made. In the former case he is absolutely liable and may ³⁴⁷ correctly be said to become the debtor of his principal; but it is not strictly correct to say that he is placed in the same situation as if he had become the purchaser himself; for, as we have seen, the principal, notwithstanding this liability, may exercise a control not allowable between creditor and debtor. When the principal appears, the right of the factor to receive payment ceases. The effect of the commission is not to extinguish the relation between principal and factor, but applies solely to a guaranty that the purchaser shall pay. The liability is not contingent, so as to require legal measures to be exhausted against the purchaser before the factor is bound, but an engagement to pay on the day the purchase money becomes due. Although the factor is absolutely liable, he is not bound to pay until the money becomes due from the purchaser. Subject to the limitations above mentioned, the factor, under a commission, becomes a debtor to his principal." This being the law, and the plaintiffs having continued to sell and dispose of the goods in question in the same manner since as before the failure of the defendant corporation, they certainly would have no cause of action in any event, except for the balance that upon an accounting should now be found due to them.

But the plaintiffs argue that said agreement shows that the advances were to be treated as indebtedness, as appears by the second, fifth, and eighth clauses thereof. The second clause speaks

of sums which the consignors may "owe" the plaintiffs, and provides that interest shall be computed thereon; the fifth clause obligates the plaintiffs to make certain fixed advances; and the eighth clause allows the consignors to fix the prices of the goods to be sold. It is doubtless true that, in a certain qualified sense, the consignors would "owe" the plaintiffs for the advances which they should make under said contract, and for the simple reason that said advances, as already stated, were payments made in anticipation of a debt not due at the time. And as the consignors were to be accommodated in this way, it was natural that they should treat an advance as a temporary indebtedness so far as to call for the payment of interest ²⁴⁹ thereon. This was no more, in effect, than the making of a discount for money paid before it was due—a thing which is of every day occurrence in commercial transactions. As to the fifth and eighth clauses, we fail to discover wherein they indicate an intention to create a debt, except as aforesaid. Under the former the plaintiffs were to make certain fixed advances; but, as already said, these were mere prepayments on account of goods received, while, as to the latter, it simply shows that the consignors treated said goods as belonging to them, which they undoubtedly did, subject to the plaintiffs' lien thereon. That is, the consignors retained the general ownership of said goods until sold, with the right to fix the prices at which they should be sold. But this in no wise militates against the claim of the consignors that said advances did not create a present unqualified indebtedness. Moreover, we may add that, so far as we are aware, the custom and understanding amongst merchants and factors in this state are in harmony with the views which we have herein expressed regarding advances.

It is clear, therefore, that in no event can the plaintiffs claim a dividend from the assignee upon the whole amount of the advances made by them and unpaid from the proceeds of goods sold at the time of said assignment.

But, as before intimated, we think the better doctrine is, that where advances are made upon the faith of the goods consigned, and especially under an agreement like the one before us, the proceeds are to be deemed as the primary fund to which the factor must look for reimbursement, and that it must be made to appear that this fund is insufficient before he can recover his advances from the consignor.

From what has thus been said it will be apparent that the relations of the parties to this suit are radically different from those which existed in *Allen v. Danielson*, 15 R. I. 480, which is relied

on by the plaintiffs, and hence that said case does not control the present one. In that case the question was, whether the creditors whose claims were secured by mortgage were entitled to dividends on their full claims pro rata with the other creditors. The court held that they were, ³⁴⁹ on the ground that the creditors were severally creditors to the full amount of their claims, the security being regarded as something collateral, which did not reduce the debt. In the present case, however, as already intimated, the security was the primary fund to which the plaintiffs must look, and hence they held no claim, except a contingent one against said corporation, and in no event to a greater amount than the balance, if any, that should be found due after exhausting their security. In other words, the plaintiffs were not entitled to double security in the first instance, as were the plaintiffs in the case cited, nor did they have any claim on which a suit could be based at the time of the assignment, or which they could prove, independently of the goods consigned to them and then on hand and unsold. The security which they held not only reduced the debt so far, indeed, as it was such, but, if sufficient, entirely canceled it. We therefore decide that the plaintiffs are not entitled to receive from the assignee of the defendant corporation a dividend upon the whole amount of the advances made by them and unpaid from the proceeds of goods sold at the time of said assignment, but only on the balance, if any, that shall be found to be due after crediting the net proceeds, when sold, of the goods on hand at the date of said assignment.

This conclusion renders it unnecessary for us to consider the second question submitted to us.

FACTORS—DEL CREDERE AGENTS.—A factor under a del credere commission has a lien for advances made on goods consigned to him: *Holbrook v. Wight*, 24 Wend. 169; 35 Am. Dec. 607; and may protect himself to the extent of his advances by selling his principal's goods: *Benny v. Rhodes*, 18 Mo. 147; 59 Am. Dec. 293. A commission del credere is the premium or price given by the principal to the factor for a guaranty. A del credere factor, therefore, when he sells on credit, warrants the solvency of the purchaser. He is liable as principal. He must pay the price for which the goods were sold, when the credit has expired: See monographic note to *Amidown v. Osgood*, 58 Am. Dec. 171, on factors.

MATHEWSON v. MATHEWSON.

[18 RHODE ISLAND, 456.]

MARRIAGE AND DIVORCE—RECRIMINATION.—A divorce will not be granted, when it appears that the petitioner, although otherwise entitled to a decree, has been guilty of conduct that is cause for a divorce. Hence, if a man deserts his wife and enlists in the military service, writing but once or twice soon afterward to her, after which she hears nothing more from him for twenty-seven years, and she, in the mean time, believing him to be dead by reason of common report that he has been killed in war, marries again, after which the first husband appears with a wife and several children, but she continues to live with her second husband for over two years, when she ceases to cohabit with him, and prefers a petition for a divorce from her first husband, she is not entitled to such a divorce, because she was guilty of conduct authorizing a divorce in continuing to live with her second husband after she knew that her first husband was alive.

Stephen O. Edwards, for the petitioner.

Nathan W. Littlefield and Walter R. Stiness, for the respondent.

⁴⁵⁷ **TILLINGHAST, J.** This is a petition for divorce from bed and board and for separate maintenance, on the grounds of desertion, neglect to support, and adultery. The parties were married October 2, 1853, and lived together until 1861, when the respondent deserted the petitioner, telling her he was going away on business, and entered the service of the United States as a soldier. He wrote to her once or twice shortly after leaving, after which she heard nothing from him directly for twenty-seven years, but it was commonly reported that he was killed in the army during the late Civil War, and the petitioner, supposing that he was dead, remarried in 1872 to one James M. Place, with whom she lived as his wife until August, 1892. About five years ago, the respondent returned with another wife and several children, and the petitioner became aware of this fact as early as January, 1890, when she saw him and had a talk with him. She also saw and consulted with an attorney of this court as to her relations with said Place about two years ago, shortly after which she ceased to cohabit with him and filed this petition for divorce. In this state of the proof, the respondent's counsel contends that the divorce should not be granted, as it appears that the petitioner was herself guilty of adultery, or at any rate of such gross misconduct and wickedness repugnant to and in violation of the marriage ⁴⁵⁸ covenant under which she is now seeking relief as to bar her from asserting any claim against her husband.

The petitioner was perhaps justifiable in contracting said second marriage, her husband being presumptively dead, and as she believed, and had reason to believe, dead in fact. As soon as it came to her knowledge, however, that he was living, if she intended to claim her conjugal rights, she should have immediately ceased cohabitation with her second husband, her marriage with him not being voidable merely, but absolutely void: Pub. Stats., c. 163, sec. 5. She was only justified, therefore, in living with Place during the continuance of her belief that the respondent was dead. By continuing to live with him after the return of the respondent, she certainly forfeited all legal claim to the support of the latter, if indeed she did not thereby commit the crime of adultery (1 Bishop on Marriage, Divorce, and Separation, sec. 1511) and hence is in no position to complain of the wrongs committed by him. She alleges, as does every petitioner for divorce, that ever since her marriage with the respondent, she has "on her part demeaned herself as a faithful wife, and performed all the obligations of the marriage covenant," while her own testimony shows that she has grossly violated the same, and, therefore, that she does not come into court with clean hands, as the law requires. But on the other hand, the proof shows that, had the respondent been himself free from legal fault at the time of the commencement of this suit, he would have had a good and sufficient ground for divorce against the petitioner. It appearing, then, that the petitioner, whether equally guilty with the respondent or not, has been guilty of conduct which would be a sufficient ground for divorce, she is not entitled to the relief prayed for in her petition: 5 Am. & Eng. ⁴⁵⁹ Ency. of Law, 824, and cases cited in note 10; Church v. Church, 16 R. I. 667; 2 Bishop on Marriage, Divorce, and Separation, sec. 349; Browne on Divorce and Alimony, 84. For circumstances that would excuse cohabitation with the second husband, while the first marriage was still subsisting, see Pratt v. Pratt, 157 Mass. 503.

Petition denied and dismissed.

DIVORCE is a remedy provided for an innocent party: *Burke v. Burke*, 44 Kan. 307; 21 Am. St. Rep. 283; and if the complaining party has violated the marriage contract to the extent that the violation would constitute a good cause for a divorce, a divorce will be denied. The complainant must come into court with clean hands: See monographic note to *Pierce v. Pierce*, 15 Am. Dec. 211-214, on the misconduct of the plaintiff as a defense in a suit for divorce. As no person can marry while the former husband or wife is living, the fact that the second marriage was entered into in good faith, and with a full but erroneous belief of the death of the former husband or wife, and without any knowledge within seven years of his or her being alive, does not make it valid: See monographic note to *Gathings v. Williams*, 44 Am. Dec. 55, on void marriages.

OAKDALE MANUFACTURING COMPANY v. GARST.

[18 RHODE ISLAND, 484.]

TRADE, COMBINATIONS IN RESTRAINT OF.—Combinations for mutual advantage which do not amount to a monopoly, but leave the field of competition open to others, are not void as in restraint of trade, although they may have the effect of diminishing the number of competitors in business. A mere consolidation of firms is not illegal, on the ground of reducing competition in business.

CONTRACTS IN RESTRAINT OF TRADE are not necessarily void by reason of universality of time or of place. Their validity depends upon the reasonableness of the restrictions under the conditions of each case, and the test of reasonableness in contracts of this kind is the test of validity.

CORPORATIONS MAY BE FORMED IN ONE STATE TO DO BUSINESS IN ANOTHER.—It is not a violation of the laws or policy of the state of Rhode Island for citizens thereof to procure an act of incorporation in another state for the purpose of carrying on business as a corporation in Rhode Island.

CONTRACTS NOT TO ENGAGE IN BUSINESS, VALIDITY OF.—An agreement that one will not engage, or be concerned, in the manufacture or sale of butterine or oleomargarine for the period of five years from the date of the agreement is not void. An injunction will therefore lie to restrain the violation of such agreement.

CONTRACTS NOT TO ENGAGE IN BUSINESS, ESTOPPEL TO DENY VALIDITY OF.—One who enters into an agreement not to engage, or be concerned, in the manufacture or sale of butterine or oleomargarine for a period of five years from the date of the agreement, and which agreement is mutually beneficial and equally restrictive upon the parties, is estopped from setting up its invalidity in proceedings to enjoin him from violating it.

Injunction. The company formed in pursuance of the agreement referred to in the opinion was the Oakdale Manufacturing Company, a corporation organized under the laws of the state of Kentucky.

Arnold Green, Richard B. Comstock, and Rathbone Gardner, for the plaintiffs.

Simon S. Lapham, for the respondent.

485 STINESS, J. The complainants seek an injunction against the respondent, to restrain him from violating his covenant that he would not engage or be concerned in, directly or indirectly, the manufacture or sale of butterine or oleomargarine for the space of five years from the date of the covenant. Prior to April 30, 1891, the parties carried on that business separately, when they agreed to unite and form a corporation for the purpose of carrying on their business together. To this end, all the parties turned in the stock, machinery, accounts, and goodwill of their respective concerns, at a valuation greatly in excess of the

value of the property itself, taking an amount of stock ⁴⁸⁶ in the corporation represented by such valuation. The corporation has carried on the business since that time. In August, 1892, the defendant sold his stock in the company to present holders for sixty thousand dollars, although, as he says, the property it represented was worth only about twenty-eight thousand dollars. After this he entered the same business again, and claims the right to do so upon the following grounds, viz: 1. That he was induced to enter into the contract through false and fraudulent misrepresentations of the complainants; 2. That the contract is void as a combination to raise the price of a necessary and useful commodity in trade and to stifle competition; 3. That one purpose of the contract was to form a corporation in violation of the laws of this state; 4. That the contract being in restraint of trade, its enforcement is unreasonable.

As to the first defense, it is sufficient to say that we do not find it to be supported by the evidence. The respondent knew perfectly well what he was doing in making the arrangement, and agreed to it freely. The facts that one of the companies was using a secret process to preserve the freshness of the product, so that it could be exported to tropical climates, and that it was engaged to some extent in such export, are shown by the proof.

In support of the second ground of defense, the respondent cites cases of contracts to create a monopoly and to force prices. Such was *People v. North River Sugar etc. Co.*, 54 Hun, 354, a proceeding to vacate the charter of the company because it had become a partner in the "Sugar Trust." The unlawfulness of such a combination was largely dwelt upon, but in the court of appeals, 121 N. Y. 582, 18 Am. St. Rep. 843, the decision was sustained only upon the ground that the company had practically relinquished its corporate functions, and so had forfeited its franchise. *Arnot v. Pittston etc. Coal Co.*, 68 N. Y. 558, 23 Am. Rep. 190, *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171, *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, 8 Am. Rep. 159, and *Emery v. Ohio Candle Co.*, 47 Ohio St. 320, 21 Am. St. Rep. 819, were cases ⁴⁸⁷ where contracts, based upon a monopoly, were held to be invalid. Undoubtedly, there may be combinations so destructive of the right of the people to buy and sell and to pursue their business freely that they must be declared to be void upon the ground of public policy. In such cases the injury to the public is the controlling consideration. But it does not follow that every combination in trade, even though such combination may have the effect to diminish the

number of competitors in business, is therefore illegal. Such a rule would produce greater public injury than that which it would seek to cure. It would be impracticable. It would forbid partnerships and sales by those engaged in a common business. It would cut off consolidations to secure the advantages of united capital and economy of administration. It would prevent all restrictions and exclusive privileges, and hamper the familiar conduct of commerce in many ways. There may be many such arrangements which will be beneficial to the parties and not injurious to the public. Monopolies are liable to be oppressive, and hence are deemed to be hostile to the public good. But combinations for mutual advantage which do not amount to a monopoly, but leave the field of competition open to others, are neither within the reason nor the operation of the rule. This is well put in *Skrainka v. Scharringhausen*, 8 Mo. App. 522, where twenty-four owners of stone quarries, on account of a ruinous competition which made it impossible to work their quarries at a profit, made an agreement to sell through a common agent for the space of six months, and the agreement was sustained. The court says: "But not every agreement in restraint of trade is illegal. Where the contract injures the parties making it, by diminishing their means for supporting their families, tends to deprive the public of the services of useful men, discourages the industry, diminishes the production, prevents competition, enhances prices, and, being made by large companies or corporations, excludes rivalry and engrosses the markets — tends to 'make a corner,' to use the slang of the stock and provision gamblers — it is against the policy of the law. But restraints upon trade imposed by ⁴⁸⁸ agreement, under limitations as to locality, time, and persons, are not necessarily restraints of trade in the general sense which is objectionable." So in *Tode v. Gross*, 127 N. Y. 480, 24 Am. St. Rep. 475, the defendants had sold their business of making cheese by secret process, under a general restriction not to engage in the business for five years, with reference to which it is said: "The covenant was not in general restraint of trade, but was a reasonable measure of mutual protection to the parties, as it enabled the one to sell at the highest price and the other to get what they paid for. It imposed no restriction on either that was not beneficial to the other by enhancing the price to the seller or protecting the purchaser. Recent cases make it very clear that such an agreement is not opposed to public policy, even if the restriction was unlimited as to both time and territory. The restriction under consideration,

however, was not unlimited as to time." These two cases state a very sensible rule, both as to the public and the parties, and they are exactly like the case before us. Here there is no monopoly. Three of the four companies in New England in this line of manufacture agreed to unite, one inducement being to stop the sharp competition then existing between them. But even so, not only is the field open to the other company, equal in strength to either of these, but it is also open to competition from companies in other parts of the country and to the formation of new companies. This is neither monopoly, nor such an approach to it as amounts to the same thing. It is the common occurrence of a consolidation of firms. It is not illegal on the ground of reducing competition.

With reference to the third ground of defense, it does not appear that the agreement in any way violates the laws or policy of this state, and if it did, the defendant, being a party to it, could not set it up: *Chafee v. Sprague Mfg. Co.*, 14 R. I. 168. The mere fact that the complainant corporation is created under the laws of the state of Kentucky is not sufficient to warrant a dismissal of its case, for foreign corporations have frequently been recognized as suitors in this court: *Windham County Bank v. Kendall*, 7 R. I. 77; ⁴⁸⁹ *Howe Machine Co. v. York*, 11 R. I. 388; *Boston etc. Smelting Co. v. Smith*, 13 R. I. 27; 43 Am. Rep. 3; *Singer Mfg. Co. v. King*, 14 R. I. 511. They are also recognized as doing business here by comity: *Pierce v. Crompton*, 13 R. I. 312. While the fact that citizens of Rhode Island go to Kentucky for an act of incorporation is one that naturally excites curiosity, if not suspicion, as to the motives and good faith of the concern, yet, so long as it pursues a lawful business and violates no law of this state, we do not see how we can refuse to recognize it. True, the advantage of yearly statements and liability of stockholders given to creditors under our statutes are wanting; but that is a matter for those who deal with the corporation to consider. We can hardly deny the right of a foreign corporation to do business in this state, upon considerations of public policy, when our own statutes (Pub. Laws, c. 1200) expressly provide for corporations formed in this state for carrying on business out of the state.

The fourth ground of defense involves the reasonableness of the restrictive covenant. The test of reasonableness is the test of validity in contracts of this kind. The test is to be applied according to the circumstances of the contract, and is not to be arbitrarily limited by boundaries of time and space. There has been

much discussion upon this subject, which need not be repeated. The law has advanced, *pari passu*, with social progress to a point of practical unanimity. The rule, now generally received, has been recognized in this state, that contracts in restraint of trade are not necessarily void by reason of universality of time (*French v. Parker*, 16 R. I. 219; 27 Am. St. Rep. 733), nor of space (*Herreshoff v. Boutineau*, 17 R. I. 3; 33 Am. St. Rep. 850), but they depend upon the reasonableness of the restrictions under the conditions of each case. The diversity of these conditions produces an apparent diversity of decision, and yet it will be found upon examination that most of the cases really turn upon the reasonableness of the restriction. For example, in *Wiley v. Baumgardner*, 97 Ind. 66, 49 Am. Rep. 427, cited by the respondent, sale was made of a dry goods store, with the vendor's agreement not to engage in the dry goods business for five years, and in *Herreshoff v. Boutineau*, 17 R. I. 3, 33 Am. St. Rep. 850, the agreement ⁴⁰⁰ was not to teach within this state. In these cases the subjects of the contracts were of a purely local character and outside restraint was unreasonable. On the other hand, in *Watertown Thermometer Co. v. Pool*, 51 Hun, 157, where the business was extensive, restraint within the entire territory of the United States, and in *Tode v. Gross*, 127 N. Y. 480, 24 Am. St. Rep. 475, unlimited restraint as to territory, were sustained. The contract is to be determined by its subject matter and the conditions under which it was made; by considerations of extensiveness or localism, of protection to interest sold and paid for, of mere deprivation of public rights for private gain, of proper advantage on one side or useless oppression on the other. In this case the contracting parties were all capable business men. They knew what they were about. The clause objected to was mutually beneficial and equally restrictive. The respondent was to gain as much advantage from it as any of the others, so long as he remained in the company, and in case of sale it would enhance the value of his stock. And this it did; for when he sold his stock he received for it more than double what he testified the property was worth. Having received this large price for his stock, he now seeks to destroy its value upon the ground that the original agreement was unreasonable. The circumstances show that it was not unreasonable. The parties contemplated an extensive business, with a special effort to develop an export trade. No limitation of foreign countries could be made in advance, for the company was to seek its markets. In this country it might need to set branches in different parts for the sale or manufac-

ture or exportation of its products. Time was needed to ascertain what could be done and where, and so the term of five years was agreed upon, within which the company should be free to seek its field of operation. To allow the respondent now to overthrow that agreement would be grossly inequitable. We think the complainants are entitled to the relief prayed for.

CONTRACTS IN RESTRAINT OF TRADE, OR NOT TO ENGAGE IN BUSINESS, VALIDITY OF—INJUNCTION.—The general rule is that contracts which impose an unreasonable restraint upon the exercise of a business, trade, or profession are void: See monographic note to *Angier v. Webber*, 92 Am. Dec. 751; but contracts in partial or reasonable restraint thereof are valid: Note to *Angier v. Webber*, 92 Am. Dec. 751; *Chapin v. Brown*, 83 Iowa, 156; 32 Am. St. Rep. 297. A contract entered into between two competing business firms, supported by a valuable consideration, whereby one sells its stock to its rival, and agrees to desist from further competition, is not void as being an unreasonable restriction on trade, when properly construed in connection with the attendant circumstances showing the limits of the territory covered by their previous competition: *Moore etc. Hardware Co. v. Towers etc. Hardware Co.*, 87 Ala. 206; 13 Am. St. Rep. 23.

The test of reasonableness is to determine whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public: Note to *Angier v. Webber*, 92 Am. Dec. 752; note to *Callahan v. Donnelly*, 13 Am. Rep. 174, 175. Limitations as to persons, time, and space also depend generally upon the question of reasonableness: Note to *Angier v. Webber*, 92 Am. Dec. 755; monographic note to *Pike v. Thomas*, 7 Am. Dec. 743-746; note to *Chapin v. Brown*, 32 Am. St. Rep. 301; though some cases hold that contracts not to engage in business, without any limitation as to place, space, or territory, are void: *Gamewell etc. Tel. Co. v. Crane*, 160 Mass. 50; 3 Am. St. Rep. 458, and note. Thus, a covenant by which the covenantor agreed, without any limitation as to space, that for and during the period of five years, he would not, directly or indirectly, continue in, carry on, or engage in, the business of manufacturing or dealing in bedquilts or comfortables, or of any business of which that may form a part, was held to be void as being in restraint of trade: *Bishop v. Palmer*, 146 Mass. 469; 4 Am. St. Rep. 339.

But in regard to trade or commerce in articles of prime necessity or of very frequent use among a large number of people in any given locality, the extent of the territory is not the sole test by which to determine the reasonableness of the restraint of such trade. The effect of such restraint upon the interest of the public is a better test: *Texas Standard Oil Co. v. Adoue*, 83 Tex. 650; 29 Am. St. Rep. 690; and an agreement in restraint of trade is not necessarily void on the ground of public policy because it extends throughout the state: *Herreshoff v. Boutineau*, 17 R. I. 3; 33 Am. St. Rep. 850; as some businesses require a limit of larger range than others: Note to *Callahan v. Donnelly*, 13 Am. Rep. 175. Hence, a contract restraining the exercise of a trade or business throughout the kingdom or state may be reasonable, and therefore valid: Note to *Angier v. Webber*, 92 Am. Dec. 755. A contract in restraint of trade is valid, if it imposes no restriction upon one party not beneficial to the other, and was induced by a consideration which made it reasonable for the parties to enter into it: *Hodge v. Sloan*, 107 N. Y. 244; 1 Am. St. Rep. 816.

A person carrying on a business founded on a secret process known only to himself and his agents may sell such business, including as an essential part thereof, the secret process, and promise to divulge the secret

to his vendee, and to keep it from everyone else. Such an agreement is not in general restraint of trade nor opposed to public policy, but is a reasonable measure of mutual protection to the parties, imposing no restraint upon either that is not beneficial to the other, and is therefore valid, especially when the restriction is limited as to time: *Tode v. Gross*, 127 N. Y. 480; 24 Am. St. Rep. 475.

One engaged in business may sell his stock in trade and goodwill, and make a valid contract with the purchaser binding himself not to engage in the same business in the same place for a time named, and he may be enjoined and restrained from violating his contract: *Chapin v. Brown*, 83 Iowa, 156; 32 Am. St. Rep. 297; *French v. Parker*, 16 R. I. 219; 27 Am. St. Rep. 733.

ESTOPPEL.—A party proposing the terms of a contract cannot be heard to object to them: *Louisville etc. R. R. Co. v. County Court*, 1 Sneed, 637; 62 Am. Dec. 424.

CORPORATIONS, FOREIGN.—A corporation of one state cannot do business in another without the latter's consent express or implied; but in many of the states a foreign corporation may make contracts within the scope of its charter, and may sue and be sued thereon: See note to *Taylor v. Branham*, 48 Am. St. Rep. 254.

BEEHLER v. DANIELS.

[18 RHODE ISLAND, 563.]

REAL PROPERTY—DUTY OF OWNER AS TO LICENSEES.—One who owns a building must keep it reasonably safe for the use of persons who enter it at his invitation, but he owes no such duty to a licensee.

REAL PROPERTY—LICENSEE—FIREMAN.—A member of the fire department of a city, injured by falling into an unguarded elevator well in a building while extinguishing a fire therein, cannot recover of the owner, without showing that he has violated some statute, or proving facts which amount to an invitation to enter therein. The action cannot be grounded on negligence in failing to guard the well, or in so packing the merchandise on the premises as to conduct one to the well.

Trespass on the case. The question involved arose on demurrer.

Walter B. Vincent and Amasa M. Eaton, for the plaintiff.

William G. Roelker, for the defendants.

563 **STINESS, J.** The plaintiff seeks to recover for injury caused by falling into an elevator well in the defendants' building, which he entered in the discharge of his duty as a member of the fire department of the city of Providence, in answering a call to extinguish a fire. The negligence alleged in the first count is a failure to guard and protect the well, and in the second count such a packing of merchandise as to guide and conduct one to the unguarded and unprotected well. The defendants demur to

the declaration, alleging as grounds of demurrer that they owed no duty to the plaintiff; that he entered their premises in the discharge of a public duty and assumed the risks of his employment; that he was in the premises without invitation from them; and that they are not liable for consequences which they could not and were not bound to foresee.

⁵⁰⁴ The decisive question thus raised is, Did the defendants, under the circumstances, owe to the plaintiff a duty, for failure in which they are liable to him in damages? The question is not a new one, and we think it is safe to say that it has never been answered otherwise than in favor of the defendants. The plaintiff argues that it was his duty to enter the premises, and, consequently, since an owner may reasonably anticipate the liability of a fire, a duty arises from the owner to the fireman to keep his premises guarded and safe. An extension of this argument to its legitimate result, as a rule of law, is sufficiently startling to show its unsoundness. The liability to fire is common to all buildings and at all times. Hence every owner of every building must at all times keep every part of his property in such condition that a fireman, unacquainted with the place, and groping about in darkness and smoke, shall come upon no obstacle, opening, machine, or anything whatever which may cause him injury. This argument was urged in *Woodruff v. Bowen*, 136 Ind. 431; but the court said: "We are of the opinion that the owner of a building in a populous city does not owe it as a duty at common law, independent of any statute or ordinance, to keep such building safe for firemen or other officers, who, in a contingency, may enter the same under a license conferred by law."

Undoubtedly, the plaintiff in this case had the right to enter the defendant's premises, and the character of his entry was that of a licensee: *Cooley on Torts*, *313. But no such duty as is averred in this declaration is due from an owner to a licensee. This question is discussed in the case just cited, as also in many others. For example, in *Reardon v. Thompson*, 149 Mass. 267, Holmes, J., says: "But the general rule is that a licensee goes upon land at his own risk, and must take the premises as he finds them. An open hole, which is not concealed otherwise than by the darkness of the night, is a danger which a licensee must avoid at his peril." So in *Mathews v. Bensel*, 51 N. J. L. 30, Beasley, C. J., says: "The substantial ground of complaint laid in the count is, that the defendants did not properly construct their ⁵⁰⁵ planer, and, being a dangerous instrument, did not surround it with proper safeguards. But there is no legal principle that

imposes such a duty as this on the owner of property with respect to a mere licensee. This is the recognized rule. In the case of *Holmes v. Northwestern Ry. Co.*, L. R. 4 Ex. 254, 256, Baron Channell says: "That where a person is a mere licensee he has no cause of action on account of the dangers existing in the place he is permitted to enter." In *Parker v. Portland Pub. Co.*, 69 Me. 173, 31 Am. Rep. 262, this question is fully examined, the court holding it to be well settled, if the plaintiff was at the place where the injury was received by license merely, that the defendant would owe him no duty, and that he could not recover: See, also, *Indiana etc. Ry. Co. v. Barnhart*, 115 Ind. 399; *Gibson v. Leonard*, 37 Ill. App. 344; *Bedell v. Berkey*, 76 Mich. 435; 15 Am. St. Rep. 370.

There is a clear distinction between a license and an invitation to enter premises, and an equally clear distinction as to the duty of an owner in the two cases. An owner owes to a licensee no duty as to the condition of premises, unless imposed by statute, save that he should not knowingly let him run upon a hidden peril or willfully cause him harm; while to one invited he is under obligation for reasonable security for the purposes of the invitation. The plaintiff's declaration does not set out a cause of action upon either of these grounds, and the cases cited and relied on by him fall within the two classes of cases described, and mark the line of duty very clearly. *Parker v. Barnard*, 135 Mass. 116, 46 Am. Rep. 450, was the case of a police officer who had entered a building, the doors of which were found open in the night-time, to inspect it according to the rules of the police department, and fell down an unguarded elevator well. A statute required such wells to be protected by railings and trapdoors. Judgment having been given for the defendant at the trial, a new trial was ordered, upon the ground of a violation of statute. The court says: "The owner or occupant of land or a building is not liable, at common law, for obstructions, pitfalls, or other dangers there existing, as, in the absence of any inducement ⁵⁰⁶ or invitation to others to enter, he may use his property as he pleases. But he holds his property 'subject to such reasonable control and regulation of the mode of keeping and use as the legislature, under the police power vested in them by the constitution of the commonwealth, may think necessary for the preventing of injuries to the rights of others and the security of the public health and welfare.'" Then, likening the plaintiff to a fireman, the court also says: "Even if they must encounter the danger arising from neglect of such precautions against obstructions and pitfalls

as those invited or induced to enter have a right to expect, they may demand, as against the owners or occupants, that they observe the statute in the construction and management of their building." In *Learoyd v. Godfrey*, 138 Mass. 315, a police officer fell down an uncovered well in or near a passageway to a house where he was called to quell a disturbance of the peace. A verdict for the plaintiff was sustained, upon the ground that the jury must have found that the officer was using the passageway by the defendant's invitation, and that the evidence warranted the finding. *Gordon v. Cummings*, 152 Mass. 513, 23 Am. St. Rep. 846, was the case of a letter carrier who fell into an elevator well, in a hallway where he was accustomed to leave letters in boxes put there for that purpose. The court held that there was an implied invitation to the carrier to enter the premises. In *Engel v. Smith*, 82 Mich. 1, 21 Am. St. Rep. 549, the plaintiff fell through a trapdoor left open in a building where he was employed. The question of duty is not discussed in the case but simply the fact of negligence. In *Bennett v. Railroad Co.*, 102 U. S. 577, the plaintiff, a passenger, fell through a hatch hole in the depot floor. The court construed the declaration as setting out facts which amounted to an invitation to the plaintiff to pass over the route which he took through the shed depot where the hatch hole was.

In the present case, the plaintiff sets out no violation of a statute, or facts which amount to an invitation, and, consequently, under the well-settled rule of law, the defendants were under no liability to him for the condition of their ⁵⁶⁷ premises or the packing of their merchandise. The demurrer to the declaration must therefore be sustained.

DUTY AS TO PERSONS INVITED UPON PREMISES—LICENSEES—FIREMEN.—The owner of property must keep it in a reasonably safe condition for the use of those who come upon it at his invitation: *Atlantic etc. Oil Mills v. Coffey*, 80 Ga. 145; 12 Am. St. Rep. 244; but he owes no such duty to licensees. They enjoy the license subject to its attendant risks: Note to *Peake v. Buell*, 48 Am. St. Rep. 949. Persons have an implied license to enter premises in case of fire to save property, but the owner is under no obligation to provide against the dangers of accident to such licensee, and is not liable to a fire patrolman who is injured by reason of defective premises while so engaged: *Gibson v. Leonard*, 143 Ill. 182; 36 Am. St. Rep. 376.

HANDY v. WALDRON.

[18 RHODE ISLAND, 567.]

DECEIT—REPRESENTATIONS AS TO VALUE.—Mere expressions of belief or opinion as to the quality or value of articles sold, though false, cannot be made the basis of an action for deceit, in the absence of either fraud or warranty.

DECEIT—WARRANTY AS TO VALUE.—A warranty being a statement of fact as to an article sold, an action for deceit lies against a vendor for a false and fraudulent warranty of the value of bonds and stocks which the purchaser relies on to his injury.

DECEIT—SALE OF STOCKS AND BONDS—CAVEAT EMP-TOR.—No action for deceit can be maintained against the seller of stocks and bonds for false and fraudulent representations as to their value, if the buyer, not knowing the same, can, by ordinary diligence, ascertain it; but if he has no ready means of ascertaining it, and purchases, trusting to the honesty of the seller, by whom he is deceived and cheated, the action does lie.

DECEIT—MISREPRESENTATION AS TO MATERIAL FACTS. One who effects a sale of stock upon a representation that it has always paid a dividend of ten per cent per annum in quarterly installments, when in fact it has never paid such a dividend, is liable in an action of deceit.

DECEIT—PLEADING—DUPLICITY—SEPARATE CAUSES OF ACTION.—A count in a declaration for deceit in the sale of bonds and stocks, setting out that the defendant made false and fraudulent statements as to their value, and that he falsely and fraudulently represented that the stocks had always paid a dividend of ten per cent per annum in quarterly installments, is not bad for duplicity, nor does it set out two several and distinct causes of action.

Trespass on the case for deceit. The questions involved arose on demurrer.

Dexter B. Potter, for the plaintiff.

Walter F. Angell and Edwin P. Allen, for the defendant.

567 TILLINGHAST, J. The first count in the plaintiff's declaration sets out that on the twenty-fourth day of May, 1893, the defendant falsely and scandalously deceived the plaintiff by selling him two certain bonds of the Atlantic and Pacific Railway Tunnel Company in consideration of two thousand dollars, to said defendant by the plaintiff in hand paid, as and for bonds of the value of one thousand dollars each, and then and there warranting the same to be of the value of one thousand dollars each, to wit, of par value, when in truth and in fact the said bonds so sold and warranted, at the time of sale and warranty thereof, were not of that value, as the defendant well knew. The second count sets out that the defendant on the twenty-fourth day of May, 1893, falsely and scandalously deceived the plaintiff by selling him one hundred and fifty shares of the capital stock of the Rhode

Island Organ Company in consideration of fifteen hundred dollars, to the defendant ^{ses} by the plaintiff then and there in hand paid, as and for stock of the value of fifteen hundred dollars, and then and there warranting the same to be of the value of fifteen hundred dollars, to wit, of par value, when in truth and in fact said shares of stock so sold and warranted, at the time of sale and warranty thereof, were not of that value, as the defendant well knew. The third count sets out that the plaintiff on the twenty-fourth day of May, 1893, had bargained with the defendant to buy of him two one thousand dollar bonds of the Atlantic and Pacific Railway Tunnel Company for a large sum of money, to wit, the sum of two thousand dollars, and one hundred and fifty shares of the capital stock of the Rhode Island Organ Company also for a large sum of money, to wit, fifteen hundred dollars, the said sums being then and there good prices and valuable consideration and the full par value of both said bonds and said capital stock, and the defendant then and there well knowing the said bonds and said capital stock to be of a much less value in the market than the par value thereof, then and there falsely, fraudulently, and deceitfully offered for sale, and did in fact fraudulently, falsely, and deceitfully sell and deliver the said bonds and said capital stock to said plaintiff, who was wholly ignorant of the premises and believed and relied on the promises and representations of said defendant, at the full par value thereof, representing that said bonds and capital stock could not be bought for less than the par value thereof, and that said capital stock had always paid ten per cent per annum in dividends and had paid the same in quarterly installments. And the plaintiff in fact saith that he afterwards learned that said bonds could be bought for a sum much less than the par value thereof, to wit, for the sum of five hundred and fifty dollars each, and that said capital stock could be bought for a sum much less than the par value thereof, to wit, for the sum of three dollars per share, and that the same had not paid ten per centum per annum, of all of which he was wholly ignorant at the time of said purchase, and whereof the defendant was well knowing as aforesaid, and the plaintiff has sustained great loss and detriment in and about the purchase of said bonds and of said stock.

The defendant demurs to the first and second counts, on ^{ses} the ground that the representations and warranty therein alleged refer only to the value of the property alleged to have been sold by the defendant to the plaintiff. He demurs to the third count on the grounds: 1. That the representations therein alleged re-

fer only to the value of the property therein alleged to have been sold by the defendant to the plaintiff; and 2. That the said count contains allegations of two several and distinct grounds or matters in support of the same demand.

In support of the demurrer, defendant's counsel contend that, as between a vendor and vendee, representations as to the value of the thing sold, although false and fraudulently made with intent to deceive the vendee, are not actionable; that such representations are held to be expressions of opinion merely—"dealers' talk"—upon which the vendee is not entitled to rely. There can be no doubt as to the correctness of the proposition that mere expressions of belief or opinion on the part of a vendor as to the value of articles sold by him, even though false and fraudulent, cannot be made the basis of an action for deceit. This principle is ordinarily expressed in the old maxim, "*Simplex commendatio non obligat.*" It is based upon the universal practice of the seller to recommend the article or thing offered for sale, and to employ more or less extravagant language in connection therewith. As said in 1 Benjamin on Sales, sixth American edition, section 640: "The buyer is always anxious to buy as cheaply as he can, and is sufficiently prone to find imaginary fault in order to get a good bargain, and the vendor is equally at liberty to praise his merchandise in order to enhance its value, if he abstain from a fraudulent representation of facts, provided the buyer have a full and fair opportunity of inspection, and no means are used for hiding the defects." And the common experience of mankind is that an ordinarily prudent buyer will not rely upon such statements to his hurt. The law, therefore, recognizes the fact that men will naturally overstate the value and qualities of the articles which they have to sell, and that a buyer has no right to rely thereon: *Kimball v. Bangs*, 144 Mass. 321. Indeed, the decisions have ⁵⁷⁰ gone so far under this principle as to hold that, as said by Holmes, J., in *Deming v. Darling*, 148 Mass. 504, "the law does not exact good faith from a seller in those vague commendations of his wares which manifestly are open to difference of opinion, which do not imply untrue assertions concerning matters of direct observation (*Teague v. Irwin*, 127 Mass. 217), and as to which it always has been 'understood, the world over, that such statements are to be distrusted.'"

But while the law thus countenances a certain degree of misrepresentation, sometimes termed "privileged fraud," in commercial transactions, yet it holds the seller responsible if he falsely

represents a particular fact (other than the price he paid, or an offer to him) affecting the value, quality, or condition of the property in question: Grinnell on Law of Deceit, sec. 28, and cases cited. If there is an express warranty as to quality or value, the thing sold not being open to the inspection of the buyer, or if any trick or device is employed by the seller to prevent such inspection, and the buyer relies upon the warranty or false representations of the seller and is injured thereby, the latter may be held liable. But in the absence of either fraud or warranty, the general rule is that the vendor is not liable for any allegations as to the quality or value of the thing sold: See *Bicknall v. Waterman*, 5 R. I. 43; *Gordon v. Parmelee*, 2 Allen, 212; *Mooney v. Miller*, 102 Mass. 217; *Cooper v. Lovering*, 106 Mass. 77; *Bishop v. Small*, 63 Me. 12; *Brown v. Leach*, 107 Mass. 364; 8 Am. & Eng. Ency. of Law, 809, and cases cited in notes 7, 8. See, also, Story on Sales, 2d ed., secs. 360, 361; *Nash v. Minnesota etc. Trust Co.*, 159 Mass. 437; *Chandelor v. Lopus*, 1 Smith's Lead. Cas., Hare & Wallace's 7th Am. ed., *243, *244, and note. The law applicable to a warranty of value is well stated by Campbell, J., in *Picard v. McCormick*, 11 Mich. 68. He says: "It is undoubtedly true that value is usually a mere matter of opinion, and that a purchaser must expect that a vendor will seek to enhance his wares, and must disregard his statement of their value. But while this is generally the case, yet we are aware of no rule which determines arbitrarily that any class of fraudulent misrepresentations ⁵⁷¹ can be exempted from the consequences attached to others. Where a purchaser, without negligence, has been induced by the arts of a cheating seller to rely upon material statements which are knowingly false, and is therefore damnified, it can make no difference in what respect he has been deceived, if the deceit was immaterial and was relied on. It is only because statements of value can rarely be supposed to have induced a purchaser without negligence, that the authorities have laid down the principle that they cannot usually avoid a bargain. But value may frequently be made by the parties themselves the principal element in a contract; and there are many cases where articles possess a standard commercial value, in which it is a chief criterion of quality among those who are not experts. . . . We think that it cannot be laid down as a matter of law that value is never a material fact": See, also, *McClellan v. Scott*, 24 Wis. 81; *Griffin v. Farrier*, 32 Minn. 474; *Cruess v. Fessler*, 39 Cal. 336; *Chrysler v. Canaday*, 90 N. Y. 272; 43 Am. Rep. 166; *Eaton v. Winnie*, 20 Mich. 156; 4 Am. Rep. 377.

In the case at bar, the plaintiff alleges in the first two counts of his declaration that the defendant warranted the bonds in question to be of the values therein named respectively, when in fact they were not of that value, as the defendant well knew. In short, that the defendant made a false warranty as to the value of said bonds, and the plaintiff relied thereon to his hurt. We think that when a vendor goes to the extent of warranting the value of the article sold, the vendee ordinarily has the right to rely thereon without making further investigation, and, if the warranty proves false, to hold the vendor liable. For to warrant the value of an article is not a mere expression of opinion, but of fact. It is an express undertaking that the article is of the value placed upon it. "A warranty is a statement of fact as to an article sold, coupled with an agreement to make the statement good." And we see no good reason for not holding the vendor liable on his warranty as to the value, as well as on his warranty as to the quality, of the article sold; and, more particularly, where the plaintiff, as in this case, was wholly ignorant of ⁵⁷² the premises and believed and relied on the promises and representations of the defendant as to the value of the bonds. Had the defendant, by words or acts, deceived the plaintiff as to the quality or value of goods sold which were open to his observation and inspection, so that by ordinary diligence he could have ascertained their value, no action could be maintained. But such was not the case here. The defendant knew the value of the bonds, but the plaintiff did not, and, so far as appears, had no ready means of ascertaining the same. He trusted to the honesty of the defendant as to the value of the bonds, and was by him deceived and cheated. To uphold such a transaction would be to connive at dishonesty and fraud, and bring the administration of law into just contempt. As to the third count, there can be no doubt as to its sufficiency. It sets out, not only that the defendant made false and fraudulent representations as to the value of the stock in question, but also stated that it had always paid a dividend of ten per centum per annum in quarterly installments, when in fact it had never paid such a dividend. The latter was certainly a material fact, upon which the plaintiff had the right to rely. It was not merely an opinion, belief, or estimate, but the positive statement of a pretended fact without any qualification, by means whereof the plaintiff was deceived to his hurt: *Bank of North America v. Sturdy*, 7 R. I. 109; *Laidlaw v. Organ*, 2 Wheat. 178, 195; *Pasley v. Freeman*, 3 Term Rep. 51. In short, it is the case of a seller effecting a sale by means of false and fraudulent repre-

representations as to material facts. And in such a case the rule of caveat emptor does not apply, but the seller is answerable for his fraud: 1 Parsons on Contracts, 8th ed., *578; Belcher v. Costello, 122 Mass. 189; Walsh v. Hall, 66 N. C. 233.

The second ground of demurrer to the third count is not well founded. Said count does not set out two several and distinct causes of action, but simply sets out the several false representations of the defendant whereby the plaintiff was deceived and defrauded. That is, it shows the various statements ⁵⁷³ made by the defendant respecting the subject matter of the sale which go to make up the deceit relied on.

Demurrer overruled.

DECEIT—FRAUD—FRAUDULENT REPRESENTATIONS.—Representations as to the value of property, made by a vendor thereof to the vendee, are ordinarily regarded as mere statements of opinion, and the party to whom they are made is not generally justified in relying upon them. Such representations, though false, are not usually sufficient to sustain an action for false representations or deceit. But if the parties are not dealing on equal terms, and the seller, having superior means of knowledge, gives a false opinion, or makes a false statement as to material facts for the purpose of defrauding the purchaser, and the latter has reason to rely, and does rely, on it as true, an action will lie: See monographic notes to Cottrill v. Krum, 18 Am. St. Rep. 556, 557, on action to recover for false representations; Spitz v. Baltimore etc. R. R. Co., 32 Am. St. Rep. 385, on carelessness as a bar to relief. If, however, the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, and the purchaser does not avail himself of these means and opportunities, he will not be heard to say, in impeachment of the contract of sale that he was deceived by the vendor's representations: Note to Spitz v. Baltimore etc. R. R. Co., 32 Am. St. Rep. 384. In sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud, and is not the manufacturer or grower of the article he sells, the maxim of caveat emptor applies: Kircher v. Conrad, 9 Mont. 191; 18 Am. St. Rep. 731. The buyer may protect himself by taking a warranty: Smith v. Hale, 158 Mass. 178; 35 Am. St. Rep. 485; and a positive representation relating to a matter of fact constitutes a warranty: Towell v. Gatewood, 2 Scam. 22; 33 Am. Dec. 437. It has been held that a false statement as to the value of the stock of a certain company, whereby one is induced to buy to his injury and loss, will not sustain an action for fraud and deceit: See Ellis v. Andrews, 56 N. Y. 83; 15 Am. Rep. 379, and note.

JOHNSTON v. OLD COLONY RAILROAD COMPANY.

[18 RHODE ISLAND, 642.]

EMINENT DOMAIN—TAKING RIGHT OF WAY.—Not only an absolute fee in land, but a right of way over land, or any easement or right connected with it, may be taken by eminent domain, and, of course, if so taken, must be paid for.

EMINENT DOMAIN—TAKING PRIVATE RIGHT OF WAY IN PUBLIC STREET.—One who owns a house and lot in a city purchased with reference to a recorded plat having an adjoining street marked out thereon is the owner of a right of way in such street, although it has been made a public highway. If, therefore, such right of way is taken, under proceedings condemning a portion of the highway for railroad purposes, by permanently closing the street at one end, thus throwing the house and lot into a cul de sac, the owner is entitled to compensation therefor.

EMINENT DOMAIN—DAMAGES.—The measure of damages for taking, under condemnation proceedings, a private right of way or approach to one's premises, though such way is in a platted street used as a highway, is the difference between the market value of the estate before and after the condemnation, so far as directly affected thereby.

EMINENT DOMAIN—EVIDENCE—NEW TRIAL.—In an action by the owner of a house and lot in a city to recover damages for the taking of a right of way or approach to his premises under condemnation proceedings, the defendant has no ground for a new trial because of the admission of evidence as to the business done on the premises, introduced, without objection, for the purpose of showing what they were adapted for, where the jury was instructed not to estimate the damage to the plaintiff's business.

EMINENT DOMAIN—VALUE—EVIDENCE.—One element of the value of a house and lot in a city on a platted street is its accessibility by means of the street leading into public thoroughfares beyond the limits of the plat, and the lopping off of the owner's right of way or approach to the estate by permanently closing the street at one end. Hence, evidence as to the amount of travel on the street before and after the condemnation is admissible, for the purpose of showing the extent to which the estate was isolated by closing up the street.

EMINENT DOMAIN—EXCESSIVE DAMAGES.—A verdict for six hundred dollars damages for taking a right of way appurtenant to property under condemnation proceedings is not excessive, where the jury took a view, where the property cost two thousand five hundred dollars, and where the diminution in the value thereof was put by the conflicting testimony of experts at all the way from five to fifty per cent of its value.

Petition for a new trial by the defendant.

Edwin D. McGuinness and John Doran, for the plaintiff.

Henry W. Hayes, for the defendant.

⁶⁴² **ROGERS, J.** By an act of the general assembly passed July 22, 1891, the Old Colony Railroad Company was authorized to take for railroad purposes certain ⁶⁴³ land in the city of

Providence, including a portion of Webster street near the plaintiff's premises, the condemnation to be made under and in conformity with the provisions of the charter of the Boston and Providence Railroad and Transportation Company.

The plaintiff's claim was rejected by the commissioners, whereupon she asked for a jury trial as provided for in the charter. Upon trial in the court of common pleas before a jury, she recovered a verdict of six hundred dollars, and the defendant now petitions for a new trial, alleging errors in the rulings of the presiding justice, that the verdict was against the law and the evidence, and that the damages were excessive.

The taking of Webster street by the defendant consisted in closing it up bodily, so as to prevent any passing whatsoever over it, whereby the plaintiff's house was thrown into a cul de sac leading off at Ashburton street, whereas before that it was upon an open, much frequented way or street. The plaintiff owns a house and lot on the southerly side of Webster street, about seventy-one feet easterly of the part of the street taken, and about eighty-four feet westerly from Ashburton street, the nearest open street to her premises. Webster street, before it was closed up, at the time of the condemnation was a public highway with considerable travel over it, and though the city council of Providence, before the condemnation, had declared that part of Webster street taken to be useless, and that it had been abandoned as a highway, yet the plaintiff had appealed from the order of the council. The plaintiff's estate forms a part of the Philip W. Martin plat, which was duly recorded in the Providence land records, to which plat her title deeds referred, and upon which plat is shown and laid out a street, which has since been established as a public street under the name of Webster street. The estate, then, a part of which, viz., a right of way, has been taken by the defendant, is a lot of land on the Philip W. Martin plat, appurtenant to which is a way or street laid out on said plat, superimposed upon which way is a public highway, which appurtenant way would remain to the plaintiff should Webster street ever be ⁶⁴⁴ abandoned as a highway. For the damage done to her by taking her interest in this way or street under her deed the plaintiff claims damage. The charter of said Boston and Providence Railroad and Transportation Company, section 1, provides that all damages that may be occasioned to any person by the taking of land or material for laying out and constructing its railroad shall be paid for by said corporation in manner there-

inafter provided, which is the manner followed in the proceedings in this case.

Did the plaintiff have such an interest in the way now known as Webster street that said street cannot be taken and closed by the defendant without compensation to her? We are of the opinion that she did have such an interest, and no question has been made but that, if she did have such an interest, it was taken within the constitutional and statutory meaning of the word "take." Not only an absolute fee in land, but a right of way over land, or any easement or right connected with it, may be taken by eminent domain, and, of course, if so taken, must be paid for: *Pratt v. Buffalo City Ry. Co.*, 19 Hun, 30; *Common Council v. Croas*, 7 Ind. 9; *Indianapolis v. Kingsbury*, 101 Ind. 200; 51 Am. Rep. 749; *Gerhard v. Seekonk River Bridge Commrs.*, 15 R. I. 334; 6 Am. & Eng. Ency. of Law, 531, 542.

The defendant contends that when such private way has been taken for highway purposes, and condemnation of a portion of said highway is made for railroad purposes, the reversionary interest of such lotowner in said way is not of such appreciable value as to require compensation, or, at most, any more than nominal damages.

In our opinion, the amount of damages in each case must be determined by the circumstances attending it. Those who suffer have their actions, and in each particular case the jury must determine the amount of damages. The reversionary interest in Webster street, as the defendant terms the private right of way, in contradistinction from the right of the public in a public highway, is what prevents the state even from closing it up without compensation to the plaintiff, and if the approach to plaintiff's estate over Webster street is ⁶⁴⁵ shown to the jury to be valuable, theirs is the duty of assessing the damage. The argument that the value of the plaintiff's right of way over Webster street was as if she had to stop at the limit of the Philip W. Martin plat and could proceed no further is erroneous, for her right of way over Webster street and the streets on said plat led to public highways which could be traveled over to points beyond the plat.

The difference between the market value of plaintiff's estate before and after the condemnation, so far as directly affected thereby, is unquestionably the proper measure of damages. If the property has been sold since the condemnation, that would doubtless furnish the best evidence as to its value; but when, as in this case, it has not been sold, then other evidence of the reduced value must be resorted to, and whatever lessens its desir-

ableness and the price that purchasers would pay for it—causes directly attributable to the condemnation and closing up of plaintiff's private way—would be proper evidence.

The plaintiff testified that she paid two thousand five hundred dollars for the estate ten years ago, at which sum she valued it before the condemnation; the only other evidence as to the lump value of the estate before the condemnation was that put in by the defendant that its assessed tax value was eight hundred and fifty-six dollars. The house consisted of a brick basement or first floor used as a shop, and a story and a half frame building above it containing two tenements, one of which she occupied herself, and the other she let. The shop had been used as a liquor store before plaintiff bought the estate, as well as afterwards and until her husband's death shortly before the condemnation. She took out no license after her husband's death, and did not attempt to use it herself as a liquor store, and, as she could not let it, she used it as a store for knick-knacks, selling little or nothing. Evidence was put in as to the diminution of rental value; also as to what the store was used for before condemnation and since, as tending to show what it was adapted for, and to aid in showing what the rental value would now be; and evidence was also put in as to the amount of travel over Webster street. The jury took a view, and experts were ⁶⁴⁶ called on both sides as to the effect of the condemnation on the value of the premises, several of the defendant's experts testifying that in their opinion the market value was not much lessened, while one of them testified that in his opinion it was injured to the extent of five or ten per cent. On the other hand, one of the plaintiff's experts gave it as his opinion that the value was reduced one-half, and the other that it was reduced at least one-quarter, of its value before the condemnation.

Though the defendant did not object to the admission of evidence showing the business that had been done on the plaintiff's premises, yet it now claims that the admission of such evidence is ground for new trial. We do not understand that the difference in the profit of business before and after the closing of Webster street was claimed by the plaintiff as the measure, or as an item of damage, for the same business was not carried on nor attempted to be carried on after the closing of the street, so no comparison was, or could be, or was attempted to be, instituted. The only purpose of such evidence was to show what the premises were adapted for, and as no objection was made to its admission, and, moreover, as the presiding justice, in compliance with the

defendant's request, charged the jury that they were not to estimate the damages to the trade or business of the plaintiff, because they were too remote to be a subject of damages and because they depend on contingencies too uncertain and speculative to be allowed, we see no just ground for complaint by the defendant in that regard.

Evidence was offered by the plaintiff, without objection, that there was a travel or traffic of business over Webster street before the condemnation of one thousand or twelve hundred foot passengers, and of at least one hundred teams a day, and that the stopping up of Webster street stopped all this. When, however, this was used as one of the bases of a hypothetical question to experts, the defendant objected, the objection being that it is assuming that damages can be assessed for the interruption of traffic on a street as a street, ⁶⁴⁷ whereas the damages should be assessed in reference to the injury to a private right of way.

When the plaintiff bought her estate on the Martin plat she bought the right to have what is delineated thereon as Webster street kept open as a street. This was as much a part of her purchase as the land on which her house stood. The right she bought had no such limitation that only she herself and her immediate family might pass over it, but it was the right that her lot should be situated on such a way as was delineated on the plat, and as broadly as if it were a street. It might not be a public highway, but she had the right that the public should be allowed to travel there as if it were a street. It is common knowledge that people are every day buying lots on plats and building expensive houses on platted streets, and it is not to be supposed that all they have a right to demand is the right for themselves, solitary and alone, to use such streets. If the city should superimpose upon that platted street a public highway, the underlying right of the plaintiff in the platted street is not taken away. The city, in establishing it as a public highway, only gets a public right of way there and the right to repair and regulate it. The right of the public to use it as a public highway is abstract rather than practical. If the city should abandon it as a public highway, the public would still continue to use it as a platted street. It seems to us that if the question of travel is admissible at all, it does not rest on the distinction as to whether this is a public highway or a platted street, so far as the plaintiff is concerned in this case. If all the right the plaintiff had in Webster street had been merely the right that one of the public has in a public highway, then, perhaps, the principle indicated in *Gerhard v.*

Seekonk River Bridge Commrs., 15 R. I. 334, as to owners of estates on public highways, might apply. In *Proprietors v. Nashua etc. R. R. Corp.*, 10 Cush. 385, 391, the supreme court of Massachusetts, in considering the question whether the owners of an estate on a public highway, which was crossed some distance from said estate, but between it and the thickly settled part of the city of Lowell, ⁶⁴⁸ by a railroad which, under authority of the state, had raised the grade of the highway, making it less desirable for travel, and thereby diverting travel and traffic from their estate, could recover damage therefor, used this language as to the law regulating the recovery of damages, viz: "We propose, in case there should be another trial, that it be stated somewhat in this form: That all direct damage to real estate by passing over it, or part of it, or which affects the estate directly, though it does not pass over it, as by a deep cut or high embankment, so near lands or buildings as to prevent or diminish the use of them; . . . by obliterating or obstructing private ways leading to houses or buildings. These, and perhaps many others of like kind, which particular circumstances may present, we think are proper subjects for the assessment of damages. But that no damage can be assessed for losses arising directly or indirectly from the diversion of travel, the loss of custom to turnpikes, canals, bridges, taverns, coach companies, and the like, nor for the inconveniences which the community may suffer in common, from a somewhat less convenient and beneficial use of public and private ways, from the rapid and dangerous crossings of the public highways, arising from the usual and ordinary action of railroads and railroad trains, and their natural incidents." We are not quite sure that we understand what the damages caused by obliterating or obstructing private ways leading to houses or buildings consist in, as construed by the Massachusetts supreme court, nor whether it is intended to draw a distinction between the injury or inconvenience the community may suffer in common and those the owner of a private way may suffer. As this case, or rather the text-book referring to it, was the sole authority furnished us by the defendant in support of its contention, we advert to it at length. Unquestionably, the establishment of a highway parallel and near to another highway, or to a turnpike, and thereby diverting travel, would cause no actionable damage; and so, likewise, a railroad's crossing a public highway and making it somewhat less convenient, and so also in many other cases of diversion of ⁶⁴⁹ travel, and of inconvenience in using highways. In the case at bar, it will be noted that it was

not for a public highway, nor for the inconveniences which the community may suffer in common, that the damage was claimed, but for what we should consider a practical destroying and obliterating of a platted or private street. If the travel by others, valuable to the owner in the platted street, can be diverted without legal damage, then why not the travel of the owner himself; and if a railroad can block up one side without liability for damage, why cannot another railroad block up the other side with equal exemption from liability, and thus leave a man's estate bottled or bagged up without paying damages? There can be no doubt that this lopping off of the approach to one's estate takes value from it; in fact, such approach is the very key of its value. The travel past estates in cities is what in large measure constitutes both their selling and their renting value. If one pays his money directly for such approaches, as he does when he buys on a plat—approaches that he relies on to be traveled over and make his estate central—why should a railroad appropriate such approaches and deprive him of the right of its becoming central without also paying for it? It is practically robbing one to enrich another, for though a railroad corporation is a public corporation so far as to entitle it to the right of eminent domain in its behalf, the shareholders are individuals who are enriched by every such favor granted to it. It is common knowledge that the more centrally located an estate is, the more valuable it is, and that ordinarily, when an estate is removed by one single act, and in a single day, off of a much traveled way, and isolated and cooped up in a mere cul de sac, more or less value is thereby taken out of it. Such damage in such a case as the one at bar does not seem to us indirect or remote, but direct and proximate. It is difficult to conceive what constitutes injury to an estate if lopping off its approaches which one has bought does not.

The case at bar seems to us an extreme one, and, if the elements of damage are such as may mislead a jury, then the protection against excessive damages must be found in the ⁶⁵⁰ power of the court in some of the modes allowed by law to revise or set aside the verdicts of juries. In this case the damages do not seem to us excessive, nor the verdict against the weight of the evidence. Defendant's petition for new trial denied and dismissed, with costs.

EMINENT DOMAIN.—In the monographic note to *Vanderlip v. Grand Rapids*, 16 Am. St. Rep. 614, on what is a taking of property for public use, it is said that the discontinuance or closing up of a street or highway, causing inconvenience to an owner, is not a taking of his

property within the meaning of the constitution. A fair test of damages in eminent domain proceedings is the difference between the value of land before and after the taking: See monographic note to *Winona etc. R. R. Co. v. Waldron*, 88 Am. Dec. 118, on damages in eminent domain proceedings.

FISH v. CAPWELL.

[18 RHODE ISLAND, 667.]

LICENSE—REVOCATION—CONVEYANCE OF TREES—STATUTE OF FRAUDS.—A written instrument, in form a deed, conveying all of the standing wood on certain premises for two years, does not pass any interest in the land, but is a mere parol license, or executory contract for trees to be severed from the land, is not within the statute of frauds, and is revocable by a conveyance of the land during the term. If so conveyed, trespass quare clausum fregit may be maintained against the licensees who afterwards cut and remove trees from the land under such contract.

Petition by the plaintiff for a new trial.

Charles J. Arms, for the plaintiff.

George T. Brown, for the defendants.

DECISION. STINESS, J. This action of trespass quare clausum fregit was brought by the plaintiff, grantee of Nicholas Brown, to recover damages for cutting and removal of trees from his close by the defendants, who justified under a writing signed and sealed by said Brown, as follows, viz:

"Know all men by these presents that I, Nicholas Brown, of Coventry, R. I., have sold to Oliver H. Greene, of said Coventry, and Edward C. Capwell, of West Greenwich, R. I., all of the standing wood on a certain lot of land situated in said West Greenwich, bounded as follows: Northerly by the Greene land, so called, easterly by a wall, southerly by land of James Rathbun, and westerly by land of Edward C. Capwell, estimated to contain ten acres. To have and to hold the same to said Greene and Capwell, their heirs, executors, and administrators, with two years from the date hereof to cut and remove said wood in, they having paid me the sum of fifty dollars, being in full for said standing wood, the receipt of which is hereby acknowledged. In witness whereof I hereunto set my hand and seal at Coventry, R. I., Dec. 13, 1892. NICHOLAS BROWN. [L. S.]

"In presence of S. W. Griffin."

This instrument was not acknowledged and recorded as required for deeds of real estate by the Public Statutes, chapter 173, sections 3, 4.

The plaintiff asked the judge to rule that this was a mere license from Brown, revocable at his will, and that his deed ^{was} to Fish revoked it. The judge denied these requests, and ruled that if the plaintiff knew of this instrument at the time he bought the land he was bound by it and could not maintain the action. To these rulings the plaintiff excepted, the verdict being for the defendants.

The first question is, What was the nature of the instrument; did it convey an interest in land or not? In 1 Greenleaf's Cruise on Real Property, section 45, page *55, note, the learned editor says: "The cases on this much vexed question are extremely contradictory; but the principle now most generally recognized seems to be this, that in contracts for the sale of things annexed to and growing upon the freehold, if the vendee is to have a right to the soil for a time, for the purpose of further growth and profit of that which is the subject of sale, it is an interest in land, within the meaning of the fourth section of the statute of frauds, and must be proved by writing; but where the thing is sold in prospect of separation from the soil immediately, or within reasonable and convenient time, without any stipulation for the beneficial use of the soil, but with a mere license to enter and take it away, it is to be regarded as substantially a sale of goods only, and so not within that section of the statute; although an incidental benefit may be derived to the vendee from the circumstance that the thing may remain for a time upon the land." The same distinction between pernanacy of the soil and products bought with a view to their separation from it is also stated in 1 Greenleaf on Evidence, 14th ed., sec. 271. In Browne on the Statute of Frauds, fourth edition, sections 235-258, this subject is very thoroughly discussed, and the general rule deduced that where the intention is to convey a mere chattel, though it may in the interim be a part of the realty, it is not affected by the statute of frauds; but if it is to confer an exclusive right to the land for a time, for the purpose of making a profit of the growing surface, it is within the statute and must be in writing, even though the purchaser's real profit may come from the sale of the produce of the land as a chattel. On the other hand, Professor Washburn gives, as an attempt to harmonize decisions, the result that a sale of ^{growing} trees or other fructus naturales, when they are not to be severed at once, but are to remain in the soil some definite or indefinite time, is generally regarded as a grant of an interest in the land: 3 Washburn on Real Property, 5th ed., 368. Mr. Benjamin states the rule in this way: that where a sale is

made which vests the property at once in the buyer before severance, a distinction is made between *fructus naturales* and *fructus industriales*, the former being an interest in the land, which is within the statute of frauds: 1 Benjamin on Sales, Kerr's ed., sec. 136.

We think the better reason is with the view which holds the sale to carry a chattel interest and not an interest in the land. Evidently, the parties to a sale of standing trees, as in this case, have in mind the trees as timber, and not the land. They are not bargaining for occupation, and would not often think to clinch the trade by a deed. They have contracted for wood, which happens not to have been cut; but why should a mere contract of that sort be different in legal effect from a contract for wood which has been cut? If, by its peculiar terms, it necessarily involves an occupation of land, there is reason for it, but not otherwise. If a man sells cut wood, he may refuse to deliver it and become liable for a breach of contract. We see no reason why the same rule should not apply where the thing sold is standing wood simply. What the buyer pays for and expects to get is, not an interest in land, but trees severed from the land. The whole thing rests in contract. This view is supported by respectable authority. It is very clearly stated by Bigelow, C. J., in *Drake v. Wells*, 11 Allen, 141, where it is held that a sale, such as the one before us, does not pass an interest in land, but only in the trees when they are severed from the land; that it is an executory contract for the sale of chattels when they shall be cut, with a license to enter on the land for the purpose of removal. Before they are cut the license may be revoked, otherwise it would amount to an interest in the land. In some of the cases the contract has been oral and in others written, but we do not see that this is important, for, if the sale be an executory contract, either form is sufficient. To ⁶⁷¹ the same effect are *Silby v. Trotter*, 29 N. J. Eq. 228; *Herrick v. Newell*, 49 Minn. 198; *Poor v. Oakman*, 104 Mass. 309; *Cain v. McGuire*, 13 B. Mon. 340; *Byassee v. Reese*, 4 Met. (Ky.) 372; 83 Am. Dec. 481; *McClintock's Appeal*, 71 Pa. St. 365; *Sterling v. Baldwin*, 42 Vt. 306. In *Owens v. Lewis*, 46 Ind. 488, 15 Am. Rep. 295, there is as thorough an examination of this subject as can be found anywhere, with the conclusion that a contract for the sale of growing trees is a contract for the sale of an interest in land: See, also, *Williams v. Flood*, 63 Mich. 487. While we must concede that this view is taken by the greater number of authorities, yet we are constrained to think that the other view, that such a sale is an exec-

utory contract for trees to be severed from the land, and so not within the statute of frauds, is much more sensible. From the nature of the transaction, it is plain that what the buyer is after is wood, not land; if so, we do not see why we should say that, by legal construction, he buys an interest in land and not wood. The buyer has just the same rights and remedies under the contract, as we construe it, that he would have for a sale of any chattel; whereas, under a contract by parol, or in writing not conformable to the statute, if it be held to be an interest in land, he would have none at all.

In this case there was a written instrument, which was substantially a deed of the trees; but, if we give effect to it as a deed of an interest in land, we must say that it is more than a deed of trees, and that it practically amounts to a lease of the land for two years; because, under it, the purchasers might fell the trees at once and obstruct the use of the land for any other purpose for nearly all that time. Now, the parties have made no such express agreement. It is more reasonable to imply that the owner meant to retain the possession and use of the land, subject to the license to remove the trees, than that he virtually surrendered it under such a license. If the deed carries an interest in land, suppose the purchaser refuses to take the trees—what then? The owner of the land cannot get back the interest he has conveyed, so as to be able to deal with another, unless he also can get a deed from the purchaser. Yet who would think of a purchaser ⁶⁷² of trees making a deed back in order to clear the title? The fact is, the parties have simply made a contract, and it ought to be treated as such; and putting it into the form of a deed does not make anything more than a simple contract. One party has agreed to turn a part of his realty into personalty and sell it to the other. If he had agreed to turn cattle into beef he would not be held to convey a present interest in the cattle, and there is no greater reason to hold that in the former case he conveys a present interest in the land. Courts have frequently tried to avoid the full effect of their construction of these contracts by making a distinction between the natural growth of the land, *fructus naturales*, and crops produced by tillage, *fructus industriales*; calling the former a contract for realty and the latter for chattels. But we see no logical ground for this distinction. They are both a part of the realty until they are severed. The fact that the policy of the law allows the latter to go to the executor or administrator as a reward for the labor of the husbandman does not change its character in the mean time. The better reason, as it seems to us,

is to put both classes on the same footing and treat them as contracts for the things to be severed.

Construing this contract, then, as amounting only to an executory contract or parol license, it follows that it was revocable: *Foster v. Browning*, 4 R. I. 47; 67 Am. Dec. 505; *Owens v. Lewis*, 46 Ind. 488; and the conveyance to the plaintiff operated as a revocation, because, as to him, the license was void: *Thurber v. Dwyer*, 10 R. I. 355.

The refusal to charge as requested must therefore be held to be erroneous and a new trial granted.

LICENSE—CONTRACT FOR SALE OF STANDING TREES.—There is a decided conflict of authority upon the question as to whether a contract for the sale of growing or standing trees is one for the sale of an interest in land, and, therefore, within the statute of frauds. The cases each way are collected in *Hirth v. Graham*, 50 Ohio St. 57, 40 Am. St. Rep. 641, and slightly preponderates in favor of the rule that such a contract is one concerning an interest in lands, and within the fourth section of the statute of frauds: See, also, the cases collected in the monographic note to *Kingsley v. Holbrook*, 86 Am. Dec. 182, on whether a sale of growing trees is a sale of an interest in land, within the statute of frauds. A parol sale of standing trees, although void as a sale of an interest in land, operates as a license to enter and cut and carry away the trees, until revocation, but is revoked by a sale and conveyance of the land to a third person: *Jenkins v. Lykes*, 19 Fla. 148; 45 Am. Rep. 19. A sale of growing trees is sometimes held to be a sale of chattels only: See note to *Kingsley v. Holbrook*, 86 Am. Dec. 182; *Byassee v. Reese*, 4 Met. 372; 83 Am. Dec. 481.

MANTON v. RAY.

[15 RHODE ISLAND, 672.]

SPECIFIC PERFORMANCE—PERSONALTY.—A court of equity will not, as a general rule, order the specific performance of a contract for a sale of personal property.

SPECIFIC PERFORMANCE—PERSONALTY.—Equity will decree the specific performance of a contract to convey personal property, if like property cannot be obtained elsewhere, or if loss cannot be adequately compensated by damages in an action at law.

SPECIFIC PERFORMANCE—CONVEYANCE OF STOCK. Equity will decree the specific performance of a contract to convey corporate stock if it cannot be obtained elsewhere than from the respondent and its value is uncertain and not easily to be ascertained.

SPECIFIC PERFORMANCE—CONVEYANCE OF STOCK—DEMURRABLE BILL.—A court of equity will not order one to transfer stock which he does not have. A bill to compel the specific performance of a contract to convey stock must, therefore, allege that the respondent had the stock at the time of the contract.

Clarke H. Johnson, for the plaintiff.

Charles A. Wilson and Thomas A. Jenckes, for the respondent.

⁶⁷³ STINESS, J. This is a bill for the specific performance of a contract to convey twenty-five shares of the capital stock of the Home Investment Company, a corporation, in exchange for stock owned by complainant in another corporation. The bill sets out that the complainant, prior to June 26, 1893, delivered certificates of the shares he was to convey, duly issued by the corporation and transferred in blank, to one Goff, a broker, with instructions to deliver the same to Ray in exchange for the shares he was to receive pursuant to the contract; that on June 26th the respondent met the complainant at Goff's office and promised to exchange the shares the next day; that thereupon he made agreements for the disposal of said stock; that he cannot obtain the stock of said Home Investment Company elsewhere than from said Ray; that the value of said stock is uncertain and not easily ascertainable, and that the respondent has refused to carry out his contract. To these allegations the respondent demurs generally.

The general rule is, that a court of equity will not order the specific performance of a contract for a sale of personal property, because, ordinarily, there is an adequate remedy at law: *Chafee v. Sprague*, 16 R. I. 189. Moreover, as to most kinds of personal property and many stocks, a similar purchase can be made in the market, so that a bill for specific performance is needless. But this rule is neither inflexible nor without exceptions. Cases which involve trusts are recognized exceptions: *Chafee v. Sprague*, 16 R. I. 189; *Goodwin etc. Co's Appeal*, 117 Pa. St. 514; 2 Am. St. Rep. 696; *Johnson v. Brooks*, 93 N. Y. 337. So also in England, Lord Chelmsford ⁶⁷⁴ said, in *Cheale v. Kenward*, 3 De Gex & J. 27, that it was settled that a bill for specific performance would lie for railway shares which are not always to be had in the market. Another exception is that a bill will lie where the loss cannot be adequately compensated by damages in an action at law: *Bumgardner v. Leavitt*, 35 W. Va. 194; *Johnson v. Brooks*, 93 N. Y. 337; *Treasurer v. Commercial etc. Min. Co.*, 23 Cal. 390; *Eckstein v. Downing*, 64 N. H. 248; 10 Am. St. Rep. 404; *White v. Schuyler*, 1 Abb. Pr., N. S., 300; 31 How. Pr. 38; *Todd v. Taft*, 7 Allen, 371; *Story's Equity Jurisprudence*, 12th ed., sec. 717; 1 Cook on Stocks and Stockholders, 3d ed., sec. 337, 338. Indeed, the rule of law, as claimed by the respondent, is not substantially different from that embodied in the above exceptions, but he claims that the bill does not show a case which falls within these recognized exceptions, for the following reasons:

1. The bill does not allege that the stock was not on the market

for sale at the time of making the contract or since; 2. It does not aver that the complainant has made any effort to obtain other stocks of the Home Investment Company. This is so, and yet we think the complainant presents a traversable averment which covers these points by saying that he cannot obtain the stock elsewhere than of the respondent; 3. The bill shows no necessity for the complainant to resort to this court rather than to a court of law. The allegation that the value of the stock is uncertain and not easily ascertainable brings the case within the class of exceptional cases where there is not an adequate remedy at law. The true standing of a corporation is seldom known outside of its own officers. A stranger would, in most cases, find it difficult, if not impossible, to prove the real value of its stock, unless it is one that is rated and for sale in the market. He has no access to its books; he cannot know its assets and liabilities; and, although he is willing to take the stock for a price, he might be quite unable to prove that it was worth that or any other price. No one can say that the remedy of damages in such a case is an adequate remedy. But there is a stronger reason for sustaining the bill. If it be assumed that the stock cannot ⁶⁷⁵ be obtained elsewhere than of the respondent, and that he has made a valid contract for this particular stock, it is also to be assumed that he wants this stock in specie. To deny this remedy would be to deny him the substantial benefit of his contract. This fact marks the exception to the general rule, which is based upon the fact that like property may be obtained elsewhere, and so the remedy is not needed: Story's Equity Jurisprudence, 12th ed., sec. 716.

The fourth ground urged in support of the demurrer is that it does not aver that the respondent had the stock at the time of the contract. We think the bill is faulty in this respect. Of course, a court cannot order one to transfer stock which he does not have. If one has agreed to do this, the only remedy is upon the contract, for a court of equity would be powerless to do more. The averment is that the respondent, "being, or pretending to be, possessed of or otherwise entitled to certain shares of stock." We do not think this amounts to an averment of ownership, and to this extent, therefore, the demurrer to the bill is sustained.

SPECIFIC PERFORMANCE — PERSONALTY.—Specific performance of a contract respecting personal property will not be enforced in equity, unless an adequate remedy at law cannot be had: *Eckstein v. Downing*, 64 N. H. 248; 10 Am. St. Rep. 404. In the absence of an adequate remedy at law, specific performance of a contract for the sale of

personal property will be decreed, as where stocks are sold which are limited in amount, held in a few hands, and not ordinarily to be obtained, or where articles of a personal nature are peculiar or individual in their character, or have an especial value on account of the associations connected with them, as pictures, curiosities, and the like: *Adams v. Messinger*, 147 Mass. 185; 9 Am. St. Rep. 679. While an agreement to transfer certain shares of stock is one which equity may order to be specifically performed (note to *Rothholz v. Schwartz*, 19 Am. St. Rep. 422), specific performance will not be decreed of contracts for the sale of stocks in private corporations, where the breach of the contract is capable of exact compensation in damages: *Eckstein v. Downing*, 64 N. H. 248; 10 Am. St. Rep. 404.

IN RE CASWELL'S REQUEST.

[18 RHODE ISLAND, 335.]

PUBLIC RECORDS, RIGHT TO EXAMINE.—THE JUDICIAL RECORDS OF THE STATE SHOULD ALWAYS BE ACCESSIBLE to the people for all proper purposes, under reasonable restrictions as to the time and mode of examining the same, but no one has a right to examine, or obtain copies of, public records from mere curiosity, or for the purpose of creating public scandal.

COURTS—POWER AS TO IMPROPER USE OF RECORDS.—In the absence of a statute allowing any person to examine public records and take memoranda thereof, the court has power to prevent the use of its records to gratify private spite or to promote public scandal.

COURTS—COPIES OF RECORD.—It is not the duty of a clerk of the court to furnish a copy of the proceedings in a divorce case to the reporter of a newspaper, who requests it "for publication or otherwise."

335 **TILLINGHAST, J.** At the November session of this court in Washington county, the petition for divorce of *Eva M. Lee v. Thomas Z. Lee* was heard and granted. Shortly thereafter, as represented by *William H. Caswell*, clerk of the court in that county, a reporter for a Woonsocket newspaper requested him to furnish a copy of all the proceedings in said case "for publication or otherwise," and he now asks the advice of the court as to his duty in the premises.

At common law, every person is entitled to the inspection, either personally or by his agent, of public records (this term including legislative, executive, and judicial records, etc.), provided he has an interest therein which is such as would enable him to maintain or defend an action for which the document or record sought can furnish evidence or necessary information. It is not essential, however, "that the interest be private, capable of sustaining a suit or defense on his own personal behalf; but it will be sufficient that he act in such suit as the repre-

sentative of the common or public right": 20 Am. & Eng. Ency. of Law, 522, 523, and cases cited. By statutes of the United States (see act of August 12, 1848; 9 U. S. Stats., c. 166, p. 292), and also of several of the states, the necessity of interest has been done away with, and any person may examine public records and take memoranda therefrom: In re Chambers, 44 Fed. Rep. 786; ⁵²⁶ State v. Rachac, 37 Minn. 372; Hanson v. Eichstaedt, 69 Wis. 538; Lum v. McCarty, 39 N. J. L. 287; Newton v. Fisher, 98 N. C. 20. As there is no statute in this state, however, regulating this matter, the common-law rule above stated, in so far as it is applicable here, is doubtless in force. Whether or not we should be willing to go to the full extent thereof, we are not now called upon to decide. But it is clearly within the rule to hold that no one has a right to examine or obtain copies of public records from mere curiosity, or for the purpose of creating public scandal. To publish broadcast the painful and sometimes disgusting details of a divorce case not only fails to serve any useful purpose in the community, but, on the other hand, directly tends to the demoralization and corruption thereof, by catering to a morbid craving for that which is sensational and impure. The judicial records of the state should always be accessible to the people for all proper purposes, under reasonable restrictions as to the time and mode of examining the same, but they should not be used to gratify private spite or promote public scandal. And, in the absence of any statute regulating this matter, there can be no doubt as to the power of the court to prevent such improper use of its records. We advise the clerk that he should not furnish a copy of the case referred to for the purpose named.

All the judges concur in this opinion.

JUDICIAL RECORDS.—Under a statute providing, with respect to county officers, that "all books and papers required to be in their offices shall be open for the examination of any person," one who has a present and existing interest in information to be obtained from the public records in any county office has a right to make an examination of such records to the extent of his interest, and to make copies, abstracts, extracts, or memoranda therefrom: Boylan v. Warren, 39 Kan. 301; 7 Am. St. Rep. 551. County records, however, which are open for public inspection, and of which any person may take copies, are, it is said, the records and files of the county, and not of the courts of the commonwealth within the county, and that such papers are not always open to public inspection: See note to Schmedding v. May, 24 Am. St. Rep. 79. The extent to which public records may be examined, copied, and used for private purposes is an embarrassing question, particularly as to how far a copy or abstract of the entire records of a public office may be taken by one who has no special interest therein, and who desires the same for speculative purposes: See monographic note to Randolph v. State, 60 Am. Rep. 764-768, on the right to examine and copy public

records: *Ferry v. Williams*, 41 N. J. L. 332; 32 Am. Rep. 219, and note; *Brown v. County Treasurer*, 54 Mich. 132; 52 Am. Rep. 800. At common law the right to inspect records was confined to the parties thereto, and those having an interest therein, and while more latitude is not given, there is no doubt that the right is controlled to some extent by the objects for which the examination is made, or the use to be made of the information derived: See note to *Randolph v. State*, 60 Am. Rep. 764, 767.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

AIKEN v. McDONALD.

[48 SOUTH CAROLINA, 29.]

WARRANTY.—THE MEASURE OF DAMAGES FOR BREACH of a covenant of warranty, after eviction, is that fixed by the statute in force when the covenant is made, and not by the statute in force when the eviction takes place.

WARRANTY—MEASURE OF DAMAGES.—IN CASE OF A PARTIAL BREACH of a covenant of warranty by reason of a failure of title to a portion of the estate conveyed, there must be an apportionment of the damages fixed by the statute, based upon the relative value of that portion to which the title fails, and of that portion to which the title proves good.

WARRANTY — PARTIAL BREACH — MEASURE OF DAMAGES.—If a grantor is seised of an estate for a life only, and not of the fee warranted, the value of the life estate must be deducted from the value of the fee in estimating the measure of damages for a breach of the covenant of warranty.

Alston & Patton, for the appellants.

Ragsdale & Ragsdale, for the appellee.

³⁰ **McIVER, C. J.** On the twenty-seventh day of December, 1869, defendant's testator, by a deed containing full covenants of warranty, conveyed a certain tract of land, containing seventy-four acres, in fee simple to one William Bell, in consideration of the sum of four hundred and fifty dollars. On the 31st of August, 1885, all the right, title, and interest of the said William Bell, by several intermediate conveyances, became vested in the plaintiff herein. It is conceded that the testator, Thomas W. Rabb, was not seised of an estate in fee in the said and, but only of an estate for the life of one Mary Marion, and that such estate passed by the deed of 1869 to the said Wil-

liam Bell and those claiming under him by the said several successive intermediate conveyances, and finally became vested in the plaintiff herein. This life estate terminated by the death of Mary Marion on the 21st of January, 1886. It seems that, although the life estate of Mary Marion fell in on the day last mentioned, the plaintiff herein was not disturbed in her possession of the premises until the 6th of February, 1890, when the remaindermen commenced their action against the plaintiff herein to recover possession of the same, of which action the defendants received due notice. That action resulted in a judgment in favor of the remaindermen, under which judgment the plaintiff herein has been evicted.

Thereupon, this action was commenced to recover damages for the breach of the warranty contained in testator's deed to the said William Bell, wherein it is claimed that the plaintiff is entitled to recover the sum of four hundred and fifty dollars (the consideration mentioned in the deed from Thomas W. Rabb to William Bell), with interest thereon from the date of said deed, to wit, the 27th of December, 1869, after deducting certain payments admitted to have been made by defendant before the commencement ³¹ of this action; it being also admitted that the costs of the action under which plaintiff had been evicted by the remaindermen had been paid by the defendants. The defendants in their answer, as a first defense, while admitting all the material allegations of fact in the complaint, take issue with the plaintiff as to the legal measure of damages therein claimed. For a second defense, they plead satisfaction of plaintiff's claim by payment before the commencement of the action.

In the "case" we find the following "agreed statement of facts: It is agreed by counsel in this case, that Miss Mary Marion died on the twenty-first day of January, 1886; that Thomas W. Rabb had a valid estate in the premises in question for the term of her life, and that his deed passed this estate to his grantee, and, by due course of conveyance, to the plaintiff; that the value of the use of the estate was the annual sum of seventy-five dollars; that these facts be considered as duly pleaded, and that they be given whatever consideration they may be entitled to; and that a jury trial be waived."

The circuit judge, in his decree, held that the true measure of damages which the plaintiff was entitled to recover was the purchase money mentioned in the deed from Thomas W. Rabb to William Bell, four hundred and fifty dollars, with interest thereon from the date of said deed, viz., the 27th of December, 1869; and,

as it was admitted that the defendants had paid the costs of the action under which plaintiff was evicted, and had also made certain other payments to the plaintiff, aggregating the sum of five hundred and five dollars and forty-five cents, he rendered judgment in favor of the plaintiff for the said sum of four hundred and fifty dollars and interest, less the sum of said payments. From this judgment defendants appeal, upon the several grounds set out in the record, which need not be specifically stated here, as, with the exception of the first, they made the single question as to what is the true measure of damages in this case.

The circuit judge held that the law which was in force, the act of 1824, at the time of the making of the contract upon which this action is based must govern, and that it could not be affected by the subsequent change in the law ³² by the act of 1879, and the first ground of appeal imputes error to the circuit judge in so holding. The plaintiff bases her action upon the ground that she is the assignee of the covenants contained in the deed of the 27th of December, 1869, and, upon well-settled principles, we think it clear that the contract for the breach of which she sues must be governed by the law which was in force at the time such contract was made. But as the very intelligent counsel, who so ably argued the other point in the case, while not abandoning the first ground, did not press it, we need not pursue the subject further.

We come, then, to the main question in this case, which may be thus stated: In an action to recover damages for the breach of a covenant of warranty contained in a conveyance of real estate, is the same measure of damages to be applied to a case where there has been only a partial breach of the warranty, as would be applied where there has been a total breach of the warranty? It seems to us that to the question thus stated there can be but one answer. It would be contrary to the plainest principles of justice that one who has lost only a portion of the thing purchased should be entitled to just as much damages as if he had lost the whole of the thing purchased. It is, however, contended by the counsel for respondents, and the circuit judge so held, that under the act of 1824, as construed in the case of Lowrance v. Robertson, 10 S. C. 8, the measure of damages adopted by the circuit judge is fixed by statute, and cannot be departed from. This is undoubtedly true where there has been a total breach of the warranty, but it by no means follows that the same measure must be applied where there has been only a partial breach of the warranty.

In the case of Earle v. Middleton, Cheves, 127, decided in 1840,

the action was upon a covenant of warranty in a deed from Middleton to Earle, purporting to convey one thousand and twenty acres of land, and the breach assigned was the loss of one hundred and thirty-one acres by paramount title in a third person. Plaintiff recovered judgment for the value of the one hundred and thirty-one acres, and the judgment was affirmed. In that case, O'Neill, J., used the following language: "The AA. 1824, section 4, page 24, enacts, in affirmance of the rule ^{as} as laid down in *Furman v. Elmore*, 2 Nott & McC. 189 (decided in 1812), *Bond v. Quattlebaum*, 1 McCord, 584, 10 Am. Dec. 702 (decided in 1822), and the other cases decided at law, that in any action or suit at law or in equity for reimbursements or damages upon covenant or otherwise, the true measure of damages shall be the amount of the purchase money at the time of alienation, with legal interest. Testing the case before us by this act, or by the rule of law settled long before it was enacted, there can be no doubt that the jury adopted the true measure of damages in giving to the plaintiff the proportion of the purchase money which the land recovered bore to the whole tract, with interest from the date of his deed." The same doctrine was recognized and applied in the cases of *Wallace v. Talbot*, 1 McCord, 466, and *Crawford v. Crawford*, 1 Bail. 128, where there was only a partial breach of the warranty by a deficiency in the number of acres of the land sold. The fact that these cases arose prior to the passage of the act of 1824 cannot make any difference, if, as O'Neill, J., in *Earle v. Middleton*, Cheves, 127, said (what is undoubtedly the fact) the act of 1824 was but an affirmance of the rule which had been settled in this state ever since the case of *Furman v. Elmore*, 2 Nott & McC. 189. In addition to this, we have two cases in this state which arose since the passage of the act of 1824 (*Lewis v. Lewis*, 5 Rich. 12, and *Jeter v. Glenn*, 9 Rich. 374), in which there was a partial breach of warranty by outstanding estates of dower, and in which the same rule for the measurement of damages was applied.

If, then, the rule requires that in case of a partial breach of the warranty by a failure of title to a portion of the thing conveyed, there shall be an apportionment of the measure of damages fixed by the statute, based upon the relative values of that portion to which the title fails, and of that portion to which the title proves to be good, we do not see why, upon the same principle, there should not be a similar apportionment in a case where there is a partial breach of the warranty by reason of a failure of title to a portion of the estate conveyed. In this case it is conceded

that Thomas W. Rabb had a valid estate in the land for the life of Mary Marion, and that such estate passed by his conveyance to William Bell, and the same was enjoyed by ³⁴ him and his grantees for the term of sixteen years, and that such estate was of the annual rental value of seventy-five dollars. It seems to us that this life estate must be regarded as representing a portion of the purchase money mentioned as the consideration of the deed to William Bell, and that upon the plainest principles of law and justice the estate of the testator can only be held liable for so much of the purchase money (with the interest thereon) as represented the balance of the estate, which did not pass by his deed to Bell, to wit, the estate in remainder after the termination of the life estate of Mary Marion. As the sum of four hundred and fifty dollars, mentioned as the consideration of the deed to Bell, must be regarded as the value of the fee in the land, in order to arrive at the true measure of damages occasioned by the partial breach of the covenants of warranty, it will be necessary to ascertain the relative value of the life estate of Mary Marion, assuming that the sum of four hundred and fifty dollars was the value of the fee, and the value of the life estate ascertained upon this basis should be deducted from the said sum, and the balance, with interest thereon from the date of the deed from Rabb to Bell, will constitute the true measure of the plaintiff's damages, from which all payments made by defendants to plaintiff must, of course, be deducted.

While no case has been cited, and we have been unable to find any, in which the precise point made by this appeal has been decided in this state, yet we think that the analogies afforded by the cases which we have cited not only warrant, but necessarily require, us to adopt the conclusion which we have reached. Even the case of Lowrance v. Robertson, 10 S. C. 8, so strongly relied upon by counsel for respondent, is not only not in conflict with our view, but, inferentially at least, supports it. In the first place, that was not a case of a partial breach of warranty, but was a case of a total breach; and the language used in that case, in vindication of the rule there adopted, indicated very plainly that the court there had in mind only a case where there was a total breach of warranty. Amongst other things, it is there said: "For if a person sells land for which he has no title to another, there is certainly no injustice, so far as he is concerned, in taking from him the purchase ³⁵ money and interest for the time for which he has had the money, for it is simply taking from him that

which, in equity and good conscience, was never his, and which he ought never to have had."

This language, while very appropriate to a case where there has been a total breach of the warranty, would be so wholly inapplicable to a case where there had been only a partial breach of the warranty as to be not only untrue but absurd. Take the present case as an illustration—it could not with any propriety or truth be said that the testator, Rabb, sold land for which he had no title, for it is conceded that he did have a good and valid title for the life of Mary Marion, which, as the event proved, inured to the benefit of his grantees for the term of sixteen years; nor could it be said that there was no injustice in taking from him money which, in equity and good conscience, was never his, for it cannot be denied that so much of the purchase money as represented the value of the life estate was his, both in equity and good conscience, obtained by parting with an estate of the annual rental value of seventy-five dollars, which inured to his grantee's benefit for the term of sixteen years. The fact that the plaintiff enjoyed the benefits of the life estate for only a small portion (about five months) of the sixteen years during which the successive grantees of Rabb enjoyed that estate cannot affect the question; for she can only maintain this action as assignee, and she cannot stand in any higher or better position than her assignors.

But while, as we have said, there is no case in our own state, so far as we are informed, which is precisely in point, the research of appellant's counsel has furnished us with abundant authority from standard text-writers, and decisions in other states, which fully support our view: See, also, the case of *Brooks v. Black*, 24 Am. St. Rep. 267, where Mr. Freeman, the learned editor of that valuable publication, has collected in a note a number of cases in support of the view which we have adopted.

Counsel for appellant has asked this court, in the event his appeal is sustained, to go on and fix the value of the life estate, and thus ascertain whether the plaintiff is entitled to recover ³⁶ anything, claiming that after deducting the admitted payments there will be really nothing due. Inasmuch as the question of the value of the life estate was not considered or passed upon by the court below, we doubt the propriety of this court undertaking to do so, and, therefore, without intimating any opinion as to the proper rule for ascertaining such value, we will simply reverse the judgment, and remand that question to the circuit court.

The judgment of this court is, that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial, in order that the views herein announced may be carried into effect.

COVENANTS OF WARRANTY—PARTIAL BREACH—DAMAGES.—Where the eviction is partial, the damages will bear the same proportion to the whole consideration paid, when that is taken as the measure, or to the whole value of the property at the time of eviction, when it is taken as the measure, that the value of the part to which the title fails bears to the whole premises estimated at the price paid, or at the value at the time of eviction, as the case may be: Extended note to *Brooks v. Black*, 24 Am. St. Rep. 267. This question will be found fully treated in the notes to the following cases: *Hoffman v. Chamberlain*, 53 Am. Rep. 788; *Furnas v. Durgin*, 20 Am. Rep. 346; *Turner v. Miller*, 19 Am. Rep. 49; *Logan v. Moulder*, 33 Am. Dec. 345; *Ferriss v. Harsha*, 17 Am. Dec. 788; *Horsford v. Wright*, 1 Am. Dec. 8.

PEOPLE'S BANK v. JACKSON.

[48 SOUTH CAROLINA, 86.]

USURY.—NOTE FOR PURCHASE PRICE OF LAND, stipulating for a rate of interest from its date greater than that allowed by statute on any "contract for the hiring, lending, or use of money or other commodity," is usurious.

USURY—RIGHT OF JOINT MAKER OF NOTE TO PLEAD.—One of three joint makers of a note for the purchase price of land, who, by purchase of the interests of his comakers, becomes liable for the whole debt, may set up the defense of usury to the whole note.

J. E. McDonald, for the appellant.

Ragsdale & Ragsdale, for the appellee.

GARY, J. This action was brought for a foreclosure of a mortgage of realty, executed by Adam Jackson, James Jackson, and Albert Gladney, to Calvin Brice and John A. Brice, and assigned by them to the plaintiff herein after maturity. The mortgage was given to secure the payment of a note which had been executed by the defendants for the purchase money of the mortgaged premises. It was the joint note of all the defendants for the sum of fifteen hundred and ninety-five dollars, with interest from date at ten per cent per annum, and was dated the first day of January, 1883. Before the commencement of this action, James Jackson and Albert Gladney had conveyed their interests in the mortgaged premises to Adam Jackson, and he alone answered the complaint. His answer interposed the defenses of

payment and usury. The referee, to whom the case was referred, filed a report adverse to the defendant. The case came on for trial before his honor, R. C. Watts, presiding judge, on exceptions to the report of the referee. His honor modified the report by sustaining the plea of usury and in other respects not material here.

The plaintiff appealed to this court on the following exceptions: "1. For that his honor erred in holding that the plea of usury was applicable to the note set forth in the complaint, and that the plaintiff could not recover anything except the principal of said note without costs; 2. Because his honor erred in not holding that the said note was given for the purchase money of the tract of land described in the mortgage, and for that reason the interest mentioned and charged therein was not usurious; 3. For that his honor erred in not holding that the note, having been given for the purchase money of land, was not a 'contract arising in this state for the hiring, lending, or use of money or other commodity,' and, therefore, the plea of usury should not have been sustained; 4. For that his honor erred in not holding that the plea of usury, even if applicable, could only affect said note and mortgage to the extent of the interest of Adam Jackson in the land at time said note and mortgage were executed."

This case is ruled by the principle laid down in the case of *Thompson v. Nesbit*, 2 Rich. 73, the facts of which are as follows: To an action of assumpsit on a note for thirteen hundred dollars, credited by seven hundred and fifty dollars paid at various times, the defendant pleaded usury. The note was given for a negro sold by the plaintiff to the defendant. The plaintiff asked one thousand dollars for the negro. The defendant was willing to purchase at that price, but could not pay the cash. The plaintiff was willing to give any time that the defendant wanted, if he could have the price increased by the addition to the one thousand dollars of ten per cent per annum until payment should be made. After consultation with several persons as to the best means of carrying out their bargain so as to steer clear of usury, it was agreed that the defendant should fix the time and the plaintiff the price. The defendant said he must have three years; the plaintiff said he must have three hundred dollars more. Whereupon the bill of sale was drawn expressing the consideration to be one thousand dollars, and the note was drawn in the following words:

"Three years after date I promise to pay H. Thompson, or bearer, thirteen hundred dollars, to be paid at such times as I

please, and to deduct ten per cent per annum off of the amount paid at each payment.

"11th Nov., 1839.

(Signed) SAMUEL NESBIT."

The intention was that ten per cent per annum should be added to each payment from the time it was made until the note became due, so that the defendant should have the right of paying as he pleased within the three years, and upon every payment should have interest calculated in the same manner as it had been done on the one thousand dollars.

His honor left it to the jury to say whether there was a bona fide sale of the negro at thirteen hundred dollars upon credit, with a stipulation of advantage to the defendant upon payments anticipated, or whether there was forbearance of one thousand dollars upon usurious terms. The court in that case said: "The effect of the agreement is precisely the same as if the note had been taken for one thousand dollars, the price of the negro, with usury at ten per cent per annum. . . . No proof of a corrupt agreement is necessary, for the contract may be usurious, though the parties did not know that it was against law." The court also held that "the jury should have been instructed that the uncontradicted state of facts submitted ^{to} to them presented a case of usury, and that they should find for the plaintiff only that balance." The plea of usury was sustained.

The case of *Wheeler v. Marchbanks*, 32 S. C. 594, does not conflict with the case just mentioned. Chief Justice Simpson, in delivering the opinion of the court in *Wheeler v. Marchbanks*, 32 S. C. 594, says: "It is sufficient for us to say that the question involved is whether the transaction between the parties, and which gave rise to the action below, was a loan of money by the plaintiff to the defendant, or was a sale of land to said defendant by said plaintiff." In that case the circuit judge found that the facts made out a sale of the land; whereas, in the case at bar, interest, *eo nomine*, at a greater rate than was allowed by law was charged in the note secured by the mortgage.

We do not think there is force in the fourth exception of appellant. The defendant was liable on the note to the full extent, and had the right to plead usury to such extent. The purchase by the defendant from his comortgagors of their two-thirds interest in the land did not relieve him from liability on the note, and, therefore, should not affect his defense of usury.

It is the judgment of this court that the judgment of the court below be affirmed.

Pope, J., concurred.

USURY AS DEFENSE TO NOTE FOR PURCHASE PRICE.—In an action on a note given for the price of a horse, it is no defense that the holder, being a national bank, took usury in discounting the note at twenty-five per cent or upwards of its value: *Second Nat. Bank v. Morgan*, 165 Pa. St. 199; 44 Am. St. Rep. 652. See, also, the extended note to *Bank v. Cook*, 46 Am. St. Rep. 182.

PARR v. SPARTANBURG UNION AND COLUMBIA R. R. Co.

[48 SOUTH CAROLINA, 197.]

RAILROADS—TORTS WHILE IN HANDS OF RECEIVER.—A railroad company is liable for torts committed by the negligent operation of trains on its line while in the hands of a receiver of its lessee, appointed in an action to which it is not a party.

T. P. Cothran, for the appellant.

Ragsdale & Ragsdale, for the appellee.

197 **POPE, J.** The plaintiff brought an action against the defendant before Joseph McMeekin, Esq., a trial justice in and for Fairfield county, in June, 1893, for ninety-five dollars, damages for the negligent killing of plaintiff's mule colt. The defendant denied any liability for the tort on the grounds that it had leased its railroad to the Richmond and Danville Railroad Company, which latter company had, under the order of the United States circuit court, been put into the hands of receivers, who were operating such leased road at the time the mule colt was killed.

The trial justice overruled the defense and gave plaintiff his judgment for ninety-five dollars. Thereupon the defendant appealed to the circuit court upon two grounds: 1. That it was not liable for any tort while its property was managed by receivers of its lessee; 2. That plaintiff had failed to prove ownership of the mule colt. This appeal came to be heard before the 198 Hon. Ernest Gary, as presiding judge, who overruled both grounds of appeal and affirmed the judgment of the trial justice. From this judgment the defendant now appeals to this court, upon the single ground that it cannot be held liable for this tort, which occurred while its property was in the hands of receivers of its lessee, under the appointment of the United States circuit court.

We have been very much interested by the clear and able argument of the counsel for appellant. He frankly admits that, under the authority of the cases of *National Bank v. Atlanta etc. Ry. Co.*, 25 S. C. 222, and *Harmon v. Columbia etc. R. R. Co.*, 28 S. C. 401, 13 Am. St. Rep. 686, reinforced by the case of *Rail-*

road Co. v. Brown, 17 Wall. 450, he cannot contend that if the defendant railroad were in the hands of its lessee, the Richmond and Danville Railway Company, it would not be liable to the plaintiff for this tort. Yet he contends that when defendant's property passed into the hands of receivers of its lessee, the defendant ceased to be liable for torts that occur while such receivers have control of its property, and that the plaintiff must apply to the court, whose servants the receivers are, for his relief. It seems that the defendant was not a party to the suit in the United States circuit court when receivers were appointed to take charge and operate lessee's property. The respondent here suggests that this presents a barrier to the assertion by the defendant of its release of responsibility for this tort; that these receivers of the Richmond and Danville Railway Company are in no sense its (defendant's) receivers. Therefore that, granting that the Richmond and Danville Railway Company, as a corporation, is not liable for any torts occurring while its property is operated by the court, through the hands of receivers, it does not follow that the defendant, who is not in the hands of a receiver, can invoke this freedom from responsibility for this tort.

Upon a full consideration of our cases, it will be ascertained that the principle underlying the doctrine that a railroad company cannot avoid responsibility for its contracts or delicts by leasing its line to another is that such leasing is a voluntary act of the chartered railroad, and that such contract for leasing has a valuable consideration moving the lessor ¹⁸⁹ to transfer for the time its power to transport passengers and freight for him to another. See *National Bank v. Atlanta etc. Ry. Co.*, 25 S. C. 222, where the present chief justice, in announcing the opinion of the court, says: "When a railroad or other corporation receives its charter from the state, conferring certain franchises, rights, and privileges, it is upon the consideration that such corporations shall perform the duties and fulfill the obligations which it at the same time incurs. The fact that the corporation *chooses* to perform those duties and fulfill its obligations to the community through another, whether as lessee or otherwise, cannot release it from the obligations which it has assumed by the acceptance of its charter" (italics ours). So, also, see *Harmon v. Columbia etc. R. R. Co.*, 28 S. C. 404, 13 Am. St. Rep. 686, where the same learned judge says: "As was said in one of the cases, if it were otherwise, a railroad company, by leasing its road to irresponsible persons, might enjoy all the benefits conferred by its charter, and practically leave the public generally, as well as individuals, with-

out any of the protection which the obligations imposed upon the company by the charter, as well as the general law of the state, were designed to afford. Accordingly we find it laid down by Mr. Justice Davis in the case of the *Railroad Co. v. Brown*, 17 Wall. 450, as the 'accepted doctrine of this country that a railroad company cannot escape the performance of any duty or obligation imposed by its charter or the general laws of the state, by a *voluntary* surrender of its road into the hands of lessees' " (italics ours). This principle is admitted by the appellant here.

A careful consideration of the authorities which restrict this doctrine when a railroad has passed into the hands of receivers appointed by a court will show that such restriction is based upon the fact that where receivers are appointed and operate a railroad, such control is not the voluntary act of such railroad. There is no contract of the road devolving its franchises and property upon the receivers. The surrender to the receivers is an enforced act on the railroad. It seems to us that this defendant cannot say that the appointment of receivers of the Richmond and Danville Railroad Company alters their status. The only ligament that binds them to these receivers is one of ²⁰⁰ self-interest, viz., the payment of the stipulated price of the lease. If this is not paid by these officers, their property and franchises may be recovered at once. If it is paid, they have no right to complain that the public or private individuals hold them to the performance of their duties under their charter or the general laws of the state. They suggest that application should be made to the court which appointed and controls the receivers by the plaintiff here. Why may not the plaintiff reply, "Pay me for the destruction of my property by the agents of your lessees, and then you may apply to the court to be reimbursed from the funds earned by the receivers?" We are satisfied that the circuit judge has committed no error.

It is the judgment of this court that the judgment of the circuit court be affirmed.

RAILROADS—LIABILITY FOR TORTS WHILE IN HANDS OF RECEIVER.—A railroad company, having no control over the receiver of its property or his servants, is not, in the absence of an absolute liability imposed by statute, responsible for the negligence or torts of the employees of the receiver in operating the road: *McNulta v. Lockridge*, 137 Ill. 270; 31 Am. St. Rep. 362, and note. See, also, the extended note to *Texas Pac. Ry. Co. v. Johnson*, 18 Am. St. Rep. 75.

CARTIN v. SOUTH BOUND RAILROAD COMPANY.

[43 SOUTH CAROLINA, 221.]

JUDGMENTS—NONSUIT—RES JUDICATA.—Nonsuit granted, not for a failure of evidence, but on the merits, and because plaintiff has no cause of action, is *res judicata* and binding in a subsequent suit between the same parties based upon the same cause of action.

A JUDGMENT OF NONSUIT BASED UPON THE CONSTRUCTION OF A DEED is *res judicata* in a subsequent action between the same parties based upon the same deed.

JUDGMENTS AS ESTOPPEL—SEPARATE CAUSES OF ACTION.—If a plaintiff sets up two causes of action in his complaint and the defendant fails to require him to separate them, or to elect upon which to proceed, he is estopped after judgment on his complaint from separating the causes of action, and bringing a separate suit thereon.

C. M. Efird, for the appellant.

Lyles & Muller, for the appellee.

222 **GARY, J.** The plaintiff executed to the defendant a deed by which she conveyed to said defendant a right of way three hundred feet wide over her lands, "for the purpose of building a railroad over the same. Such right of way to be over said lands in such shape and direction as the said railroad company, its successors or assigns, may select, but so as not to interfere with my dwelling, barn, or any other outbuilding, and not nearer than four hundred yards to my dwelling. But if said railroad company should find it necessary to run its road nearer my dwelling than first above stated, it may do so on paying such damages, if any, I may sustain thereby, as may be assessed by three disinterested parties, one chosen by me, one by it, and the third by the first two."

The complaint sets forth this deed, and alleges that the defendant did construct its road and is operating the same nearer than four hundred yards to plaintiff's dwelling; that thereafter plaintiff offered to arbitrate with the defendant the question of damages, but the defendant failed, neglected, and refused to comply with her request; that the plaintiff has sustained damages, by reason of the location and operation of defendant's road within four hundred yards of her dwelling, to the amount of one thousand dollars, which is the price the defendant company agreed to pay for said right of way. The defendant in its answer admitted its corporate existence, and admitted the execution and delivery of the deed, and denied every other allegation in said complaint contained, and for a second defense set up the plea of *res adjudicata*.

The case came up for a hearing before his honor, Judge Benet, and a jury, but, before any testimony was offered by plaintiff, a motion was made by defendant's counsel to dismiss the complaint, on the ground that the issues raised by the ²²³ pleadings herein were res adjudicata. The motion was heard by consent, and the record in the former action, consisting principally of the original complaint, order sustaining oral demurrer to same, order for leave to amend, amended complaint, and order of nonsuit, presented to the court. The motion was granted and the complaint dismissed, his honor, Judge Benet, holding that the order of nonsuit was "a bar in this action, and that the plaintiff's only remedy was to proceed under the statute." The order of his honor, Judge Witherspoon, is as follows: "A motion having been made in the above-entitled action for a nonsuit, after hearing arguments by Joseph W. Muller, Esq., in support of the motion, and C. M. Eford, Esq., contra, and upon inspection of the deed from the plaintiff to the defendant and set forth in the complaint, I find, as matter of law, under the authorities cited by defendant's counsel, to wit, *Hammond v. Port Royal etc. Ry. Co.*, 15 S. C. 33, and *Hale v. Finch*, 104 U. S. 261, that there is no agreement in said deed, on the part of the defendant, the South Bound Railroad Company, to submit the question of damages to arbitration. It is therefore ordered that the motion be granted, and the complaint herein dismissed with cost."

Plaintiff excepts to the order of his honor, Judge Benet, and contends that he should have held: 1. That the deed was a valid contract between the two parties, and took the case out of the statute; 2. That the deed was not rendered void by the provisions as to arbitration having been decided not binding upon the defendant, but that its other provisions remained unimpaired, making it so far a valid contract between the parties, and that the plaintiff could enforce her right under it in the courts."

The so-called nonsuit was not granted simply because there was a failure of evidence, but because, from a construction of the deed, plaintiff did not have a cause of action. To this extent the order of Judge Witherspoon must be construed as an adjudication upon the merits of the case. His construction of the deed was binding upon the parties to said action. There can be no question that if the cause of action herein was set forth in plaintiff's amended complaint when his honor, ²²⁴ Judge Witherspoon, construed the deed, such construction is binding on the plaintiff, and is res adjudicata.

It is argued by the appellant that the plaintiff has two causes

of action—one for the alleged wrong on the part of the defendant in constructing its roadbed nearer than four hundred yards to plaintiff's dwelling-house, and also for the alleged wrong in refusing to arbitrate the question of damages caused thereby. Even admitting that plaintiff had two such causes of action, we do not think the circuit judge was in error. The first complaint, the amended complaint, and the complaint herein, all set forth the facts, both as to the alleged wrongful act on the part of the defendant in constructing its roadbed nearer than four hundred yards to plaintiff's dwelling, and also its wrongful act in refusing to arbitrate the question of damages caused thereby. If two causes of action were set forth in the complaint, without being separately stated, the defendant, it is true, had the right to make a motion that the complaint be made more definite and certain; or if allegations were made which were unnecessary to sustain the cause of action stated in the complaint, to make a motion to strike out such allegations as irrelevant and as surplusage: *Pomeroy's Remedies and Remedial Rights*, secs. 447, 451. If the defendant waived said objections by failing to make such motions, then the plaintiff had the right to the relief to which all the allegations showed he was entitled. The plaintiff, where the allegations of the complaint are appropriate to either of two causes of action, may be required, upon motion of the defendant, to make his election as to the cause of action upon which he will proceed to trial: *Westlake v. Farrow*, 34 S. C. 270; *Hammond v. Port Royal etc. Co.*, 15 S. C. 10; *Hellams v. Switzer*, 24 S. C. 39. If the defendant fails to take such steps, the plaintiff is estopped, afterwards, from separating the causes of action and bringing separate suits thereon. Having had the benefit of such allegation in the first complaint, he cannot be allowed to bring them in review a second time by alleging a separate cause of action.

It is the judgment of this court that the order of the circuit court be affirmed.

NONSUIT—JUDGMENT OF, AS RES JUDICATA.—It has long been a well-settled and inflexible rule that a judgment of nonsuit is, in no case, a judgment upon the merits, and cannot be pleaded as res judicata in another suit between the same parties upon the same cause of action. With the single exception of the principal case, it has always been uniformly held that a judgment of nonsuit, whether voluntary or involuntary, is not a bar to another action for the same cause, and does not deprive or estop a plaintiff of his right to try the same case a second time: *Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 121; *Lowny v. McMillan*, 8 Pa. St. 157; 49 Am. Dec. 501; *Moreland v. Gardner*, 109 Pa. St. 116; *Fleming v. Hawley*, 65 Cal. 492; *Pendergrass v. York Mfg. Co.*, 76 Me. 509; *Holmes v. Chicago etc. R. R. Co.*, 94 Ill. 439; *Cheney v. Cooper*, 14 Neb. 415; *Clapp v. Thomas*, 5 Allen, 158; *People v. Vilas*,

36 N. Y. 459; 93 Am. Dec. 520; Audubon v. Excelsior Ins. Co., 27 N. Y. 316; Gummer v. Trustees of Omro, 50 Wis. 247; Harvey v. Large, 51 Barb. 222; Mechanics' Banking Assn. v. Mariposa County, 7 Robt. 225; Hammergen v. Schurmeier, 3 Fed. Rep. 77; Evans v. White, Hemp. 296; Derby v. Jacques, 1 Cliff. 425; Jones v. Howard, 3 Allen, 223; Knox v. Waldoborough, 5 Me. 185; Jay v. Carthage, 48 Me. 353; Haynes v. Jackson, 66 Me. 93; Bridge v. Sumner, 1 Pick. 371; Holton v. Gleason, 28 N. H. 501; Blair v. McLean, 25 Pa. St. 77; Haws v. Tiernan, 53 Pa. St. 192; Vought v. Sober, 73 Pa. St. 49; Beadle v. Graham, 66 Ala. 99; Howes v. Austin, 35 Ill. 396; Ellington v. Crockett, 13 Mo. 72; National Water Works Co. v. School District, 23 Mo. App. 227; Gardner v. Michigan etc. R. R. Co., 150 U. S. 349; Smith v. Floyd County, 85 Ga. 420; Hendrick v. Olonts, 91 Ga. 196; State v. Anderson, 26 Fla. 240; Robinson v. Merchants' etc. Co., 16 R. I. 217; 1 Freeman on Judgments, sec. 261.

The only case found that lends any semblance of support to the ruling in the principal case is that of Brett v. Marston, 45 Me. 401, wherein it was held that if a nonsuit has been entered in an action on a note, a second suit brought upon the same note is not affected by such judgment, unless the entry thereof is a decision upon the validity of the note. On the other hand, the exact question raised in the principal case was passed upon in Hendrick v. Olonts, 91 Ga. 196, where the court said: "Where, in the trial of a case, a certain muniment of title to a recovery is offered in evidence by the plaintiff, and is excluded on objection of the defendant, and thereupon the plaintiff announces that he has no further evidence, and the court grants a nonsuit, and where the plaintiff subsequently brings another action for the same cause against the same defendant, and on the trial of that case offers in evidence the same paper, it is error in the court to reject it on the ground that the plaintiff is estopped from offering it by the former judgment excluding it."

The general rule is correctly stated in Taylor v. Larkin, 12 Mo. 103, 49 Am. Dec. 119, to the effect that to constitute a former judgment res judicata and a bar to a subsequent suit, it must appear to have been a decision upon the merits of the case; a judgment of nonsuit is never a decision of the merits, and is no bar to a second action for the same cause.

In Gummer v. Trustees of Omro, 50 Wis. 252, the court said: "We conclude, then, that a judgment of nonsuit, whether voluntary or involuntary, is never a bar to another action for the same cause. This rule in respect to involuntary nonsuits is not only sustained by the authorities, but by reason, and is evidently recognized generally by the courts and the bar, from the common practice of nonsuits granted on motion, without a question as to their effect in barring another action. The defendant, instead of moving for a nonsuit on the case made by the plaintiff, may, if he have confidence in his position, have a judgment which will be a bar to another action by submitting the cause to the verdict of a jury, or to the court if a jury be waived. He should not be allowed to experiment with a motion for a nonsuit, and obtain the opinion of the court of the plaintiff's case, and, if he fails in his motion, then go to a full trial on the merits, without also allowing the plaintiff, if he is the losing party on the hearing of the motion, to sue over. If the defendant is not bound and concluded by the decision of the motion, the plaintiff should not be; and if the rule is adopted, that a nonsuit granted upon the motion of the defendant is to bar another action, then the correlative rule should be adopted also, that a decision against the motion operates as a judgment for the plaintiff": Gummer v. Omro, 50 Wis. 253.

"In ordering a nonsuit on account of the insufficiency of the evidence produced by the plaintiff, the court simply declares the law applicable thereto. It says the facts proved by the plaintiff fail to cast any legal liability upon the defendant, but it does not attempt to determine the actual facts of the case, nor can it do so, for the law has imposed that

duty elsewhere, and, as the facts of the case are not determined, it does not follow that the plaintiff in some future suit may not be able to produce more and better evidence of his claim, which he is at liberty to do": *Pendergrass v. York Mfg. Co.*, 78 Me. 509. A judgment of nonsuit will not support the plea of *res judicata*: *Baudin v. Roliff*, 1 Martin, N. S., 165; 14 Am. Dec. 181; *Allinet v. His Creditors*, 15 La. Ann. 130. If the plaintiff in an action of replevin is nonsuited, he is not thereby barred from bringing another action of replevin: *Daggett v. Robins*, 2 Blackf. 415; 21 Am. Dec. 752. In an action of claim and delivery, the answer set up as new matter that in another action between the same parties on the same cause of action, a judgment of nonsuit was rendered against the plaintiff, and it was held that this was no defense to the present action, and that such matter was sham and irrelevant: *Fleming v. Hawley*, 65 Cal. 492. A nonsuit in an action against a deputy sheriff for the wrongful attachment of property is no bar to an action against the sheriff for the same cause: *Clapp v. Thomas*, 5 Allen, 158. Although a judgment is reversed and the case remanded for further proceedings, and the plaintiff in the lower court then voluntarily takes a nonsuit, he is not thereby estopped from bringing a new action: *Holland v. Hatch*, 15 Ohio St. 464. A nonsuit suffered by the appellee, on appeal from a justice's judgment, is no bar to a bill in chancery for the same cause of action: *Crawford v. Summers*, 3 J. J. Marsh. 300. If a plaintiff suffers a voluntary nonsuit in an action of detinue, the judgment is not conclusive against him in a subsequent action on the bond, as to the question of ownership: *Savage v. Gunter*, 32 Ala. 467. "It is not only for a nonappearance, or for delays or defaults, that a nonsuit may be entered. The plaintiff's proceeding in such particulars may be altogether regular, and the pleadings may be completed to an issue for a trial by the jury; yet the parties may agree to take it from the jury with the view to submit the law of the case to the court upon an agreed statement of facts, with an agreement that the plaintiff may be nonprossed if the facts stated are insufficient to maintain the right which he claims. The court, in such case, will order a nonsuit if it think the law of it against the plaintiff, but it will declare it to be done in conformity with the agreement of the parties, and its effect upon the plaintiff will be precisely the same as if he had been nonprossed for a nonappearance when called to prosecute the suit, or for one of those delays from which it may be adjudged that he is indifferent: *Homer v. Brown*, 16 How. 354.

"A dismissal or nonsuit not determining the rights of the parties cannot support the plea of *res judicata*. Nor will the reasoning and opinion of the court upon the subject, on the evidence adduced before it, have the force and effect of a thing adjudged, unless the subject matter be definitely disposed of by the judgment." (*Fisk v. Parker*, 14 La. Ann. 491), for the reason that a judgment of nonsuit "is but like the blowing out of a candle, which a man at his own pleasure lights again": *Clapp v. Thomas*, 5 Allen, 158-160.

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MILHAUS v. SALLY.

[48 SOUTH CAROLINA, 518.]

SPECIFIC PERFORMANCE OF FRAUDULENT CONTRACT BETWEEN HEIRS.—A contract between all of the heirs and the widow of an insolvent ancestor, in fraud of his creditors, whereby a portion of the heirs are to purchase the estate, without paying any money on their bid, when the land is sold under a judgment in favor of the widow, and are to hold the property for the benefit of the widow during her life, and distribute it among all of the heirs after her death, and under which such heirs purchase the estate for much less than its market value, under representations that they are bidding for the benefit of the family, is against public policy, and cannot be specifically enforced against the purchasing heirs having title and in possession after the death of the widow, in the absence of a showing that all of the parties are not in pari delicto.

CONTRACTS TAINTED WITH FRAUD—EFFECT ON MINOR. If heirs make an illegal contract regarding the estate of their ancestor, and one of them afterwards dies, his minor child claiming under the contract by right of representation has no greater rights than those possessed by his deceased parent.

SPECIFIC PERFORMANCE OF FRAUDULENT AGREEMENT.—A complaint alleging that all of the heirs of an insolvent estate are tenants in common, and setting up a contract between them in fraud of the creditors of the estate, whereby certain of the heirs were to obtain a certain part of the estate which they agreed to convey to the other heirs, does not entitle the latter to a specific performance of the contract.

APPELLATE PRACTICE.—MOTION TO AMEND A COMPLAINT, first made upon the hearing of exceptions to a master's report sustaining a demurrer, comes too late and cannot be considered.

D. O. Herbert and T. S. Moorman, for the appellant.

Henderson Brothers, for the appellee.

§19 McIVER, C. J. The controversy presented for the determination of the court in this case arises upon a demurrer to the complaint, upon the ground that the facts therein stated are not sufficient to constitute a cause of action. The case was referred to the master to hear and determine all of the issues therein, and, at the first reference, before any testimony was offered, the defendants interposed a demurrer based upon the several grounds stated in the master's report, all of which were overruled except the fourth, to wit, that the contract was an illegal one and in fraud of the rights of others, and therefore will not be enforced "in a court of equity," which was sustained, and the master reported accordingly. To this report plaintiffs excepted, and the case came before the honorable Ernest Gary, judge of the fifth circuit, who overruled all of the exceptions, and rendered judgment confirming the report of the master. In his order

rendering this judgment his honor says: "At the hearing of the case, the plaintiffs asked leave to amend the complaint by striking from the fourth paragraph thereof the words, 'numerous creditors,' and inserting in lieu thereof the words, 'Ann C. Sally,' and by adding to paragraph 7 of the said complaint the words, 'and said representations were made without any authority, and solely upon their own responsibility'; this motion is refused, for the reason that there is nothing to amend, and, even if allowed, the ³²⁰ amendment would not cure the defects in the complaint." From this judgment plaintiffs appealed, upon the several grounds set out in the record; and defendants, according to the proper practice, gave notice that, at the hearing, they would contend that the judgment of Judge Gary should be sustained, upon other grounds likewise set out in the record.

Our first inquiry, obviously, is, What are the allegations of the complaint? That paper is too long for insertion here. We will, however, proceed to state, substantially, what we understand to be the facts therein stated, and the relief demanded.

1. That one John A. Sally departed this life some time in the year 1870, intestate, being seised and possessed, at the time of his death, of certain real estate described in the complaint.

2. That prior to his death, said John A. Sally confessed a judgment, in favor of certain persons named, for the sum of ten thousand dollars, and that thereafter said judgment was duly assigned, for value, to Mrs. Ann C. Sally, the wife of the said John A. Sally, but whether this assignment was made before or after his death does not distinctly appear, though we infer from the order in which the statements appear in the complaint that it was before his death; but we may say that we do not see that this is material.

3. The complaint sets forth the names of the heirs whom the said John A. Sally left surviving him, and goes on to state the names of those who succeeded to the estates of such of the heirs as have since died.

4. In the fourth paragraph of the complaint the allegations of the complaint are as follows: "That the said John A. Sally, at the time of his death, was largely indebted to numerous creditors and was totally insolvent, and his said heirs at law found that it was necessary after his death that all of his property, both real and personal, should be sold and applied to the payment and satisfaction of his debts and liabilities."

5. That on the — day of — A. D. 1871, the heirs at law of said John A. Sally held a meeting, "for the purpose of coming to

an agreement in reference to the sale of the estates of the said John A. Sally, deceased; that it was then and there agreed by and between the said heirs at law, including the ³²¹ widow, Ann C. Sally (and J. George H. Sally and J. Martin Sally being present and parties to the said agreement), that all of the real estate of which the said John A. Sally died seised and possessed, and heretofore mentioned and described, should be sold under the judgment in favor of John F. and Henry Hartzog, executors, then held by the said Ann C. Sally, and that the real estate should be bid in by one or more of the said heirs at law as the agent for all of said heirs, and that the said lands should be held by them in trust for the support of their mother, the said Ann C. Sally, for and during the term of her natural life, and at her death to be divided amongst all the heirs at law of the said John A. Sally and Ann C. Sally, share and share alike, according to law and the statute of distributions, the child or children of deceased children to take by representation the parent's share."

6. That in accordance with the said agreement the said lands were sold, under said judgment, some time in the year 1871, and tracts Nos. 1, 4, and 5 were bid in by the said J. George H. Sally, tract No. 2 by the plaintiff, R. Adeline Price, and tract No. 3 by J. Martin Sally, one of the defendants.

7. The seventh paragraph of the complaint reads as follows: "That the said lands were bought in by the said parties as the agents and representatives of all of said heirs at law, acting under said agreement with them; that by reason thereof, and by holding themselves out as representing and bidding for the widow and family under said agreement, they were enabled to bid off the property at a very low price, and very much less than its actual market value; that under said agreement the said parties were not required to pay any portion of the purchase money bid for the said lands, and they did not pay any portion thereof, but took possession of said lands and continued to hold the same under the trusts imposed thereon, for the benefit and support of the said Ann C. Sally during her lifetime, rendering to her the rents, issues, and profits arising therefrom."

8. That the said Ann C. Sally departed this life, intestate, prior to the commencement of this action, leaving as her heirs at law and distributees the persons named in the complaint.

³²² 9. That since the death of the said Ann C. Sally the said J. George H. Sally, up to the time of his death, and his heirs since, and the said J. Martin Sally, have continued in the possession and enjoyment of the lands bid in by them, and have refused

to recognize the existence of the agreement hereinbefore set forth, and have repudiated the trust created by said agreement, and have claimed said lands as their own, and have attempted to dispose of portions thereof to third parties.

10. That the defendant, J. Martin Sally, and the heirs at law of the said J. George H. Sally are in possession of said real estate, and wrongfully withhold the same from plaintiffs.

11. That certain of the defendants named in the complaint are in possession of portions of said real estate, with full notice of the agreement hereinbefore set forth, and are supposed to claim interest in said portions.

12. "That the plaintiffs and defendants, the heirs at law of the said John A. Sally and Ann C. Sally, are tenants in common of the said real estate hereinbefore mentioned and described, and that they own no other lands as tenants in common in this state."

13. That certain of the defendants named in the complaint are minors.

Judgment is demanded as follows: 1. That the said agreement between the heirs at law of the said John A. and Ann C. Sally be specifically performed; 2. That the purchasers of the said land under said judgment be declared trustees of the same for the benefit of the said heirs at law; 3. That said J. Martin Sally and the heirs of J. George H. Sally be required to account for the rents and profits of said land; 4. That the said real estate be partitioned among the several parties in interest, according to their respective interests therein, but if that be impracticable, then that the same be sold, and the proceeds divided amongst the several parties, according to their respective interests.

Upon these facts, all of which, under the demurrer, must be assumed to be true, the plaintiffs rest their claim for relief in the court of equity, and the question is, whether such facts are sufficient to justify that court in lending its aid ~~and~~ in affording the relief demanded. It must be kept in mind throughout this discussion that these plaintiffs never had any legal right to, nor even any interest in, the land which is the subject of this action, for one of the facts stated in the complaint, which really constituted the moving cause of the agreement upon which plaintiffs based their claim, is, that the estate of their ancestors, whose property the land was, was totally insolvent," and hence these heirs could have no lawful claim on said property until the debts of the ancestor were paid, for which purpose the said property was confessedly insufficient. Indeed, even the widow, Mrs. Ann C. Sally, had no legal interest in the estate of her deceased hus-

band, for at most she only had a lien thereon as the holder of the Hartzog judgment. The manifest object of the agreement was to so arrange matters as that the rights of creditors should be entirely disregarded, and the property of the insolvent ancestor of these plaintiffs and the other heirs should be preserved for their own use.

It seems to us that the bare statement of such an agreement is quite sufficient, even without citing any authority, to show that a court of equity would never lend its aid to the carrying out such a scheme, even amongst the parties to such agreement, for it would be subversive of every principle of equity and good conscience. But we are not left without authority upon the subject, as we shall presently show. The real purpose and actual effect of the agreement which the plaintiffs are seeking to enforce was to have the lands which constitute the subject matter of this controversy sold under the Hartzog judgment and bought in for the benefit of those who, as we have said, had no legal interest therein, and this purpose was intended to be, and was, in fact, effected by that feature of the scheme allowing some of the heirs to bid in the property, under representations that they were bidding for the benefit of the family, whereby they obtained 'he property "at a very low price and very much less than its market value," and what is more, were not to be required to pay, and did not, in fact, pay, even such "very low price." No other construction can be placed upon the allegations contained in the seventh paragraph of the complaint, hereinabove distinctly set out. This was practically ³²⁴ nothing more nor less than a combination amongst the heirs to obtain the property of their insolvent ancestor for their own benefit, at the expense of creditors, by chilling the biddings, when it was offered for sale under legal process by the sheriff. It is well settled that such an arrangement will never receive the sanction of a court of equity, but, on the contrary, that court, when appealed to by third persons, whose legal rights have thus been disregarded and defeated, will unhesitatingly set aside the whole transaction. Ever since the case of *Hamilton v. Hamilton*, 2 Rich. Eq. 355, 46 Am. Dec. 58, the doctrine above stated has been regarded as firmly established in this state, and that case has been recognized and followed in a number of other cases, the last being *Herndon v. Gibson*, 38 S. C. 357; 37 Am. St. Rep. 765.

It is urged, however, that it would be inequitable to allow those who had bid off the land to retain the same at the expense of the other heirs. That consideration is entitled to no favor, and has

never received any at the hands of a court of equity when urged by those who participated in the fraudulent arrangement by which such an advantage was acquired by the defendants. It does not approve the conduct of any of the parties to the fraudulent arrangement, but simply leaves them in the situation in which they have placed themselves, and will not lend its aid to relieve any of them. As is said by Dunkin, C., in *Hamilton v. Hamilton*, 2 Rich Eq. 355, 46 Am. Dec. 58, such transaction "can be enforced by none of the parties to it, *even against each other*" (italics ours). See to same effect, *Baggott v. Sawyer*, 25 S. C. 405, where it was held that parties to the conspiracy cannot obtain the aid of the court in specifically enforcing their illegal agreement with their coconspirators.

As is said by Lord Mansfield in *Holman v. Johnson*, 1 Cowp. 341: "The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which the defendant has the advantage of, contrary to real justice as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *Ex dolo malo non oritur actio*. "No court will lend its aid ~~335~~ to a man who founds his cause of action upon an immoral or illegal act." And as is said by Dixon, C. J., in *Clemens v. Clemens*, 28 Wis. 637, 9 Am. Rep. 531, after making the above quotation from Lord Mansfield: "The principle or policy of the law, therefore, is to reject the suit of and reprove the plaintiff for his wrong, not to reward the defendant. The plaintiff must be punished, even though it be at the expense of allowing the defendant, an equally guilty party, to obtain most unjust and unfair advantage for himself. . . . The suit of the party compelled to seek the aid of the courts in order to obtain the fruits of his own fraud or wrong must be dismissed, although it may result in unjustly giving to the other equally culpable party the entire benefit of them." See to same effect, 1 *Pomeroy's Equity Jurisprudence*, section 401, where, amongst other things, that author says: "Where two or more have entered into a fraudulent scheme for the purpose of obtaining property in which all are to share, and the scheme has been carried out so that all the results of the fraud are in the hands of one of the parties, a court of equity will not interfere on behalf of the others to aid them in obtaining their shares, but will leave the parties in the position where they have placed themselves." And he cites two cases, *Johns v. Norris*, 7 O. R.

Green, 102, and Walker v. Hill, 7 C. E. Green, 513, in support of his text, which are not distinguishable in principle from the case now under consideration.

It is earnestly contended on the part of the appellants that the maxim, *in pari delicto*, etc., is not of universal application, but is subject to certain limitations; and 1 Pomeroy's Equity Jurisprudence, section 403, is cited to sustain such contention. It is true that certain limitations to that maxim are there laid down by that distinguished author, but we are unable to see that this case falls under either of the limitations there laid down. In the first place, we do not see how it can be said that any of the parties to the illegal agreement, upon which the plaintiff's whole case rests, were not in equal fault; for while it is true that the said J. Martin Sally and J. George H. Sally were the parties who actually bid off the land, yet it is distinctly alleged that, in doing so, they were merely acting as the agent of all the heirs, under the terms of ³²⁶ the agreement to which they were all parties. Their act, therefore, was the act of all. Nor does it appear that any of the heirs were minors, or under any other disability at the time the agreement was entered into, and the fact that some of the heirs—those who have become so by reason of the death of some of the original heirs—are now minors cannot affect the question, for such heirs must stand in the shoes of those under whom they claim, and can have no higher rights than their ancestors. Nor does it appear that any of the heirs were induced by any false representations made to them by either Martin or George Sally to enter into the agreement, or that they advanced any money or parted with any property of their own in pursuance of said agreement. In fact, nothing appears to place the other heirs in a better or more favorable light before the court than that in which Martin and George Sally stood. They all equally participated in the common design to obtain property to which they never had any claim, either legal or equitable, at the expense of the creditors of their insolvent ancestor, by combining together to buy the property at a sacrifice when offered for sale under legal process.

We think it will be found that in the cases cited by appellants other elements entered which are absent in this. For example, in *Clemens v. Clemens*, 28 Wis. 637, 9 Am. Rep. 520, the plaintiff and defendant entered into an arrangement, instigated by defendant, whereby plaintiff, for the purpose of protecting his property against a suit then pending against him, was to convey to defendant, who was his son, a certain tract of land; but, by the fraud of the defendant, the conveyance was made so as to include

another tract of land, which was protected by the homestead law, and it was held that the conveyance should be set aside as to the tract included in the conveyance by defendant's fraud, which was altogether outside of and not in any way dependent upon the agreement to defraud plaintiff's creditors. So in *Harper v. Harper*, 85 Ky. 160, 7 Am. St. Rep. 583, the plaintiff, who was an aged lady, was induced, by the false representations of her son, in whom she had implicit confidence, to convey her property to the son, with a view to avoid the effect of a threatened suit for slander, which, however, was never ³²⁷ brought, and it was held that the plaintiff was entitled to relief on account of the fraud practiced upon her by her son, notwithstanding the fact of her intention to evade the alleged suit for slander; the court resting its decision upon the ground that the parties did not stand upon an equal footing, and that defendant had obtained the consent of his mother to execute the deed by undue influence and false representations. In other of the cases it will be found that the defendant had, by reason of the fraudulent agreement, obtained from the plaintiff money or property to which the plaintiff was lawfully entitled, and for which defendant was held accountable.

We do not think that the plaintiff's case, as stated in their complaint, brings it within any of the limitations insisted upon by appellants, and hence we agree with the circuit judge that the facts stated in the complaint are not sufficient to constitute a cause of action.

The attempt to sustain the complaint under the allegation in the twelfth paragraph, that plaintiffs and defendants, as heirs at law of John A. Sally and Ann C. Sally, are tenants in common of the lands, must fail, for those allegations read in connection with the other allegations in the complaint, must be construed that they were tenants in common under the terms of the agreement relied on, as such other allegations show clearly that they could not be tenants in common, qua heirs, as John A. Sally died insolvent, leaving nothing for them to inherit, and Ann C. Sally never had any right or title to the said lands which could descend to her heirs, having, at most, only a lien thereon.

Under this view, it becomes unnecessary to consider the additional grounds relied upon by respondents to sustain the circuit decree.

It only remains to consider whether there was any error in refusing plaintiff's motion to amend the complaint. Here, too, we agree with the circuit judge. This motion seems to have been made "at the hearing of the case," and, so far as appears, without

notice to the other side. In the first place, it is, at least, doubtful whether the motion to amend did not come too late. It will be remembered that the case was referred ³²⁸ to the master to hear and determine all the issues therein. At the first reference the demurrer was interposed, no motion to amend the complaint being then made. The master made his report, sustaining the demurrer, and the case came before the circuit judge upon the report and exceptions, amongst which there was none presenting the question of amendment. We are inclined to think that the only question before the circuit judge was whether any of the exceptions should be sustained, and if not, then the confirmation of the report followed, as a matter of course, and the case was at an end.

Besides, we think, as intimated by the circuit judge, that even if the amendments moved for had been allowed, the complaint would still have failed to state a cause of action. It would still have appeared to be a case in which the heirs at law of an insolvent ancestor were seeking to obtain the property of such ancestor as the fruits of an agreement fraudulent in law, and it would make no difference whether the creditors were one hundred or only one in number. The other amendment, by adding certain words at the end of paragraph 7 of the complaint, besides making the allegations of that paragraph utterly inconsistent, would add nothing to the plaintiffs' cause of action. They were not creditors of the intestate, and this additional allegation would afford them no ground for setting aside a sale which they themselves brought about. Even if Mrs. Sally were still living, she, though a creditor, could not, with any propriety, have asked a court of equity to set aside a sale which she had brought about, and the fruits of which she enjoyed, as alleged in the seventh paragraph, and, certainly, the plaintiffs, as her heirs, could claim no higher rights than she could have done.

The judgment of this court is, that the judgment of the circuit court be affirmed.

SPECIFIC PERFORMANCE OF CONTRACTS FRAUDULENT AS TO CREDITORS is discussed in the extended notes to *Gary v. Jacobson*, 30 Am. Rep. 517, and *Boyd v. Barclay*, 34 Am. Dec. 765.

DUNN v. BARNWELL.

(43 SOUTH CAROLINA, 393.)

MUNICIPAL CORPORATIONS—LIABILITY FOR FAILURE TO REPAIR STREETS.—A municipal corporation charged by its charter with the duty of keeping its streets in proper repair is not liable to a civil action for damages at the suit of an individual who has sustained an injury either in person or property by reason of the failure of the corporation to perform such duty.

MUNICIPAL CORPORATIONS—LIABILITY FOR UNSAFE CONDITION OF STREETS.—A statute giving a right of action against a municipal corporation to any person receiving injury to his person or property through a defect in any street, by reason of defect or mismanagement of any thing under the control of such corporation within its limits, and providing that it shall not be liable unless such defect is caused by its neglect or mismanagement, does not give a right of action for any nonfeasance or misfeasance on its part, except such as is connected with the keeping of its streets in proper repair.

MUNICIPAL CORPORATIONS—LIABILITY FOR OBSTRUCTION IN STREETS.—If a municipal corporation is liable only for defects in the repair of its streets, it is not liable for injury to a horse resulting from his becoming frightened at a booth erected in the street, if the horse could have safely passed along the street but for his fright.

J. E. Davis, for the appellant.

Bellinger, Townsend & O'Bannon, for the appellee.

300 McIVER, C. J. The sole question presented by this appeal is, whether the circuit judge erred in sustaining a demurrer to the complaint, based upon the ground that the facts stated therein are not sufficient to constitute a cause of action. To determine this question, it is necessary first to ascertain what are the facts stated in the complaint. Omitting the merely formal allegations, these facts are substantially stated: 1. That it is made the duty of defendants to keep the streets of the town "in good order, to cause to be removed therefrom all obstructions of whatever kind, so that persons traveling thereon might pass and repass with safety"; 2. 400 That a certain street in said town, known as Main street, "was, and is, much used by the citizens thereof and the public generally, so much so that said duty of said defendants becomes a matter of public concern"; 3. That on the 23d of September, 1893, the defendants "negligently allowed to be placed and maintained in said street, at a point where the same was very narrow, a dangerous obstruction, commonly called a booth, or long table, on which they allowed persons to display goods, wares, and merchandise for sale, and by maintaining the same there the said street was rendered unsafe to persons riding

or driving thereon"; 4. That on the day above mentioned, "the defendants negligently allowed the narrow pass in said street, caused as aforesaid, to be thronged with vehicles of various kinds, and to remain therein for an unreasonable time, and the plaintiff, who was at the time the owner of a valuable horse, of the value of one hundred and fifty dollars, and while the same was being ridden along said street, without any fault on the part of the plaintiff, and while attempting to ride between said throng and booth, or table, as aforesaid, which was the only apparent safe way along said street at said time, the said horse became greatly frightened at the flaming goods displayed at and upon said table, and ran against the point of a buggy shaft, which was congregated in said street as aforesaid, seriously injuring said horse and causing its death, to the damage of the plaintiff one hundred and fifty dollars."

Inasmuch as it is the settled law of this state that a municipal corporation, charged by its charter with the duty of keeping in proper repair the streets or public highways within the corporate limits, is not liable to a civil action for damages at the suit of an individual who has sustained an injury, either in person or property, by reason of a failure on the part of the corporation to perform such duty, in the absence of a statute imposing such liability, we must next inquire whether we have any statute upon the subject, and if so, what are its terms.

The statute referred to, and relied upon by the appellant as authorizing this action, is the act of 1892 (21 Stats., p. 91), incorporated in the Revised Statutes of 1893 as section 1582.

401 The terms of that statute are as follows: "That any person who shall receive bodily injury or damage, in his person or property, through a defect in any street, causeway, bridge, or public way, or by reason of defect or mismanagement of anything under control of the corporation, within the limits of any town or city, may recover, in an action against the same, the amount of actual damage sustained by him by reason thereof. If any such defect in a street, causeway, or bridge existed before such injury or damage occurred, such damage shall not be recovered by the person so injured, if his load exceed the ordinary weight; provided, the said corporation shall not be liable unless said defect was occasioned by its neglect or mismanagement." The second proviso, relating as it does to contributory negligence, not being pertinent to the inquiry, need not be set out. It is apparent from the title of this act, as well as from the terms used in the body of the act, that the sole purpose was to give a person

who had sustained an injury by reason of a defect in a street a right of action to recover damages for such injury. The title of the act is as follows: "An act providing for a right of action against a municipal corporation for damage sustained by reason of defects in the repair of streets, sidewalks, and bridges, within the limits of said municipal corporation," and it is manifest that the purpose thus declared in the title was adhered to in the body of the act, especially from the language used in the proviso above set out, where it is declared that the corporation should not be liable, "unless said defect was occasioned by its neglect or mismanagement," indicating very clearly that the term "mismanagement," as used in a previous part of the act, meant mismanagement in making repairs on the streets, so that the corporation should be held liable, not only for neglect in making the repairs on the streets, but also for mismanagement of anything under the control of the corporation in making such repairs. There is nothing whatever in the act indicating an intention on the part or the legislature to make a municipal corporation liable for any other nonfeasance or misfeasance on its part, except such as was connected with the keeping of the streets, etc., in proper and safe repair.

402 Now in this case it is very apparent that there is no allegation in the complaint that the injury complained of arose from, or was caused by, any neglect or mismanagement on the part of the defendants in keeping the streets of the town in proper and safe repair. On the contrary, the allegation is that the injury resulted from the fright taken by plaintiff's horse at certain objects exposed for sale in the streets of the town, and was not in anywise due to any fault of defendants in allowing any defects in the street to remain unrepaired, or any mismanagement in making such repairs. On the contrary, one of the allegations in the complaint is that there was an "apparent safe way along said street at said time," over which plaintiff could have safely passed, but for the fright which his horse took at certain goods, wares, and merchandise displayed for sale. This does not give the plaintiff any cause of action, either under the statute or at common law, as has been held by this court in several cases, when called upon to construe a previous statute of similar tenor, so far as the present question is concerned, though differing in some other respects not pertinent to the present inquiry. See what is said in *Acker v. County of Anderson*, 20 S. C. 495, where, though the point was not decided, because not necessary to that case, yet a very strong intimation is thrown out in favor of our

view. See, also, *Brown v. Laurens County*, 38 S. C. 282, and *Mason v. County of Spartanburg*, 40 S. C. 390, 42 Am. St. Rep. 887, where the point is decided. The cases from Massachusetts and Maine, cited by respondent's counsel, seem to support the same view.

The judgment of this court is that the judgment of the circuit court be affirmed.

MUNICIPAL CORPORATIONS—DUTY TO KEEP STREETS IN REPAIR.—The duty to keep streets in repair is a ministerial duty devolving on the municipality, for the breach of which an action lies in favor of a party injured by reason of a neglect of such duty: *Sutton v. Snohomish*, 11 Wash. 24; 48 Am. St. Rep. 847, and note. If a city, by its charter, is charged with the duty to keep its streets in repair, and has the means provided by taxation to discharge it, it is liable for neglect to perform such duty: *Maus v. Springfield*, 101 Mo. 613; 20 Am. St. Rep. 634; *Farquar v. Roseburg*, 18 Or. 271; 17 Am. St. Rep. 732, and extended note; but where the charter imposes no liability on a municipal corporation for damages sustained by individuals upon its streets and highways in consequence of defects therein, such defects are not actionable: *Bates v. Rutland*, 62 Vt. 178; 22 Am. St. Rep. 95, and note. Incorporated towns and cities owe a duty to the public to keep their streets in repair; but, in the absence of a statute, the town or city is not liable in a civil action for an injury resulting to a party from a neglect to keep them in repair: *Arkadelphia v. Windham*, 49 Ark. 139; 4 Am. St. Rep. 32, and note.

MUNICIPAL CORPORATIONS—LIABILITY FOR DEFECTS IN HIGHWAYS FRIGHTENING HORSES.—Where objects ordinarily calculated to frighten roadworthy horses are allowed to remain on a highway, they are regarded as defects, and after due notice to the authorities, the township will be liable for injuries caused thereby: *North Manheim Tp. v. Arnold*, 119 Pa. St. 380; 4 Am. St. Rep. 650, and note; *Card v. Ellsworth*, 65 Me. 547; 20 Am. St. Rep. 722. See, also, *Cleveland v. Bangor*, 87 Me. 259; 47 Am. St. Rep. 326, and note, and especially the extended note to *Morse v. Richmond*, 98 Am. Dec. 610.

KEY v. WEATHERSBEE.

[48 SOUTH CAROLINA, 414.]

DEVISE—VOID ESTATE FOR LIFE—ACCELERATED REMAINDERS.—If a devise of land to a specified person for life is void, because the devisee signs the will as a subscribing witness, the remainders declared by the will, after the termination of the life estate, vest in the remaindermen in possession immediately upon the death of the testator.

DEVISE—LIMITATION OF ESTATE—BENEFICIAL INTEREST.—If a tenant for life is directed by will to pay over the rents and profits of the estate to his children after the death of the testator and his own death, the estate and income therefrom then to go to a third person, the life tenant has no beneficial interest in the estate and is only a trustee for his children as to the income.

Action to obtain a construction of a will, and for the partition of the estate of Bethaney Moore, deceased. Judgment for the de-

fendants and plaintiffs appeal. The decree of the lower court and the exceptions thereto were as follows:

"The plaintiffs allege in their complaint that the said Bethaney Moore left a last will and testament, and two codicils thereto, which have been duly admitted to probate, and which contain devises to Floyd W. Weathersbee and Charlice Ann Weathersbee, his wife; and it is further alleged that, because the said Floyd W. Weathersbee is a witness to the said will and codicils, he can take nothing under the same, he not being an heir at law of the testatrix; and it is further alleged that, the devises to the said Charlice Ann Weathersbee (who is an heir at law of the testatrix) being of greater value than the interest that she would take in the said estate as an heir at law, it follows such devises to her are null and void; and it is then alleged that, there being no particular estate to support the remainders which are devised to Bessie, Jane B., and James Moore Weathersbee, the same are defeated, and partition is asked of the real estate left by the testatrix the same as if there had been no last will and testament. The answer of the defendants deny that the plaintiffs have any interest in the said estate, and it is further alleged in the answer that, even if the devise to Floyd W. Weathersbee is forfeited under the statute, and that the estate devised to Charlice Ann Weathersbee is in part forfeited under the statute, the remainder to James Moore and Bessie are not defeated, but, to the contrary, are thereby accelerated, and vest at once.

"The case is presented mainly upon an agreed statement of facts, and I find therefrom as follows: That Bethaney Moore died in the early part of the year 1890, leaving a last will and testament and two codicils thereto, which were duly admitted to probate in the court of probate for Barnwell county; that Floyd W. Weathersbee is one of the subscribing witnesses to said will and each of the codicils; that the plaintiffs and the defendant, Charlice Ann Weathersbee are the heirs at law of the testatrix, and as such would be interested in her estate in the proportion set forth in the complaint; that Floyd W. Weathersbee is not an heir at law of the testatrix, but the husband of the defendant Charlice Ann Weathersbee, and Bessie, Jane B., and James Moore Weathersbee are the children of Floyd W. and Charlice Ann Weathersbee and they are the grandnieces and grandnephew of Bethaney Moore. The will, as modified by the codicils, contains the following devises, namely: To Floyd W. Weathersbee and Charlice Ann, his wife, is given a life estate in the testatrix's home place and the Darlington place, to have and to hold the

same in common between themselves for and during the term of their natural lives, and, should one survive the other, the whole shall remain in such surviving one during the term of his or her natural life. At the death of the survivor of the said Floyd W. Weathersbee and Charlee Ann the homestead place is devised in fee to Bessie Weathersbee, and the Darlington place and the Dickes place is at the same period devised to the said James Moore Weathersbee. By the fifth clause of the will, all the rents and profits arising from the Dickes place, which may accrue between the death of the testatrix and the death of the survivor of the said Floyd W. and Charlee Ann, is devised to the said Bessie, Jane B., and James Moore Weathersbee, to be equally divided between them, Floyd W. and Charlee Ann Weathersbee taking no beneficial interest in the Dickes place. A legacy of two hundred dollars in gold is given to the said Bessie Weathersbee, and directed to be used in purchasing a piano for her when she arrives at the age of twelve years, or sooner if the executors of the will saw fit to do so. A legacy of nine hundred and fifty dollars is given to the said Charlee Ann Weathersbee and her said children, Bessie, Jane B., and James Moore Weathersbee. Under this provision the said Charlee Ann takes one-fourth of the nine hundred and fifty dollars; and one-fourth of the said amount goes to each of the said children. The balance of testator's property, after the legacies are paid, is devised to Floyd W. and Charlee Ann Weathersbee.

"Under these facts the plaintiffs allege, as above stated, that the will is practically superseded by the statute law of this state (Rev. Stat., new ed., sec. 1991); that there is no precedent estate to support the remainder in the real estate; that Floyd W. Weathersbee takes nothing, and Charlee Ann, his wife, only as much as she would take under the statute as heir at law, and not under the will. But I hold to the contrary, that the statute provides that 'such devise, legacy, and bequest shall be valid and effectual, . . . except so far as the property, estate, or interest so devised or bequeathed shall exceed in value any property, estate, or interest to which such witness, or the husband or wife of such witness, would be entitled upon the failure to establish such will, . . . but to the extent of such excess the said devise, legacy, or bequest shall be null and void.' It is clear, under section 1991, that the devise to Floyd W. Weathersbee is void, and that the devise to Charlee Ann Weathersbee, his wife, is void as to the excess of such devise over and above what she would take as heir at law; but to that extent it is valid, and she takes the same under the will. It ap-

pears that the said Charlee Ann would be entitled to the one twenty-fifth part of the entire estate as heir at law, and to that extent her devise under the will is valid. The agreed facts are not sufficiently full for me to ascertain the value of the estate, and it will be necessary to refer the case to the master to ascertain such value.

"The ascertained will of the testatrix is contained in the written instrument as admitted to probate. It can be defeated only by enforcing the forfeiture pronounced by the statute on account of Floyd W. Weathersbee being a subscribing witness thereto. This will be done so as to inflict as little injury as possible upon innocent third parties who were the objects of the testatrix's bounty, and interfere no more with the terms of the will than necessary to meet the requirements of the law. In my judgment, that is fully done in declaring as forfeited all that Floyd W. Weathersbee would take under the will, and in cutting down the estate and legacy to Charlee Ann to an amount equal in value to what she would have taken as heir at law of the testatrix, which we have seen amounts to one twenty-fifth part of the estate. It is manifest from the will that the reason why the testatrix postponed the enjoyment of the estate left to her grandnephew and grandnieces was because she supposed that the devise of the life estate to Floyd W. and Charlee Ann Weathersbee was valid. Such life estate, being defeated wholly as to Floyd W. Weathersbee, and in part as to Charlee Ann, will not, on that account, destroy the remainder to their children, but the effect is, the life estate being out of the way, the remainders are accelerated, and vest at once in the children. It cannot be doubted that the testatrix postponed the enjoyment of the estate left to the grandnephew and grandnieces solely because she desired the parents to have a life estate. Now, it matters not how the life estate falls in, whether by the death of the life tenant or by the forfeiture under the statute; in either case the remainderman takes as soon as the life estate ceases to exist. This construction seems to me sound upon principle, and is supported elsewhere by the most respectable authority. The reasoning in the case of *Jull v. Jacobs*, 3 Ch. Div. 709, cited by defendants' counsel, meets my hearty approval, and the case of *Woodbery v. Collins*, 1 Desaus. Eq. 424, while not in point, yet shows the inclination of our courts to construe the statute the same as the English courts have done. See, also, 20 Am. & Eng. Ency. of Law, 895, where the case of *Jull v. Jacobs*, 3 Ch. Div. 709, is cited with full quotation. But, whatever view I might entertain as to the argument pre-

sented by the plaintiffs' counsel, I could not interfere with the testatrix's disposition of the Dickes place, the whole beneficial interest in which is devised to other than those against whom the law inflicts its penalties, nor of the two hundred and fifty dollars given to Bessie Weathersbee, nor of at least three-fourths of the nine hundred and fifty dollars given to the children of the said Charlice Ann.

"It is therefore ordered, adjudged, and decreed that the vested remainder of Bessie Weathersbee in the homestead place and of James Moore Weathersbee in the Darlington place be, and the same are hereby, declared accelerated as to the whole or any part of the life estate not required to make up to the said Charlice Ann Weathersbee the one twenty-fifth part in the value of the testatrix's estate. It is further ordered and adjudged that it be referred to the master of Barnwell county to ascertain and report the total value of the real and personal estate left by the said Bethaney Moore, deceased, and how much thereof has been expended in the payment of the expenses of the administration, including the probate cost of this suit. That he also ascertain and report the value of the life estate devised to Charlice Ann Weathersbee in each the homestead place and the Darlington place. That the said master also ascertain and report the value of the fourth part of the nine hundred and fifty dollars bequeathed to the said Charlice Ann, the remaining three-fourths part of said sum having been bequeathed to her children, as hereinbefore stated; and the said master do further ascertain and report whether there be any other personal property of said estate, after paying the said specific legacy of nine hundred and fifty dollars just mentioned, and the legacy of two hundred dollars given to Bessie Weathersbee, and, if there be any such other property, the value thereof; and that he also ascertain and report whether the testatrix owned at the time of her death other real estate than that enumerated in her will, and, if any, what is the value of the same; and that he do also ascertain and report whether the one twenty-fifth part of the whole estate can be paid out of the one-fourth part of the nine hundred and fifty dollars bequeathed to the said Charlice Ann and the residuary estate, and, if not, how much the deficiency will be. It is further ordered and adjudged that the master report in detail a scheme for setting apart to the said Charlice Ann Weathersbee the one twenty-fifth part in value of the estate of the testatrix out of the interest devised or bequeathed to her in the following order, to wit: 1. Out of the one-fourth part of the nine hundred and fifty dollars bequeathed to her; 2. Out of the residuary es-

tate; and 8. Out of the life estate devised to her and her husband in the homestead and Darlington places. It is further ordered and adjudged that when the foregoing provisions of the order have been carried out, and if it therefrom appear that there is a surplus of the residuary estate of testatrix, then such surplus be divided among the plaintiffs according to their respective interests as set forth in the complaint therein, excluding in such division the defendant Charlee Ann Weathersbee. It was stated at the hearing that there were no debts against the estate of the testatrix, hence there is no reason why the rights of the parties hereto may not now be fully adjudicated."

"Exceptions: The plaintiffs except to the judgment and decree of his honor, Judge J. J. Norton, filed herein on the third day of July, A. D. 1894, and will move the supreme court of the said state to reverse the said judgment upon the following grounds, to wit: 1. Because his honor erred in holding that, where the life estates intended to support remainders, as in this case, are void in their creation by virtue of a statute, that the remainders would be accelerated and vest at once; 2. Because his honor should have held that, there being no particular precedent estate in this case to support the remainders limited to the children of Floyd W. and Charlee Ann Weathersbee by the will of Bethaney Moore, the same were void, and that the estates devised should pass as intestate property; 3. Because his honor erred in holding as follows: 'Now, it matters not how the life estate falls in, whether by death of the life tenant or by forfeiture. Under the statute, in either case, the remaindermen take as soon as the life estate ceases to exist, for the reason that in this case no life estate ever existed to cease, the same being void in its creation by operation of law'; 4. Because his honor erred in holding that Charlee Ann and Floyd W. Weathersbee take no beneficial interest in the Dickes place, whereas, he should have held that the testatrix attempted to create in them a life estate in said place, as in the other property, and that the same stood on a similar footing with the Darlington place and the home place; 5. Because his honor erred in referring the case to the master to ascertain the value of the interest which Charlee Ann Weathersbee takes, and to report a scheme for the settlement of same, it being agreed that she would take one twenty-fifth part in said estate, this being the interest which she would take as heir at law of the said Bethaney Moore; 6. Because his honor should have held that, as the life estate devised to Charlee Ann Weathersbee by said will was in excess of the interest which she would have taken in case of

intestacy, and her interest being reduced to one twenty-fifth part of said estate in consequence of her husband being one of the subscribing witnesses to the said will and codicils, this would transform the interest of Charlee Ann Weathersbee to that of a fee in said property, and would therefore, of necessity, disorganize the remainders attempted to be created by the said will and codicils."

W. A. Holman and Henderson Brothers, for the appellant.

Croft & Chafee, for the appellee.

⁴²⁰ McIVER, C. J. The questions raised by this appeal involved the proper construction of the will of the late Mrs. Bethaney Moore, with the two codicils thereto, as affected ⁴²¹ by the provisions of the act of 1865, incorporated in the Revised Statutes of 1893 as section 1991. For a full understanding of the facts of the case, about which there is no dispute, and of the questions presented by the appeal, reference must be had to the decree of his honor, Judge Norton, and the exceptions thereto, all of which should be incorporated in the report of this case, care being taken to correct the error in the decree, giving the section of the Revised Statutes referred to as section 1974 instead of 1991, and the omission in the latter part of the quotation from that section, arising, doubtless, from a misprint.

It will be sufficient to state here that the testatrix by her will specifically devised certain real estate to the defendants Charlee Ann Weathersbee and her husband, Floyd W. Weathersbee, for their joint lives, and to the survivor of them during the life of such survivor, with remainder to the other three defendants, Bessie, Jane, and James Moore Weathersbee; but as it is conceded that the said Floyd W. Weathersbee was a subscribing witness to the will, as well as to the two codicils, the question is as to the effect of this conceded fact upon the provisions of the will just stated, under the provisions of section 1991 of the Revised Statutes above referred to. That section reads as follows: "No subscribing witnesses to any will, testament, or codicil shall be held incompetent to attest or prove the same by reason of any devise, legacy, or bequest therein in favor of such witness, or the husband or wife of such witness, or by reason of any appointment therein of such witness, or the husband or wife of such witness, to any office, trust, or duty; and such devise, legacy, or bequest shall be valid and effectual, if otherwise so, except so far as the property, estate, or interest so devised or bequeathed shall exceed in value any property, estate, or interest to which such witness,

or the husband or wife of such witness, would be entitled upon the failure to establish such will, testament, or codicil, but to the extent of such excess, the said devise, legacy, or bequest shall be null and void, and such appointment shall be valid, if otherwise so, but the person or persons so appointed shall not, in such case, be entitled by law to take or receive any commissions or other compensation on account thereof."

⁴²² The circuit judge held that the effect of this statutory provision was to destroy or forfeit all the interest that Floyd W. Weathersbee would otherwise have taken under the will, and to cut down the interest of Charlice Ann to an amount not exceeding in value the interest which she would have taken as heir at law if there had been no will, which, it is conceded, would have been one twenty-fifth part of the estate. And he further held that this did not destroy the interest in remainder intended for the children of Charlice Ann, but that the effect was simply to accelerate the remainders, which, therefore, took effect at once. The appellants, on the other hand, contend that the precedent life estate having been destroyed, the remainders were defeated, and the estate of the testatrix became divisible amongst the heirs at law as intestate property, and the main question in the case is, which of these two views is correct.

Before proceeding to the consideration of that question, it may not be amiss to say, simply to avoid committing the court upon the point, that it may, possibly, be open to question whether the circuit judge was right in holding that the effect of the statute was to destroy all of the interest of the husband, Floyd W. Weathersbee, in the estate intended to be devised to him, inasmuch as the language of the statute is not that a devise to a witness shall be void to the extent of its excess in value over the interest which "such witness" would take had there been no will, but the language is, "to which such witness, or the husband or wife of such witness, would be entitled upon the failure to establish such will." Now, as the wife of the witness, Floyd W. Weathersbee, would, confessedly, be entitled, upon the failure to establish the will, to one twenty-fifth of the whole estate, it is, at least, open to question whether the interest intended to be given to Floyd W. Weathersbee by the will is entirely defeated by the statute, or only to the extent of its excess in value over the one twenty-fifth part of the estate. But as there is no exception to the ruling of the circuit judge as to this particular point, and as it is not really necessary or even important to the solution of the question which we are

called upon to decide, we do not wish to be regarded as deciding or even expressing any opinion distinctly upon that question.

⁴²³ Recurring, then, to the main question, we think it is satisfactorily determined in favor of the view taken by the circuit judge by the case of *Jull v. Jacobs*, L. R. 3 Ch. Div. 709, cited both by the judge and the counsel for respondents. That case is not distinguishable from the present, for in that case the testator devised both real and personal property to his daughter, "during her lifetime, and after her decease the property to be equally divided between her children on their becoming of age," and it was held that, in respect to the real estate, the gift to the children was strictly a vested remainder; that the construction as to the personalty followed the rule as to the realty, and the gift to the daughter being void, on account of her having attested the will, the gift to the children was accelerated and took effect immediately. *Malins, V. C.*, in delivering the opinion of the court, after showing that the clause of the will above recited created a vested remainder in the children, proceeded as follows: "But then comes the question whether the wills act, by taking away the life estate of the daughter, causes an intestacy during her life so as to carry the property to the heir at law, or accelerate the remainder. It is perfectly clear, in the first place, that the children are postponed to the mother simply because the mother is to have the property for her life, but if the mother cannot have the property for her life, why are the children to be postponed? The reason of their postponement altogether ceases; they are not to have it until after her death, because the testator assumed that she would have it during her life. But he was ignorant of the law that if he called in his daughter to be an attesting witness, the very gift he made her would absolutely fail. Now, he has postponed his grandchildren—that is, his daughter's children—to the daughter, solely because the daughter was to take for life, and if he had known that she could not take for life, he would not have postponed the children until after her death; he would not have left her and her family destitute in the mean time. It is a mere accident that the daughter cannot take the life estate, and I am of opinion that the children are postponed to the daughter simply that she may have the property for life, and if she could not have it for life, the children would have had it ⁴²⁴ immediately. That would be the conclusion I should come to from the reason of the thing, without the decisions. But the decisions are all the same way." And the learned vice-chancellor proceeds to cite the

cases to that effect. That case is so exactly in point, and the reasoning employed is so directly applicable to the case under consideration, that it would seem to be unnecessary to say more.

It is true that, so far as we are informed, we have no case in this state directly on the point. But we do find cases cited by respondent's counsel which, by analogy, support our conclusion. In *Lesly v. Collier*, 3 Rich. Eq. 128, it is said by Dargan, Ch., that: "If there be a legacy to one for life, with remainder to another, which remainder on the death of the testator would be direct and vested, and not contingent, and the person intended to be the tenant for life dies in the lifetime of the testator, I think it cannot be doubted that, in such a case, the legacy does not lapse, but, on the death of the testator, goes at once to him who, in the scheme of the legacy, was intended to be only a remainderman." The same doctrine is laid down by Desaussure, Ch., in *Dunlap v. Dunlap*, 4 Desaus. Eq. 314. To the same effect, see *Bell v. Towell*, 18 S. C. 101.

Now, as a will speaks at the death of the testator, it is clear that in these cases no precedent life estate was ever really created, inasmuch as the proposed life tenant was dead at the time the will took effect, for a devise or bequest to a person deceased at the time is void ab initio (*Pegues v. Pegues*, 11 Rich. Eq. 554), except in the case specially provided for by the act of 1789; and hence the position so strenuously urged by counsel for appellants, that it is only in a case where a precedent life estate has been created which has subsequently been defeated or destroyed that the doctrine of the acceleration of the remainder can be applied, cannot be sustained. Besides, in the case of *Lomas v. Wright*, 2 Mylne & K. 769, cited by the counsel for respondents, it seems to have been held that where a limitation is void, being to a monk for life, who was regarded as civilly dead, the estate will not revert to the grantor, but the next limitation in remainder will take effect. And in *Avelyn v. Ward*, 1 Ves. Sr., 420, recognized in *Doe ex dem. Wells v. Scott*, ⁴²⁵ 3 Maule & S. 300, as well as by our own court in *Witherspoon v. Watts*, 18 S. C. 411, Lord Hardwicke said: "That he knew of no case of a remainder or conditional limitation over of a real estate, whether by way of a particular estate so as to leave a proper remainder, or to defeat an absolute fee before by a conditional limitation; but if the precedent limitation, by what means soever, is out of the case, the subsequent limitation takes place": See, also, 2 Jarman on Wills, Perkins' ed., 702, where it is said, in effect, that where an estate is given to a person for life, with a vested remainder in another,

such remainder "takes effect in possession whenever the prior gift ceases or fails, in whatever manner."

We are, therefore, of opinion that there was no error on the part of the circuit judge in the view which he took of the main question in the case. This disposes of the first, second, third, and sixth exceptions.

As to the fourth exception, we do not see what interest the appellants have in the question there raised, under the conclusion which we have adopted. But, at all events, we may say that we concur with the circuit judge in the view which he has taken. We do not see that the testatrix intended that Charlice Ann and Floyd W. Weathersbee were to take any beneficial interest whatever in the Dickes place. By the fifth clause of the will, all of the rents and profits which accrued from that place between the date of the death of the testatrix and the death of the survivor of Floyd W. and Charlice Ann Weathersbee were given to their three children, Bessie, Jane B., and James Moore Weathersbee, and, by the first codicil, the place itself is to go to James Moore Weathersbee, upon the death of the survivor of Floyd W. and Charlice Ann Weathersbee, when the right of the three children to share equally in the rents and profits of the Dickes place ceases. We do not see what possible beneficial interest either Floyd W. Weathersbee or his wife can have in that place. The utmost that could be said is, that they were to act as trustees for their children and to hold the Dickes place, and pay over the rents and profits thereof to their children, until the death of the survivor of the parents.

⁴²⁶ It is very clear, under the view which we have taken, that the fifth exception cannot be sustained.

The judgment of this court is that the judgment of the circuit court be affirmed.

ESTATES—LIFE TENANT AND REMAINDERMAN.—Where the tenant for life incurs a forfeiture the remainderman is not bound to treat the estate as merged and enter immediately. He has his action after the death of the tenant for life, and is not affected by the previous possession: *Moore v. Luce*, 29 Pa. St. 260; 72 Am. Dec. 629, and note.

MICHALSON v. ALL.

[48 SOUTH CAROLINA, 489.]

LIENS—CONVERSION.—Although the action of trespass on the case has been abolished by statute, the holder of an agricultural lien may maintain such action against one who, with knowledge of the lien, has purchased from the lienor and induced him to turn over the subject matter of such lien, thus removing it beyond the reach of the lien process, and converting it to his own use.

J. E. Davis and A. M. Boozer, for the appellant.

Patterson & Holman, for the appellee.

⁴⁵⁹ POPE, J. The plaintiff by his complaint alleged that on the sixth day of February, 1893, one John Kirkland executed to him an agricultural lien—that is, a lien on all the crops the said John Kirkland should make during the year 1893 on the plantation of land known as the Boynton place, to secure the sum of two hundred and seventy dollars, advanced to said Kirkland by the plaintiff in supplies to make such crops; that all the cotton made by Kirkland was three bales of cotton; and that the defendants, well knowing that the said Kirkland had given to the plaintiffs an agricultural lien on said cotton, and in fraud of plaintiffs' rights, induced the said Kirkland to haul said three bales of cotton from the Boynton place to the defendants' place of business in the night-time; that the defendants thereafter placed the said three bales of cotton beyond the reach of the agricultural lien and converted the same to their own use, to the damage of the plaintiff two hundred and seventy dollars. The defendants demurred to this complaint, because it failed to state facts sufficient to constitute a cause of action.

The cause came on to be heard before his honor, Judge Wither-
spoon, on the complaint and the demurrer thereto, whereupon the said circuit judge sustained the demurrer in ⁴⁶⁰ the following judgment: "The defendants interposed a demurrer to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action. The plaintiff seeks in this action to enforce his rights upon an agricultural lien. It was held in *Sternberger v. McSween*, 14 S. C. 35, and *Kennedy v. Reams*, 15 S. C. 548, that the only remedy to enforce rights under an agricultural lien is that provided by the statute. After hearing argument by counsel, I conclude that the defendants' demurrer must be sustained with costs, and it is hereby so ordered and adjudged." The plaintiff now appeals from such a judgment upon the single ground that the circuit judge erred in sustaining the demurrer.

It seems to us that the circuit judge is in error, as we shall now attempt to point out. Unquestionably, if these three bales of cotton were still in Barnwell county, the plaintiff could have seized them under the warrant of the clerk directed to the sheriff of that county, commanding such sheriff to seize said three bales of cotton, no matter in whose hands the same might be. This power to set this machinery in motion is vested by the statute in the plaintiff. And if the cotton was there, the plaintiff would be forced to adopt that remedy. But the plaintiff, by his complaint, alleges that such three bales of cotton have been carried off by the defendants, and converted to their own use, so that such warrant cannot reach them. All these facts are admitted by the demurrer. Do not these facts suggest the remedy of an action on the case—trespass on the case under the old common law? It seems so to us. It makes no difference that, under our present Code of Civil Procedure, the specific action of trespass on the case is abolished, for the present pleadings by complaint are adapted to meet all those old forms of action. We do not think the two cases cited by the circuit judge, when critically examined, conflict with this view.

It is the judgment of this court that the judgment of the circuit court be reversed, and that the cause be remanded to the circuit court, with leave to the defendants to answer.

TRESPASS.—One who receives possession of property known to him to have been taken from another wrongfully, does not thereby become a party to the wrong, and cannot be held liable as a trespasser by relation: *Harper v. Baker*, 3 T. B. Mon. 423; 16 Am. Dec. 112, and note.

CASES
IN THE
SUPREME COURT
OF
SOUTH DAKOTA.

FOSTER v. BETCHER LUMBER COMPANY.

[5 SOUTH DAKOTA, 87.]

CORPORATIONS, FOREIGN—SERVICE OF PROCESS.—Under the South Dakota statute (Comp. Laws, sec. 4898), service of process may be made on the managing agent of a foreign corporation when it has property in the state or the cause of action arises therein, and, when neither of these conditions exist, service can be made only upon the president, secretary, or duly authorized agent.

CORPORATIONS, FOREIGN—FAILURE TO COMPLY WITH STATE LAW.—The state in its sovereign capacity is the only party who can take advantage of the failure of a foreign corporation to comply with its laws.

CORPORATIONS, FOREIGN—FAILURE TO COMPLY WITH STATE LAW—SERVICE OF PROCESS.—The failure of a foreign corporation engaged in business in the state to comply with its law by filing a copy of its articles of incorporation and the certificate of the appointment of an agent authorized to accept service of process, cannot be taken advantage of by the corporation. In such case valid service of process may be made upon its managing agent.

CORPORATIONS, FOREIGN—SERVICE OF PROCESS.—If a foreign corporation fails to comply with the laws of a state, but is still engaged in business therein, it must transact such business subject to the laws of the state, and its assent to service of process upon its managing agent is implied.

CORPORATIONS, FOREIGN—MANAGING AGENT, WHO IS.—One who has sole control of the business of a foreign corporation within a state, and who corresponds with, accounts to, and receives instructions from the main office of such corporation in the state of its domicile, and who, with the knowledge and under the instruction of such corporation, holds himself out and advertises as its manager, in the former state, is its managing agent therein.

E. M. Bennett and T. M. Wilson, for the appellant.

B. A. Dodge, for the respondent.

⁶¹ CORSON, P. J. This is an appeal from an order denying the motion of the appellant to vacate and set aside a judgment rendered in favor of the respondent by default, the appellant not having appeared in the action. The summons and complaint were served upon A. J. Fairchild, at Milbank, in Grant county, in this state, and upon Albert Wildborg, at Big Stone City, in said county. The sheriff, in his amended return, states that he duly served the summons and complaint upon the persons above named, who were the managing agents of said defendant. The appellant assigns as error that the court erred in denying appellant's motion to vacate and set aside the said judgment, as the court acquired no jurisdiction of the person of the appellant. It appeared that the appellant was a foreign corporation, organized and existing under the laws of the state of Minnesota, but it also appeared that it had property and places of business in this state. It also appeared from the proof offered by appellant that it had never filed a copy of its articles of incorporation in the office of the secretary of state, nor its appointment of an agent authorized to accept service of process, as required by the laws of this state.

Two questions are presented for our decision: 1. Can service of a summons be legally made upon the managing agent of a foreign corporation, in this state, who has not been appointed by the corporation in the manner prescribed by the statute of this state? and 2. Were the persons upon whom the service in this case was made "managing agents" of the appellant, within the meaning of the statute of this state relating to the service of summons upon foreign corporations? The section of the statute relating to such service is section 4898 of the Compiled Laws, and reads as follows: "The summons shall be served by delivering a copy thereof, as follows: 1. If the ⁶² action be against a private corporation, to the president or other head of the corporation, secretary, cashier, treasurer, a director, or managing agent thereof; but such service can be made in respect to a foreign corporation only when it has property in this territory, or the cause of action arose therein, or when such service shall be made within this territory personally upon the president, treasurer, secretary, or duly authorized agent thereof." The learned counsel for appellant contend that, under this section, service can only be made upon a foreign corporation by serving the summons upon the president, treasurer, secretary, or duly authorized agent, as provided in the last clause of the section, and that service can only be made upon a managing agent in case of domestic corporations. But we cannot agree with the counsel in this construction of the statute. In our opinion, the language

of the section will not bear that construction. The first clause of the section clearly applies to all private corporations, whether domestic or foreign. No distinction is made in that clause between the two classes. But by the second clause a condition of such service is made, not as to the persons upon whom service may be made, but under what circumstance such service can be made; and it provides: "But such service can be made in respect to a foreign corporation only when it has property in this territory, or the cause of action arose therein." The expression "such service" evidently refers to the service specified in the preceding clause, as there is no other service to which it can properly refer. The third and last clause of the section provides for a different service, which may be made when the foreign corporation has no property in this state, and the cause of action did not arise therein. The learned counsel for the respondent contends "that the section authorizes service on the managing agent of a foreign corporation when it has property in this state, or the cause of action arose therein; and that when neither of these conditions exists, service can be made only upon the president, secretary, or duly authorized agent. We are of the opinion ⁶³ that this is the true construction of the section. This seems to be the construction placed upon a somewhat similar provision of the practice act of New York, whence the section we are considering apparently came: *Brewster v. Railroad Co.*, 5 How. Pr. 183; *Sterett v. Denver etc. R. R. Co.*, 17 Hun, 316; *Reddington v. Mariposa etc. Min. Co.*, 19 Hun, 405; *Tuchband v. Chicago etc. R. R. Co.*, 115 N. Y. 437. We are not able to discover any valid reason why any distinction should be made as to the service of process between the managing agent of a domestic and a foreign corporation when such corporation has such a managing agent within this state, and we think the lawmaking power has made none.

The counsel for appellant further contend that, inasmuch as the appellant had never filed its articles of incorporation with the secretary of state, nor its certificate of the appointment of an agent, as required by the law of this state, it was not legally doing business within the state, and could not legally have a managing agent therein, on whom service could be made. But we cannot assent to this proposition. The failure of appellant to comply with the laws of this state cannot be taken advantage of by itself, nor in fact by any private person in a collateral proceeding. The state only in its sovereign capacity can take advantage of such failure to comply with the law: *Wright v. Lee*, 2 S. Dak. 596; 4 S. Dak. 237. If a foreign corporation is engaged

in business in this state, though failing to comply with the laws by filing a copy of its articles of incorporation and a certificate of the appointment of an agent, it is still subject to the laws of the state and amenable to its process, until its right to so continue to do business within this state is declared forfeited by the courts of the state, upon due proceedings taken in the name of the state. The person transacting the business of the corporation in this state as managing agent must be presumed to be the agent of the corporation, and subject to the service of process. In *Hagerman v. Empire Slate Co.*, 97 Pa. St. 534, the supreme court of ⁶⁴ Pennsylvania said: "When a foreign corporation, transacting business in this state, has failed to establish an office and report the name of an agent, . . . but has some person residing therein as its agent, it must be presumed that the corporation has substituted such agent as the one on whom service is authorized to be made, to the extent, at least, of its unfinished business in this state." This seems to be the true rule. If a corporation fails to comply with the laws of the state, but is still engaged in business therein, and permitted to carry on such business, it must transact its business here subject to the laws of the state, and its assent to service upon its managing agent is implied. The general rule is thus stated by the supreme court of the United States, in *St. Clair v. Cox*, 106 U. S. 350: "The state may, therefore, impose, as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that, in any litigation arising out of its transactions in this state, it will accept as sufficient the service of process upon its agents or persons specially designated; and the condition would be eminently fit and just. And such condition and stipulation may be implied as well as expressed. If a state permits a foreign corporation to do business within her limits, and at the same time provides that, in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the state are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process": *Thomas v. Placerville etc. Min. Co.*, 65 Cal. 600; *Funk v. Anglo-American Ins. Co.*, 27 Fed. Rep. 336; *Knapp v. National Mut. Fire Ins. Co.*, 30 Fed. Rep. 607; *Moch v. Virginia etc. Ins. Co.*, 10 Fed. Rep. 696; *Pringle v. Woolworth*, 90 N. Y. 502; *Pope v. Terre Haute etc. Mfg. Co.*, 87 N. Y. 137; *Tuchband v. Chicago etc. R. R. Co.*, 115 N. Y. 437.

. This brings us to the consideration of the second question: 65

Were the parties upon whom the service of the summons in this case was made the managing agents of the defendant? The defendant, in support of its motion to vacate and set aside the judgment, read the affidavit of the president and secretary of said defendant. The material part of the affidavit of the president is as follows: "That on the first day of December, A. D. 1890, H. J. Benedict, Esq., assuming to act as the sheriff of said county of Grant, in the state of South Dakota, . . . did levy upon and take into his custody, as said sheriff, under said writ, a large quantity of lumber, lath, shingles, and other personal and real property of and belonging to the said Charles Betcher Lumber Company, then and there being at and situate in Milbank, and also Big Stone City (each and both of said places are in the said county of Grant, and state of South Dakota), and which said personal and real property was then and there of great value, to wit, of the value of sixteen thousand (\$16,000) dollars. . . . The said personal and real property of said Charles Betcher Lumber Company at said Big Stone City, in said county, was on said day of said levy in the charge of Albert Wihlborg, a hired employee of said corporation; and the said personal and real property of said Charles Betcher Lumber Company at said Milbank, the day of said levy, was in charge of said A. J. Fairchild, Esq., an employee of said corporation." The affidavit of the secretary is substantially the same. It will be noticed that the affidavits admit that the defendant was engaged in the lumber business at Milbank and Big Stone City; that the two persons named were in their employ, and, inferentially, had charge of defendant's business at the places named. It will be further noticed that it is not in terms denied that they were managing agents, but they were designated in the affidavits as "employees." It is nowhere stated in the affidavits that the defendants had any other agents or persons in charge of their business in this state. On the part of the plaintiff, a number of affidavits were read on the hearing, two being made by the ^{two} two agents on whom the service of the summons and complaint was made. The material part of the affidavit of A. J. Fairchild is as follows: "A. J. Fairchild, being duly sworn, says that for the past twenty-two months, and until the first day of December, 1890, and on that date, he was the duly authorized, acting, and managing agent, and the only agent, of Charles Betcher Lumber Company, the defendant in the above-entitled action, and also a foreign corporation, whose main office and principal place of business is in the city of Red Wing, in the state of Minnesota, at the city of Milbank, in the county of Grant, and state of South Dakota; that

as such agent he had full charge of the business of said corporation at said city of Milbank, and was subject to no authority from any other person or agent in said state of South Dakota; that he accounted to said corporation, and received all instructions from the main office thereof, at said city of Red Wing, Minnesota; that he conducted and managed the affairs and business of said corporation at said city of Milbank, and, in its behalf, he received and disbursed all moneys, sold lumber and merchandise, paid freight, made contracts and agreements with customers as to the terms of payment of accounts, issued receipts for money for said corporation, as agent thereof, employed all necessary temporary assistance for said corporation, and transacted all of the business of said corporation at said city of Milbank." The affidavit of Albert Wihlborg, the agent at Big Stone City, was more full and specific as to the nature of the agency, but we will insert only a few paragraphs of the same: "Affiant further states, on oath, that at the instance, and by and with the consent and instructions, of the said Charles Betcher Lumber Company, he inserted in a certain newspaper, the Western Wave, published at said city of Big Stone City, an advertisement of the business of the said Charles Betcher Lumber Company, including the name of affiant as agent thereof; . . . that affiant had full power and authority to hire laborers as he deemed best from time to time, to make contracts with them for the amount of ⁶⁷ their hire, and to pay the same, and that affiant had power and authority from the said Charles Betcher Lumber Company to bring suits in the name of said Charles Betcher Lumber Company whenever he deemed the same to be necessary for the protection of the interests of said corporation, to engage attorneys for the prosecution of said suits, and to settle and adjust the claims upon which such suits were based; . . . that affiant at all times during his connection with the said Charles Betcher Lumber Company, at the city of Big Stone City [has been] held out to be, and has been, and has been authorized by the said Charles Betcher Lumber Company to hold himself out to be, the sole agent of the said corporation at the city of Big Stone City, for the general transaction of its business in all its details; that at no time during affiant's connection with the said Charles Betcher Lumber Company has any person or persons in the state of South Dakota had or executed any authority or superintendency over him in his connection with the business of said corporation at the city of Big Stone City, and that he was, up to and including the said first day of December, 1890, the sole agent of said corporation at said Big Stone City, as aforesaid, and not otherwise, that af-

fiant, as such agent, received from said corporation an annual salary." It was also shown that from August 8th to the seventeenth day of October, 1889, the said Fairchild had an advertisement published in the Grant County Review, a newspaper published in said county, as follows: "Charles Betcher Lumber Co., A. J. Fairchild, Manager. . . . Office and Yards, Third Ave. and Second Street, Milbank, South Dakota." It was also shown that from May, 1890, to January 15, 1891, the following advertisement was placed in the Western Wave, a newspaper published in said Grant county: "Charles Betcher Lumber Company. . . . Albert Wihlborg, Manager." It was also shown that said Wihlborg had filed several mechanics' liens on behalf of said defendant, and as the agent of said company, some of which he had settled and released as such agent.

⁶⁸ While the term "managing agent" has no strict legal definition, and it is not easy to formulate or lay down a general rule that will govern all cases, yet we are of the opinion that the facts in this case show that both Fairchild and Wihlborg were "managing agents" within the meaning of the statute. The latest and perhaps the most satisfactory definition of a managing agent is that laid down by the court of appeals of New York in *Tuchband v. Chicago etc. R. R. Co.*, 115 N. Y. 437. The court says: "2. Whether Oberg, within the meaning of the code supra, was the 'managing agent.' The defendant, like other railroad corporations, necessarily has not only directors, a treasurer, and secretary, but other officers and agents. By these persons, or under their direction, by others, the business of the company is conducted. From the very nature of a body corporate, service of process cannot be personal, and at common law it was made by serving it on a proper officer, so that it might come to the knowledge of the company, and then further proceedings by distress: 1 Tidd's Practice, 121. Under the statute supra, the same object was in view; and when the corporation has an office in this state where a substantial portion of its business is transacted by a person designated by itself as a 'general agent,' although followed by words indicating some one department, it may safely be assumed that the object of the statute will be accomplished. It, of course, intends a managing agent in this state, and, where a corporation created by the laws of any other state does business in this state, the person who, as its agent, does that business should be considered its managing agent, and more especially should that be so where the foreign corporation has an office or place of business in this state, and when that office is in charge of that person, and he there

acts for the corporation. He is there doing business for it, and so manages its business. Such person is, in every sense of the words used in the statute, a managing agent. . . . So far as the cases cited by the appellant hold a contrary doctrine, they cannot be approved. To limit service by requiring the person served, in ⁶⁹ case of an action against a railroad corporation, to be one who controls 'the general and practical operations and business of running the road,' would so restrict the meaning of the statute as to render it useless. Such an agent would naturally find his occupation and engagement in the state where the road was domiciled or operated; and if his incidental presence in this state subjected him to process, as representing the corporation, it cannot to be supposed that the legislature intended to confine the remedy to him alone." The case of *American Express Co. v. Johnson*, 17 Ohio St. 641, is directly in point, and the law is so clearly stated that we quote the decision in full: "By the court. The plaintiff, who was defendant in the original action, is a foreign corporation, and the principal ground of error relied on is the alleged insufficiency of the service of the original summons. At the time of service, the company had a general 'superintendent' for the state, residing at Cleveland, and two or more 'local agents' in the county of Madison, one of whom resided in London, in said county, and kept an office there, where he received and forwarded packages for the company, and did all the business of the company usually transacted in such receiving and forwarding offices. Service was made upon the said agent at London alone; and the question is, whether he was the 'managing agent' of the company, within the meaning of the sixty-eighth section of the code. We think he was such managing agent, and that the service was sufficient." In *McAllister v. Pennsylvania Ins. Co.*, 28 Mo. 214, the court says: "It would seem to be a reasonable interpretation of the language of the twenty-sixth section of the attachment law that an agent of a foreign insurance company located here, and doing business under this law of 1855, should be deemed a 'managing officer' of such corporation for all the purposes of an attachment or garnishment. Such agents do in fact represent the corporation here, although in the foreign country where the corporation has been chartered and its chief place of business is, there is another chief officer of such corporation. We are not aware of any principle ⁷⁰ of public policy which could induce the legislature designedly to discriminate between domestic insurance companies and these agencies of foreign insurance companies which they have allowed to transact business here with all the

privileges of domestic corporations, so as to exempt the latter from liability to a process to which the former is undoubtedly liable": *White Lake Lumber Co. v. Stone*, 19 Neb. 402. The case of *Tuchband v. Chicago etc. R. R. Co.* 115 N. Y. 437, shows that the principles laid down in some of the earlier cases in New York, cited by appellant's counsel, are in effect overruled. As showing what agents are not regarded as managing agents, we quote briefly from *Reddington v. Mariposa etc. Min. Co.*, 19 Hun, 405: "Hence arises the material question upon this appeal, viz., whether Brumagim can be regarded a 'managing agent' of the corporation, within the meaning of said statute, so as to authorize the service upon him of a summons, in order to commence an action in this state. The duties which were assigned to Brumagim by the company were restricted in regard to their nature and extent, and the performance of such duties was subject to the direction and control of the company. We do not perceive that any exercise of independent judgment was confided to him, and he seems to have acted entirely in a subordinate capacity. . . . It is quite clear that the legislature attached importance to the term 'managing agent,' and employed it to distinguish a person who should be invested with general power, involving the exercise of judgment and discretion, from an ordinary agent or employee who acted in an inferior capacity, and under the direction and control of superior authority, both in regard to the extent of the work and the manner of executing the same. The distinction thus attempted to be drawn we deem reasonable, and in harmony with the obvious purpose of the statute in regard to the service of process upon a foreign corporation. It would, indeed, be a great hardship to allow actions to be commenced against foreign corporations by the service of a summons upon an inferior agent or servant, who, by reason of ignorance or ⁷¹ heedlessness, would be quite likely not to apprehend the purpose of such service, and therefore neglect the same." In the latter case, Brumagim was simply employed in the city of New York as transfer agent of the defendant's stock, and was authorized to collect assessments, and remit them to the company. In the former case, decided by the court of appeals some ten years later, Oberg, the agent, was described in the company's time table as "General Agent, Passenger Department, 261 Broadway, N. Y." He had nothing to do with the freight department, but he occupied an office over which was the sign, "Chicago & Alton R. R.," etc., which, as the court says, indicated that the office was a general office, for the transaction of railroad business connected with the defendant's line in that city. It seems to us

that the facts of the case at bar clearly bring the agents within the principle of the case of Tuchband v. Chicago etc. R. R. Co., 115 N. Y. 437. Fairchild had charge of the entire business of the defendant at Milbank, paid freights, made contracts, hired and discharged men, and held himself out to the public and advertised himself as manager. He exercised, in all the business of the defendant at that point, discretionary powers and independent judgment. He was subject only to the control of the company, with which he corresponded directly. The defendant had an office and lumber yard entirely under the control of Fairchild, subject, of course, as all managing agents, to the control of the corporation. The same may be said of Wihlborg at Big Stone City. He occupied a place of business, where the lumber of the defendant was sold and dealt in, under his sole charge; and he held himself out and advertised himself, under instructions of the defendant, as manager. He, too, exercised discretion and an independent judgment in the management of the business, and received, as such manager, an annual salary. Neither of these agents occupied the position of "inferior agents" or "servants," in the ordinary sense in which those terms are used, or were used by the court in the cases quoted from: Reddington v. Mariposa etc. Min. Co., 19 Hun, 405. We have examined all the authorities cited by ⁷² counsel for the appellant to which we have access, but they were, in nearly all cases, decided under provisions of statutes so dissimilar to our own, or the agent's powers were so limited, as to afford us but little aid in deciding the question before us. Our conclusions are that the learned circuit court was clearly right in denying the appellant's motion to set aside and vacate the judgment rendered in this case, and that the order appealed from should be affirmed.

The order of the circuit court is therefore affirmed.

CORPORATIONS—FOREIGN—PROCESS.—Process against a corporation must be served upon its principal officer within the jurisdiction of the sovereignty by whose law it exists, and authority for serving it in any other manner must be conferred by statute: Aldrich v. Anchor Coal etc. Co., 24 Or. 32; 41 Am. St. Rep. 831, and note.

CORPORATIONS—FOREIGN—MANAGING AGENT—WHO IS.—When a corporation, organized and doing business under the law of one state, contracts a debt through its authorized agent in another state, he is so far its managing agent there that service of summons upon him for the debt while he is temporarily within the state will bind the corporation: Klopp v. Creston City etc. Water Works Co., 34 Neb. 308; 33 Am. St. Rep. 666. For a full discussion of this subject, see the note to Blanc v. Paymaster Min. Co., 29 Am. St. Rep. 157, and the extended note to Hampson v. Weare, 66 Am. Dec. 121.

KIMMEL v. DICKSON.

[5 SOUTH DAKOTA, 221.]

BANKS AND BANKING—TRUST FUNDS.—If money is placed in a bank to be paid to a certain person upon the happening of a certain event, the depositor taking a receipt reciting the purpose for which the money is deposited, after which such money is mingled with the other deposits in the bank without the depositor's knowledge or consent, and, before the event happens or the money is paid over, the bank fails and goes into the hands of a receiver, the money so deposited is a trust fund, and not assets of the bank, and the depositor has a right to follow and recover it in the hands of the receiver.

R. Dollard, for the appellant.

G. P. Harlen, for the respondent.

²²³ **KELLAM, J.** In this case the facts are simple and undisputed. On and prior to the ninth day of June, 1893, the Douglas County Bank was a banking corporation under the laws of this state, doing business at Armour, in said Douglas county. On that day respondent Kimmel left with such bank \$265, to be paid to E. C. Ward on presentation by him of a warranty deed conveying to Kimmel certain described land, with an abstract showing good title in the grantor. The bank gave Kimmel a receipt therefor, reciting that it was so received for such purpose. On the seventeenth day of June following, and before the deed was presented and the money paid over, the bank failed, and respondent, Dickson, was appointed its receiver, and as such received and took possession of all the assets and property found in the possession of the bank, of which \$259.71 was cash. Subsequently both Kimmel and Ward demanded their money of the receiver, and this action does not involve any controversy between Kimmel and Ward, but simply whether the receiver of the bank should be required to pay over the amount, or so much thereof as the money on hand will pay; or whether the cash so found on hand at the time of the failure of the bank is assets in his hands, to be distributed with and as the other assets of the bank. The court below ordered the receiver to pay over to respondent the said \$259.71 so found in the bank at the time of its failure and taken possession of by him, and this appeal is from such order. In the affidavit of Humbert, secretary of said bank, it is stated that when this money was so left with ²²⁴ the bank it "was treated the same as any other deposits of said bank, and mixed with the other money therein." It is not intimated that this was done with the knowledge of Kimmel, or that he in any manner consented to it. Upon these facts it would appear that the money was left with the bank

in trust for a particular purpose. The bank could not afterwards, without the acquiescence of Kimmel, change its relation to him from that of a bailee or trustee to that of a general debtor. We apprehend that no different principle is involved because one of the parties happens to be a bank. Suppose, under the same circumstances, Kimmel had left the money with Humbert personally, and he had failed and made an assignment, would this money, so found in his possession, pass to his assignee as his property? If so, when and how did it become so? That he, or the bank in this case, had, without the consent of Kimmel, diverted the money and used it for some other purpose, ought not to affect Kimmel's rights. Abuse of a trust can confer no rights on the party abusing it, or on those claiming in privity with him. It is not claimed that the \$259 found in the bank's vault when it failed is the very money, or a part of it, deposited by Kimmel, and it is not necessary that it should be so. If the money delivered to the bank had been used by it in its business, it had presumably either paid its debts pro tanto or increased its assets; and the general creditors of the bank would be in the same condition if the money found in its possession were paid over in execution of the trust as though the money deposited had been kept separate, and the identical money received had been so paid over. *Peak v. Ellicott*, 30 Kan. 156, 46 Am. Rep. 90, was a case entirely analogous to this. *Peak* had left with the bank of which *Ellicott*, upon its failure, became assignee, money to pay a note, which the bank was to send for. As in this case, he took a receipt showing the purpose for which the money was left. The bank passed the amount to the credit of *Peak*. After the failure of the bank, it not having paid the note, *Peak* brought action against the assignee, asking the ²²⁵ same relief as is asked in this case, to wit, that the assignee be required to pay over the amount in full as a trust fund. The supreme court reversed the trial court, holding that the transaction constituted a trust; that the relation created was not that of a debtor and creditor, but rather that of principal and agent, or bailor and bailee; and that the subject of such trust did not pass to the assignee as assets of the bank. It was held further that the manner in which the bank had treated the fund by crediting it to *Peak* and mixing it with its own money did not affect his right to claim the amount from the funds on hand. *Ellicott v. Barnes*, 31 Kan. 170, was a similar case and the same rule controlled. *McLeod v. Evans*, 66 Wis. 401, 57 Am. Rep. 287, applies the same principle with the same result, where a draft had been left for collection with a banker who afterwards, and before the depositor had re-

ceived its proceeds, suspended, and assigned. The court held that the proceeds of the draft constituted a trust fund which did not pass to the assignee, and, there not being sufficient cash in the hands of the assignee to pay the amount, that the same should be a lien upon the assigned estate. The same principle, though to somewhat different facts, was applied in *People v. City Bank*, 96 N. Y. 32, and again in *People v. Bank of Dansville*, 39 Hun, 187.

The suggestions of appellant, that this money is imperatively needed to meet immediate expenses in administering the bank's estate, can have little weight when the money itself is no part of the estate, but belongs to another. There would be no justice in requiring Kimmel to furnish means to assist in settling the affairs of the bank. On behalf of appellant, it is further urged that the answer shows that at the time of its failure the bank held a large amount of other special deposits of the same character as this \$265; and it is insisted that by the order appealed from Kimmel is given a priority to which he is not entitled over other equally meritorious claimants. It is ²²⁰doubtful if the proceedings convey the meaning which counsel thus draws from them. The answer of the receiver is evidently framed upon the theory that, notwithstanding the circumstances of this deposit, it was a general deposit, and concludes with admitting the indebtedness of the bank on account of it. After stating how and for what purpose it was made, it proceeds: "And it is alleged that said \$265 was deposited on account of the plaintiff as herein stated, and not otherwise, and was carried to the credit of the plaintiff by the defendant corporation the same as any other deposits of said bank, and the money constituting said sum of \$265 was mixed with other money deposits of said bank, and its identity destroyed. . . . And that, after the deposit of said \$265, and previous to the seventeenth day of June, 1893, said defendant bank received on deposit moneys from its depositors to the amount of \$7,786.63, to be paid out the same as said \$265, the same being funds belonging to depositors, and no part of which has been paid to said depositors, which was mixed with its general deposit funds, of which said \$265 formed a part at the time of its deposit. The defendant further alleges that the total amount due depositors by said defendant bank on said seventeenth day of June, and which remains unpaid, is the sum of \$20,778.08, and defendant states that, except said \$259.71, cash on hand, the assets of said defendant bank consists of horses, equities, and rights of action; admit that the plaintiff and said E. C. Ward have each demanded said \$265, and defendants have each refused to pay the same; and admit

that defendant corporation is indebted to plaintiff in said sum of \$265 as aforesaid, and no part thereof has been paid." Upon this point the affidavit of Humbert, the secretary of the bank, is as follows: "That the said \$265 deposited by plaintiff as aforesaid was treated the same as any other deposits of said bank, and mixed with the other money therein. . . . That after the deposit of said \$265, and previous to the seventeenth day of June, 1893, said defendant bank received on deposit money to the amount of \$7,786.63, which was mixed with the ²²⁷ deposit funds of said bank, and all of which was paid out by said defendant corporation prior to June 17th, except said sum of \$259.71." Reading the answer of the receiver and the affidavit of the bank's officer together, I think we ought to understand, not that the bank had received and held over \$7,000 of special deposits of the same character as the \$265, but that between the dates named that amount had been deposited generally, and had been treated by the bank, and used and paid out the same as the \$265. To us these statements do not mean that the bank held other special deposits, delivered to and received by it for, and so appropriated to, a particular purpose or trust; and, even if they were so intended, there is nothing before us to indicate that any such depositor ever has, or ever will, assert his rights. The plaintiff having established his right to be paid, no question of priority is presented until it is shown that there are rival claimants in position to and disposed to raise the question, and that they will suffer by allowing plaintiff to be presently and first paid. Payment to him ought not to be denied or delayed upon a bare suspicion that others similarly situated, now sleeping on their rights, may eventually assert them.

The order of the circuit court is affirmed.

BANKS—SPECIAL DEPOSITS—LIABILITY FOR.—A special deposit in a bank is at the risk of the depositor, but if money so deposited is converted to the general purposes of the bank by its officers or agents without the depositor's consent, they are personally liable to him, and he may follow such money into the hands of third persons receiving it with a knowledge of his rights: *Matter of Franklin Bank*, 1 Paige, 249; 19 Am. Dec. 413, and extended note at page 423; note to *Mutual Assn. v. Jacobs*, 33 Am. St. Rep. 306.

SEARLS v. KNAPP.

[SOUTH DAKOTA, 326.]

LIMITATIONS—STATUTE, WHEN SUFFICIENTLY PLEADED.—An answer stating that the cause of action alleged in the complaint did not accrue within six years of the commencement of the action sufficiently pleads the statute of limitations. Upon proof of the fact alleged, the burden of proof is upon the plaintiff to relieve himself from the operation of the statute.

EVIDENCE—JUDICIAL NOTICE.—The trial court will take judicial notice of all the proceedings, pleadings, and jurisdictional papers in a case on trial. Therefore, they need not be introduced in evidence.

JUDGMENTS.—PRESUMPTIONS IN FAVOR OF, instead of those against, the regularity and validity of a judgment are indulged on appeal, and when the date of the commencement of an action is material to the validity of such judgment, and the record fails to show when summons was served or the action commenced, the appellate court will presume, in favor of the judgment, that the summons and return thereon were judicially noticed in the lower court, and that the judgment therein was supported by such notice.

J. Kirby, for the appellant.

E. S. Johnson, for the respondent.

326 FULLER, J. The plaintiff brought suit upon two promissory notes of even date, which, according to the recitals of each, became due November 1, 1884, and November 1, 1885, respectively. The defendants admit the execution and delivery of the notes, and plead the statute of limitations by way of answer and in bar of the action. At the trial the notes were offered and received in evidence without objection, and the plaintiff rested his case. Upon motion of counsel for respondents, the court directed a verdict in favor of the defendants, for the reason that the notes in evidence upon their face showed that the action is barred by the statute of limitations. From a judgment entered thereon, and from an order denying a new trial, plaintiff appeals.

Counsel for appellant urges that the statute of limitations 327 is not sufficiently pleaded to be available as a defense. The allegation contained in the answer is as follows: "2. Alleges that the cause of action therein set forth did not accrue within six years from the commencement of this action." We do not think the position is well taken. The averment is sufficient to apprise the plaintiff that the defendants relied upon the statute of limitations as a defense to the action, and upon proof of the fact alleged therein the burden would rest upon plaintiff to show something which would prevent the running of the statute, or relieve him from its operation: Mathews' Code Pleading, 478; Baylies' Code Pleading, 252. It is further contended that there was nothing

before the court to prove that six years had elapsed when the summons was served, and that the court erred in directing a verdict for defendants. According to the terms of the notes upon which this suit was based, the one which last matured became due on the first day of November, 1885. These notes, being introduced, were before the court, and their recitals are prima facie evidence of the time when each matured. It is well settled that when the judgment of a trial court is assailed on appeal, and the question of its validity must be settled by the adoption of a presumption, an appellate court will entertain a presumption in favor of such judgment, instead of one that will overthrow the same, and when the date of the commencement of an action becomes material in order to sustain a judgment on appeal, and there is no proof before us as to the time when the summons was served or the action commenced, this court will presume that the summons and pleadings in the action were judicially noticed, as they should have been, and that the trial court was thereby fully advised that the cause of action was barred by the statute of limitations. A court will take judicial notice of all the proceedings, pleadings, and jurisdictional papers in a case on trial, and the same need not be introduced in evidence: 1 Wharton on Evidence, 325; State v. Bowen, 16 Kan. 475; Secrist v. Petty, 109 Ill. 188; Leavitt v. Cutler, 37 Wis. 46. In a criminal case in Iowa it has been held ³²⁸ that the district court will take judicial notice of all the records in a case on trial: State v. Schilling, 14 Iowa, 455. Had the plaintiff, after proving by the introduction of the notes all that was deemed necessary to entitle the defendants to a judgment, offered evidence of facts that would take the cause out of the statute of limitations, and had the court refused to allow the introduction of such evidence, a different case would have been presented; but, as no such request was made, and no evidence of that character was offered, it is not unreasonable to presume that the plaintiff was in possession of no evidence that would tend to overcome the prima facie case in favor of the defendants. Proof is not required of a fact of which the court should take judicial notice, and the presumption in this case is that the court knew officially that the summons was served and the suit commenced after the cause of action was barred by the statute of limitations.

The judgment of the trial court is affirmed.

STATUTE OF LIMITATIONS—PLEADING.—The statute of limitations is properly pleaded when, to a complaint seeking relief on the ground of fraud, the answer pleads that the cause of action did not accrue within six years before the commencement of the action: Piper v. Hoard, 107 N. Y. 67; 1 Am. St. Rep. 785.

EVIDENCE—JUDICIAL NOTICE OF PROCEEDINGS IN CAUSE. Judicial notice may be taken by a court of the previous proceedings had in the cause: *Hollenbach v. Schnabel*, 101 Cal. 312; 40 Am. St. Rep. 57, and note with the cases collected.

JUDGMENTS—PRESUMPTION IN FAVOR OF VALIDITY OF. Every presumption is in favor of the correctness and regularity of proceedings of courts of general jurisdiction, and error cannot be presumed: *Aspinwall v. Sabin*, 22 Neb. 73; 8 Am. St. Rep. 258, and note. The rulings and judgment of the trial court are presumed correct: *Dowagiac Mfg. Co. v. Gibson*, 78 Iowa, 525; 5 Am. St. Rep. 697, and note; *Thompson v. Monrow*, 2 Cal. 99; 56 Am. Dec. 318, and note. Every material fact not found by the court below must be presumed in favor of the judgment: *Jones v. Adams*, 19 Nev. 78; 3 Am. St. Rep. 788.

QUINN v. QUINN.

[SOUTH DAKOTA, 22.]

WILLS—AGREEMENT TO MAKE.—One who adopts a child by legal proceedings, and, in order to induce the child's mother to consent to such adoption, orally agrees that the child shall inherit and be entitled to a share of the adopter's property as his heir, cannot deprive such child of his rights as such heir by fraudulently and without consideration disposing of his property in his lifetime or by will for that purpose, after the child has performed his part of the contract and remained in the adopter's family until he has attained his majority.

WILLS—AGREEMENT TO MAKE—STATUTE OF FRAUDS.—An oral agreement between the mother of a child and one who adopts such child by legal proceedings, to the effect that the child shall inherit and be entitled to a share of the adopter's property as his heir, does not relate to a sale or transfer of real estate, or an interest therein, and is not affected by the statute of frauds.

ADOPTION PROCEEDING AS PROOF OF HEIRSHIP.—The heirship of a child to the party legally adopting him, is conclusively shown by an order made in the adoption proceedings reciting that the child shall be capable of inheriting the estate of the adopter, and that their legal rights and liabilities shall thereafter be the same as if the relation of parent and child existed between them.

Action to set aside certain conveyances of realty, and to establish plaintiff's right to an interest therein. Appeal from an order overruling a demurrer to the complaint.

Davis, Lyon & Gates, for the appellant.

J. D. F. Smith and J. W. Jones, for the respondent.

330 **CORSON, P. J.** The complaint in this action is very lengthy, and we shall only attempt to give the substance, except as to two paragraphs, which we deem specially important. In October, 1868, the plaintiff, being a little over nine years of age, was adopted by Hollis S. Quinn, the husband of the defendant, by virtue of statutory proceedings, in the state of Illinois, the

plaintiff's mother, then a widow, consenting thereto. It is alleged in the complaint that Quinn was desirous of adopting the plaintiff as a child of his own, and making him one of his heirs at law, and bestowing upon him all the rights, privileges, and emoluments that he could enjoy and could be entitled to had he been born to the said Quinn as his own child; and "that, in pursuance of said intention so formed by said Hollis S. Quinn, at his special instance and request, complainant's mother did, about the twenty-sixth day of October, 1868, enter into a contract with said Hollis S. Quinn, by virtue of which she did give her consent to the adoption of your complainant by said Hollis S. Quinn, on the express terms and conditions that your complainant was to live with the said Hollis S. Quinn until he was twenty-one years of age, and was to work for and serve said Hollis faithfully, be kind and obedient to said Hollis, and in consideration thereof the said Hollis Quinn was to board, clothe, and send your petitioner to school at least three months out of each and every year, and when your complainant arrived at the age of twenty-one years was to give him a good span of horses, harness, and wagon, and was to give him enough farming machinery to enable complainant to start farming for himself; and also to make complainant ³³¹ one of his heirs at law, and be entitled to inherit with his other heirs a just and full portion of said Hollis S. Quinn's property at the time of his death. That in pursuance of said verbal agreement entered into between your complainant's mother on complainant's behalf and said Hollis S. Quinn, the said parties, on or about the twenty-sixth day of October, 1868, went before the county court of Bureau county, Illinois, which was at that time a court of general jurisdiction, and clothed with power and authority to do all things that were required and necessary to be done under the laws of the state of Illinois to lawfully cause your complainant to become the lawfully adopted son and heir at law of said Hollis S. Quinn." That such proceedings were had that an order was made, the material parts of which are as follows: "It also appears to the court that the mother has given her consent to the adoption of said male child; and it appears to the court, from all the testimony in the case, that it would be to the best interest of the said child to make an order declaring said child to be the adopted child of the petitioner, Hollis S. Quinn, making said child capable of inheriting said Hollis' estate. It further appears that it is the desire of said petitioner and the mother of said male child that it be ordered by the court that the name of said child be changed, and that his name hereafter be Charlie Fuller Quinn. It is there-

fore ordered, adjudged, and decreed by the court that the prayer of said petitioner be granted; and it is further ordered by the court that the said male child, Charlie Fuller, be declared to be the adopted child of Hollis S. Quinn, the petitioner; and it is further ordered and declared that said male child, Charlie Fuller, shall be capable of inheriting the estate of said Hollis S. Quinn; and it is further ordered by the court that the name of said male child shall be Charlie Fuller Quinn; and it is further ordered and declared that thenceforward the relation between said Hollis S. Quinn and said adopted child, Charlie Fuller Quinn, shall be, as to their legal rights and liabilities, the same as if the relation of parent and ³³² child existed between them, except that said Hollis S. Quinn shall never inherit from said Charlie Fuller Quinn." That thereafter the plaintiff remained in the family of said Quinn until about July 15, 1880, when he attained his majority. That while he so remained with said Quinn he was required to and did perform much hard manual labor, and largely aided said Quinn in acquiring a property which amounted to about fifteen thousand dollars. That said Quinn died in Sioux Falls, in this state, in 1891, leaving the defendant, who is the widow of said Quinn, two daughters, and this plaintiff his sole heirs at law. The complaint then alleges that said Quinn, prior to his death, entered into an unlawful and corrupt agreement with the defendant to place his property in a condition so that this plaintiff could not reach the same, and have said property in such condition that the plaintiff could not inherit the same; and that in pursuance of such corrupt and unlawful agreement the said Quinn did convey and transfer to the defendant large portions of his property without consideration, and just prior to his death made a will, by which he gave, bequeathed, and devised to said defendant the residue of his estate, real and personal, for the express purpose of defeating this plaintiff. The plaintiff prays judgment that the said conveyances and transfers from said Quinn to the defendant, so far as they affect his interests, be set aside, and that plaintiff's right to one-third of two-thirds of said property be decreed to him, etc. To this complaint the defendant interposed a demurrer, on the ground that the complaint does not state facts sufficient to constitute a cause of action. This demurrer was overruled, and the defendant appeals, assigning as error the overruling of said demurrer.

The principal ground relied on by appellant for a reversal of the order of the court below is that by the complaint it affirmatively appears that the agreement alleged to have been made by said Quinn with the mother of the plaintiff at the time of his adoption

was not in writing, and was therefore invalid. ²²³ The respondent contends that the fact that the plaintiff is heir of Quinn is conclusively established by the order. We fully agree with counsel in this contention. The order is that said plaintiff "shall be capable of inheriting the estate of said Hollis S. Quinn," and "that henceforward the relation between the said Hollis S. Quinn and said adopted child . . . shall be, as to their legal rights and liabilities, the same as if the relation of parent and child existed between them." It is true that neither in the recitals in the order nor in the order itself is there any allusion to any contract, other than that the mother consented to such adoption, and the proceedings resulting in such adoption; but the fact that the plaintiff was legally adopted and declared to be the heir of said Quinn constitutes an important element in this case in determining the legal rights of the plaintiff, independently of the contracts between the mother of the plaintiff and said Quinn. The contention of the appellants, therefore, that the contract set out in the complaint was a parol contract for the sale of lands, or an interest in lands, is untenable, as applied to the facts disclosed by the complaint; and the cases cited by appellant of *Ellis v. Cary*, 74 Wis. 176, 17 Am. St. Rep. 125, *Wallace v. Long*, 105 Ind. 522, 55 Am. Rep. 222, and *Pond v. Sheean*, 132 Ill. 312, are not authorities in this case, as in neither of those cases had the party claiming the estate been legally adopted as heirs of the party against whose estate the claim was made, and each relied solely upon the parol agreement as the ground of recovery. Without the parol contract the claimant in each of those cases had no right whatever to the property. But in the case at bar, as we have seen, the plaintiff, by judicial proceedings was duly adopted as the child and heir of said Hollis Quinn; and this proceeding, in our view of the case, renders it unnecessary to discuss or consider the questions discussed by counsel in their brief, as to what acts constitute such a performance or part performance of a parol contract as would take it out of the statute. The question of whether or not the parol contract in ²²⁴ this case was for a sale of land or an interest therein does not, in our view of the case, arise on this record. The fact that the plaintiff was legally adopted and made the heir of the said Quinn by the order of the court is the important and controlling element in this case.

The plaintiff does not seek to establish his right to inherit the estate of said Quinn, or his portion thereof, by a parol contract, but to show that Quinn had agreed not to deprive him of his rights as heir under the order of the court; not that Quinn should con-

vey or will property to him, but that he would not deprive the plaintiff of his right as heir under the legal proceedings. The contract, therefore, set out in plaintiff's complaint is not one relating to the sale of land, or of an interest therein, in the sense that such a contract is used in the statute. The order of the court makes all the provision for such a transfer necessary, by conferring upon the plaintiff the right to inherit as a child of Quinn, and making him the heir to said Quinn. The parol contract set out in the complaint is that, in consideration of the faithful services of the plaintiff for said Quinn until he should attain the age of twenty-one years, he should receive certain personal property, and should retain his legal rights as heir at law of said Quinn. The contract removes the legal presumption that the plaintiff's services were to be gratuitous, which would ordinarily arise in the case of services by a child, and establishes the fact that the order of the court was made upon a valid consideration, and that the plaintiff's rights as heir of the estate of Quinn were of such a nature that he cannot be deprived of those rights by any fraudulent proceedings of said Quinn or of the defendant. The contract upon which the legal proceedings were based having been complied with on the part of the plaintiff, a court of equity will protect him against any fraudulent conveyance of the property, or any conveyance without consideration or will, and set aside, cancel, and annul such conveyances, transfers, or will, in whatever form they may be made, so far as they affect his rights as heir to such property.

335 The plaintiff asks for no transfer to him of the property of Quinn, or that he be made the heir of Quinn, but he does ask, and we think properly, that the conveyances and the will, made under the alleged unlawful and corrupt agreement between the defendant and said Quinn, in his lifetime, be set aside, canceled, and annulled, in order that he may be in a position to assert his legal rights to the estate of Quinn as his heir. This a court of equity has power to do, and, under the allegations of the complaint, it is its duty to do. It would be manifestly unjust and inequitable to permit the defendant, after the estate of said Quinn has received the benefit of the labor and services of the plaintiff, to retain the possession of the property of said Quinn, as against the legal right of the plaintiff to inherit his portion of the same, by means of fraudulent transfers made by said Quinn in his lifetime, or transfers made without consideration, and for the express purpose of preventing the plaintiff from asserting his legal rights as heir. A court of equity will interpose its power to prevent such injustice to the plaintiff. But if the view we have taken of the effect

of the legal proceedings adopting the plaintiff and making him the heir of said Quinn is not correct, and the plaintiff's right to recover, if at all, must rest on the parol contract alleged in the complaint, we are of the opinion that the complaint is sufficient, and that the part performance of the parol agreement is sufficient to take the parol contract out of the statute, under the peculiar facts of this case. While the general rule applicable to parol contracts for the sale of land, or an interest therein, undoubtedly is that payment alone of the consideration, either in money or services, will not take the case out of the statute, yet an exception is made in the class of cases we are considering, on the ground that the contract is not usually made with reference to any specific property, and the nature of the services is such that they cannot ordinarily be definitely shown, or their value definitely determined in money. The rule is thus stated by the assistant vice-chancellor in *Rhodes v. Rhodes*, 3 Sandf. 279; ²³⁸ "It is settled that the payment of the consideration will not, in general, be deemed such a performance as to relieve a parol contract from the operation of the statute. But the reason for this, viz., that in such a case the repayment of the consideration will place the parties in the same situation in which they were before, shows that the rule applies to a moneyed consideration only. If the consideration for the contract be labor and services, those may sometimes be estimated, and their value liquidated in money, so as measurably to make the vendee whole on rescinding the contract. But in a case like this, where the services to be rendered were of such a peculiar character that it is impossible to estimate their value to Andrew Rhodes by any pecuniary standard, and where it is evident that he did not intend to measure them by any such standard, it is out of the power of any court, after the performance of the services, to restore Henry Rhodes to the situation in which he was before the contract was made, or to compensate him in damages. The case is clearly within the rule which governs courts of equity in carrying parol agreements into effect where possession has been taken or moneys laid out in improvements upon the land sold: 2 Story's Equity Jurisprudence, secs. 759-761; Lord Redesdale, in *Clinan v. Cooke*, 1 Schoales & L. 41." The doctrine of the cases cited from Illinois and Indiana, that part performance of the contract by services on the part of the adopted child does not take the case out of the statute, does not seem to have been followed in the courts of Michigan: *Wright v. Wright*, 99 Mich. 170; *Carmichael v. Carmichael*, 72 Mich. 76; 16 Am. St. Rep. 528; or by the courts of Missouri: *Sharkey v. McDermott*, 91 Mo. 647; 60

Am. Rep. 270; Sutton v. Hayden, 62 Mo. 101; or Ohio: Shahan v. Swan, 48 Ohio St. 25; 29 Am. St. Rep. 517; or New Jersey: Van Dyne v. Vreeland, 11 N. J. Eq. 370; 12 N. J. Eq. 142; Davison v. Davison, 13 N. J. Eq. 246. In the recent case of Wright v. Wright, 99 Mich. 170, the question of whether or not a parol contract performed on the part of an adopted child, though not legally adopted under a statute, took the ³³⁷ case out of the statute of frauds, was very fully and learnedly discussed in the majority opinion of the court, and with the views therein expressed we fully agree. Upon either view of the case, therefore, we think the complaint states a good cause of action, and our conclusions are that the court below properly overruled the demurrer.

The order of the circuit court overruling the demurrer and granting the defendant leave to answer is affirmed.

WILLS—AGREEMENT TO MAKE—STATUTE OF FRAUDS.—A parol agreement which expressly calls for succession by will to both real and personal property, and which is made in consideration of a child becoming the member of a family, is entire and within the statute of frauds, and cannot be specifically enforced in equity upon the death of the promisor without performance on his part: Grant v. Grant, 68 Conn. 530; 38 Am. St. Rep. 379, and note. An oral promise by a wife to make a will in favor of her husband, in consideration of land deeded by him to her, is void as being within the statute of frauds: Manning v. Pippen, 86 Ala. 357; 11 Am. St. Rep. 46.

ADOPTION—EFFECT OF.—The effect of adoption is to cast succession on the adopted child in case the adopting father dies intestate: Morrison v. Estate of Sessions, 70 Mich. 297; 14 Am. St. Rep. 500, and note. An adopted child is entitled to succeed by inheritance to the estate of the adopting parent: Estate of Newman, 75 Cal. 213; 7 Am. St. Rep. 146. See, also, the extended note to *In re Ingram*, 12 Am. St. Rep. 100.

BAILEY v. LAWRENCE COUNTY.

[SOUTH DAKOTA, 1893.]

COUNTIES—LIABILITY FOR NEGLIGENCE—DEFECTIVE BRIDGES.—A county is not liable in a private action, for an injury resulting from a defect in a bridge upon a public highway within its limits, in the absence of a statute expressly imposing such liability; and a statute imposing upon counties the duty of keeping in repair the bridges upon the public highways, and conferring upon them the power to raise by taxation the funds necessary to keep such bridges in repair, does not impose upon them the implied liability to answer in damages for injuries sustained from a defective or unsafe bridge.

E. Van Cise, for the appellant.

W. G. Rice, state's attorney, for the respondent.

³³⁸ **CORSON, P. J.** This was an action for damages for injuries sustained by the plaintiff by reason of a defective bridge, and

the case comes before us on an appeal from the order of the circuit court sustaining the demurrer, and involves the question of the liability of a county in this state for an injury resulting from a defective bridge constructed by a county, constituting a part of the public highway. It is alleged in the ³⁹⁶ complaint, in substance, that the bridge upon which the injury occurred was erected and constructed by, and under the direction of, the defendant county, and that it was the defendant's duty to keep, maintain, and operate it for the public benefit, but that, by reason of the negligence of the defendant and disregard of its said duty, it had become unsafe, fallen out of repair, and was dangerous and unfit to be used, to the knowledge of the defendant, at the time of the injury complained of; that neither the plaintiff nor his agent had any knowledge or information that the said bridge was defective, out of repair, and dangerous, and that while plaintiff's agent was crossing the same as a traveler upon the highway, and without fault on the part of the plaintiff or his agent, the said bridge fell, precipitating said agent and the buggy and horses of the plaintiff into the stream below, by reason of which they were injured, and plaintiff damaged, etc. The respondent county contends that in this state no county is liable for injuries from a defective bridge on a public highway, without regard to the fact of whether or not the county, or its agents and servants, had knowledge of such defect. The appellant contends that under the laws of this state making counties corporations, imposing upon them the duties of keeping in repair the bridges upon the public highways, and conferring upon them the power to raise by taxation the funds necessary to keep such bridges in repair, there is imposed upon such counties the implied liability to answer in damages for injuries sustained from a defective or unsafe bridge.

The proposition that at common law a county is not liable for an injury resulting from a defect in a bridge upon a public highway is sustained by the great weight of authority. From the numerous decisions upon this question, we cite the following: *Templeton v. Linn County*, 22 Or. 313; *Lorillard v. Monroe*, 11 N. Y. 392; 62 Am. Dec. 120; *Askew v. Hale*, 54 Ala. 639; 25 Am. Rep. 730; *Clark v. Adair County*, 79 Mo. 536; *Granger v. Pulaski County*, 26 Ark. 37; *White v. County of Bond*, 58 Ill. 297; 11 Am. Rep. 65; *White v. Commissioners*, ³⁹⁷ 90 N. C. 437; 47 Am. Rep. 534; *Brabham v. Supervisors*, 54 Miss. 363; 28 Am. Rep. 352; *Downing v. Mason County*, 87 Ky. 208; 12 Am. St. Rep. 473; *Barnett v. Contra Costa County*, 67 Cal. 77; *Scales v. Ordinary of Chatahooche County*, 41 Ga. 225; *Board of Commrs. v. Riggs*, 24 Kan.

255; *Watkins v. County Court*, 30 W. Va. 657; *Fry v. County of Albemarle*, 86 Va. 195; 19 Am. St. Rep. 879; *Woods v. Colfax*, 10 Neb. 552; *Commissioners v. Mighels*, 7 Ohio St. 109; *Smith v. Board etc.*, 46 Fed. Rep. 340; *Barnes v. District of Columbia*, 91 U. S. 552; *Cooley's Constitutional Limitations*, 6th ed., 301; *Dillon on Municipal Corporations*, secs. 996, 997, 999; *Elliott on Roads and Streets*, 42; *Baxter v. Winooski Turnpike Co.*, 22 Vt. 123; 52 Am. Dec. 84; *Ward v. County of Hartford*, 12 Conn. 404; *Commissioners v. Martin*, 4 Mich. 557; 69 Am. Dec. 333; *Adams v. Bank*, 1 Me. 361; *Altnow v. Sibley*, 30 Minn. 186; 44 Am. Rep. 191; *Freeholders v. Strader*, 18 N. J. L. 108; 35 Am. Dec. 530; *Farnum v. Concord*, 2 N. H. 392; *Morey v. Newfane*, 8 Barb. 645. And, for a full discussion of the question, see opinion of Mr. Justice Gray in *Hill v. Boston*, 122 Mass. 344; 23 Am. Rep. 332. The learned counsel for the appellant has furnished us with a very able and exhaustive brief in support of the position taken by him, and has called to our attention the fact that the supreme courts of Iowa, Indiana, Pennsylvania, Maryland, and Oregon have held the doctrine he contends for. From the numerous cases cited from these five states, we only deem it necessary to cite the leading case from each of the states establishing the doctrine contended for: *Wilson v. Jefferson County*, 13 Iowa, 181; *County Commrs. v. Baker*, 44 Md. 1; *House v. Board*, 60 Ind. 580; 28 Am. Rep. 657; *Rapho Tp. v. Moore*, 68 Pa. St. 404; 8 Am. Rep. 202; *McCalla v. Multnomah County*, 3 Or. 424. The Maryland decisions we have not access to, but those of the other states we will refer to; and we are of the opinion that, when the latter cases in Iowa and Indiana are considered, it will be found that the doctrine laid down in the earlier cases is followed as authority, but not approved, by the later judges. The case cited from Oregon was decided under a statute of that state then in force, which provided as follows: "An action may be maintained against a county . . . for an injury to the right of the plaintiff, arising from some act or omission of such county or other public corporation." In 1887 that statute was amended by striking out all after "for an injury," etc. Since that amendment was made the case of *Templeton v. Linn County*, 22 Or. 313, has been decided by that court, holding that the county is not liable for an injury caused by a defective bridge. In Indiana, where the court still holds counties liable in this class of cases, it is quite evident, from a recent decision made by that court, that if the question was a new one in that state, the present court would not so hold. In the case of *Board of Commrs. v. Daily*, 132 Ind. 73, Mr. Justice Miller, speaking for

the court, says: "The appellee brought this action against the appellant to recover damages for a personal injury occasioned by the alleged negligence and carelessness of appellant in the care and control of the courthouse of Vigo county. . . . It is now well settled that counties are involuntary corporations, organized as political subdivisions of the state for governmental purposes, and not liable, any more than the state would be liable, for the negligence of its agents or officers, unless made liable by statute. . . . There may be little distinction between the duties imposed upon boards of commissioners in the care and management of bridges and of public buildings; but while we regard the liabilities of counties for negligence in failing to keep bridges in repair as well settled, we recognize the fact that the weight of authority is the other way (*Board of Commrs. v. Chipps*, 131 Ind. 56; *Elliott on Roads and Streets*, 42), and are not disposed to extend the rule so as to embrace other cases." A similar view is taken by the later Iowa cases. In *Kincaid v. Hardin County*, 53 Iowa, 430, 36 Am. Rep. 236, the court says: "It is insisted by counsel for appellant that the defendant must be held liable, in the case at bar, because such liability rests upon the same ground, and is controlled by the same principles, as the cases involving liability for injuries caused by defective bridges. It must be admitted that a distinction in principle between an injury resulting ³⁹⁰ from a defective county bridge and one caused by a defective and improperly constructed courthouse is not very plain nor easily demonstrated. But as the line of decisions in this state as to the liability for defective bridges stands almost, if not quite, alone, as we have seen, we have no disposition to carry the doctrine farther than is necessary to sustain the decisions of the court, which have stood so long that it may truthfully be said they have the implied sanction of the lawmaking power and the people of the state." The admission that the line of decisions in that state holding a county liable for injuries caused by defective bridges "stands almost, if not quite, alone," and the refusal of that court to extend the rule to an injury caused by a defective courthouse, is very significant, and merits careful attention. Pennsylvania holds to the doctrine of the liability of counties for such injuries: *Shadler v. Blair County*, 136 Pa. St. 488. It may be that the rule established in that state, where the counties are densely populated, and contain a large amount of taxable property, is a very proper one; but the same rule, applied to the sparsely settled counties of the west, might result in great inconvenience to, if not in the bankruptcy of, the poorer counties. The ground upon

which it is held that counties are not liable for damages in actions of this character is that they are involuntary political divisions of the state, created for governmental purposes, and are organized without regard to the consent or dissent of the inhabitants; and the theory upon which municipal corporations proper are held liable in such cases is that they are voluntary associations, created and organized at the solicitation of, and with the free consent of, the inhabitants, under the laws of the state, and that the benefits accruing to the people by such incorporation compensate them for the liability. Practically, there may not be much force in this distinction, but upon this distinction have been based too many decisions to now attempt to disturb them: See opinion of Selden, J., in *Weet v. Trustees etc.*, reported in 16 400 N. Y. 161, note. And it may be, and undoubtedly is, true that too much importance was originally attached to the decision in the case of *Russell v. Inhabitants*, decided in 1788 by the court of king's bench of England, and reported in 2 Term Rep. 667. But, following that decision, the courts of most of the states in the Union have held the doctrine of the nonliability of counties for damages in this class of cases. The leading case in this country upon the question in controversy is *Riddle v. Proprietors* (decided in 1810), 7 Mass. 169; 5 Am. Dec. 35. In that case Parson, C. J., says: "We distinguish between proper aggregate corporations and the inhabitants of any district, who are by statute invested with particular powers without their consent. These are, in the books, sometimes called 'quasi corporations.' Of this description are counties and hundreds in England, and counties, towns, etc., in this state. Although quasi corporations are liable to information or indictment for a neglect of public duty imposed on them by law, yet it is settled in the case of *Russell v. Inhabitants*, 2 Term Rep. 667, that no private action can be maintained against them for a breach of their corporate duty unless such action be given by statute": *Mower v. Leicester*, 9 Mass. 247; 6 Am. Dec. 63. In *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332, Mr. Justice Gray says: "These cases have ever since been considered as having established in this commonwealth the general doctrine that a private action cannot be maintained against a town, or other quasi corporation, for the neglect of a corporate duty, unless such action is given by statute."

While, in this state, counties are made corporations for civil and political purposes only, they are corporations with comparatively limited powers; and while it is true that the legislature has

imposed upon counties the duty of keeping in repair the bridges on the public highways, and provided the method for raising revenue by taxation requisite for such purpose, yet to hold that the counties are thereby made liable for injuries caused by defects in such bridges, in the absence of legislation making them so liable, would be a species of judicial ⁴⁰¹ legislation. In *Barnett v. Contra Costa County*, 67 Cal. 77, the supreme court, speaking by Mr. Justice Ross, says: "In the United States there is no common-law obligation resting upon quasi corporations, such as counties, townships, and New England towns, to repair highways, streets, or bridges within their limits, and they are not obliged to do so, unless by force of statute. Even when the legislature enjoins upon corporations of this character the duty to make and repair roads, streets, and bridges, and confers the power to levy taxes therefor, the general tenor of the decisions is to treat this as a public, and not a corporate, duty, and to regard such corporations, in this respect, as public or state agencies, and not liable to be sued civilly for damages caused by the neglect to perform this duty, unless the action be expressly given by statute It is said for the plaintiff that the legislature, by section 50 of the act entitled 'An act concerning roads and highways in Contra Costa county' (Stats. 1875-76, p. 237), has made that county responsible in damages for injuries resulting from defective bridges therein. The section reads as follows: 'The county is responsible for providing and keeping passable and in good repair bridges and all public highways; and the supervisors must appoint semi-annually a special meeting, at which the road overseers, on days set apart for their respective districts, to hear highway and bridge reports and complaints from officers and citizens, when such orders must be made and such action had regarding the same as the public welfare demands.' It is not an easy matter to say exactly what this language does mean, but we are inclined to think that its effect, which is in harmony with previous provisions of the act, simply is to put upon the county, through its supervisors and road overseers, the responsibility and duty of keeping passable and in good repair all bridges and public highways within the county. It certainly does not say that the county shall be responsible in damages for a failure to keep the bridges in repair, ⁴⁰² nor, in our opinion, is such the effect of the language used." If the language in the act there quoted is insufficient to impose a liability upon the county for injuries caused by a defective bridge, the provisions of our statute are clearly insufficient. The legislature not having, in

terms, imposed this liability upon counties, we must, under the great weight of authority, hold that no such liability exists in this state.

The order of the circuit court sustaining the demurrer is affirmed.

COUNTIES—LIABILITY FOR NEGLIGENCE.—A county is not liable for injuries caused by a defective bridge, in the absence of a statute creating such liability, either expressly or by necessary implication: *Heigel v. Wichita County*, 84 Tex. 392; 31 Am. St. Rep. 63, and note. At common law an action does not lie against a county; and, in the absence of some constitutional or statutory provision, counties are to be treated as political divisions of the state, created for convenience and not liable for damages caused by the neglect of their officers or agents: *Tyler v. Tehama County*, 109 Cal. 618. For a further discussion of this subject, see the notes to *Rohrbough v. Barbour County Court*, 45 Am. St. Rep. 927; *White v. County of Bond*, 11 Am. Rep. 66; *Lehigh County v. Hoffont*, 2 Am. St. Rep. 591, and the extended note to *Gilman v. County of Contra Costa*, 68 Am. Dec. 291.

ADAMS AND WESTLAKE CO. v. DEYETTE.

[5 SOUTH DAKOTA, 412.]

APPELLATE PRACTICE—FINDINGS—PRESUMPTION.—If the evidence upon which a referee bases his findings of facts is not preserved in the bill of exceptions, and its insufficiency to sustain such findings is not assigned as error, it must be presumed on appeal that the findings of fact fully accord with, and are sustained by, the evidence.

APPELLATE PRACTICE—FINDINGS TO SUPPORT JUDGMENT.—A judgment fully sustained by findings of fact and conclusions of law cannot be disturbed on appeal on the ground that a referee has failed to find on all of the issues raised by the pleadings, when no findings of fact were presented by the appellant, and no request made for additional or more specific findings, or different conclusions of law.

CORPORATIONS—INSOLVENT—RIGHT TO BORROW MONEY TO PURCHASE STOCK.—An insolvent corporation cannot borrow money with which to purchase its own stock, and give to the party advancing the money a preference over other bona fide creditors and defeat their claims by confessing judgment in his favor, when he has actual knowledge of the purpose for which the money was borrowed.

CORPORATIONS.—PURCHASE OF SHARES OF STOCK IN ITSELF by a corporation is against public policy, and ultra vires, whenever such purchase diminishes its ability to pay its debts, or lessens the security of its creditors.

F. A. Luse, for the appellants.

J. H. Perry, for the respondent.

421 FULLER, J. From the uncontroverted averments of the complaint and from the findings of the referee we obtain the fol-

lowing facts: On the ninth day of May, 1888, the Hicks-Trask Hardware Company, a corporation, being insolvent, confessed judgments against itself in favor of each of the defendants C. E. Deyette and W. W. Lewis, amounting to \$1,469.26, the Deyette judgment being for \$649.84, and the Lewis judgment for \$819.42. After entry of the above judgments, and on the twelfth day of the same month, said defendant confessed numerous other judgments, among which there was one in plaintiff's favor for \$1,319.47. Executions issued in succession, and the property of the defendant corporation was levied upon in the order above indicated, and in the order in which the respective judgments were entered and docketed, and the property of the corporation was found to be insufficient to satisfy the judgments which preceded that of the plaintiff. The referee made, among others, the following findings of fact: "14. That the consideration of the confession of judgment in favor of Charles E. Deyette was as follows: \$514.60, money loaned to the Hicks-Trask Hardware Company on January 20, 1888, was borrowed by said company for the purpose of using the same to purchase the stock of said company held by Trask, and on account of the indebtedness of \$134.22, owing to said Deyette by said corporation for work and labor done by said Deyette for said corporation; 15. That the defendant Deyette had actual knowledge of the purpose and intent of the said corporation to use the same in the purchase of stock; 16. That the consideration of the judgment of the defendant Lewis was \$514.60, money loaned to the said corporation by him about January 20, 1888, and borrowed by ^{and} said company for the purpose of using the same in the purchase of stock of said corporation held by Trask, and the sum of \$304.07, due Lewis from said corporation on account of services rendered by Lewis to said corporation; 17. That defendant Lewis knew of the purpose and intent for which said money was borrowed by said corporation; 18. That the defendant Lewis, at the time of and prior to the making of said confession of judgment to himself, was a director of said corporation, and secretary thereof, and signed said confessions as secretary on behalf of said corporation; 19. That the defendant Deyette, at the time of said confessions of judgment by said corporation to himself, was not a director; 20. That no written consent of the stockholders of the Hicks-Trask Hardware Company was ever had to the purchase of stock from Trask by said corporation; 21. That on May 12, 1888, executions were issued from the district court upon the said judgment of said plaintiff to the sheriff of Brown county, in which said defendant the Hicks-

Trask Hardware Company had its place of business; 22. That executions issued from the clerk of the district court of Brown county, on each of the judgments of the defendants Foster, Deyette, and Lewis, and were by him levied on the personal property of the Hicks-Trask Hardware Company, and all thereof, and the said sheriff sold the same, and holds the money realized from said sale, to be applied on said executions according to the decree of this court; 23. That the proceeds arising from said sale is not sufficient to pay the judgments against the Hicks-Trask Hardware Company prior to the judgment of plaintiff." Upon these findings of fact the following conclusions of law were based: "2. That the judgment of the defendant Deyette, as to the sum of \$514.60, money loaned to the said corporation for the purpose of purchasing stock, is invalid, for the reason the Hicks-Trask Hardware Company, and the officers thereof, had no power to borrow money for the purchase of its stock, and the defendant, having loaned said money knowing of the illegal purpose for ⁴²³ which it was to be used, cannot recover the same from said corporation; 3. That as to the sum of \$134.25, included in the judgment of said Deyette, the same is valid, and should stand and be enforced for said sum of \$134.25; 4. That judgment of the defendant Lewis is invalid for the reason that the confession of the same, made by him and obtained by him when he was a director of said corporation, was an illegal preference as against the creditors of said corporation, and that the relief prayed by plaintiff should be granted as against said Lewis; 5. I further find, as to the judgment of the defendant Lewis, that as to the sum of \$514.60 it is invalid, for the reason that as to said amount the consideration was for money loaned to said corporation by Lewis for the illegal purpose of purchasing stock in said corporation." Judgment by the court was accordingly entered on motion of plaintiff's counsel, and defendants Deyette and Lewis appeal therefrom.

The record before us presents questions of law only, and for the purpose of this appeal it will be presumed that the findings of fact fully accord with, and are sustained by, the evidence, as the same was not preserved in a bill of exceptions, and the insufficiency of the evidence to sustain such findings is not assigned as error: *Barnard Mfg. Co. v. Galloway*, 5 S. D. 205; 58 N. W. Rep. 565; *Pierce v. Manning*, 2 S. Dak. 517; *Hawkins v. Hubbard*, 2 S. Dak. 631. Counsel for appellants maintains that the conclusions of law, and the judgment entered thereon, are not sustained by the findings of fact, and that the court erred in declaring as to the plaintiff the entire judgment of the defendant Lewis fraudulent

and void, and the judgment of defendant Deyette fraudulent and void as to the sum of \$514.60; and that the referee failed to make findings upon a number of the material issues raised by the pleadings and essential to a determination of the rights of the parties. No findings of fact were presented to the court by counsel for defendants, and no request was made for more specific or additional findings, and appellants are not in a position to demand a reversal of the ⁴²⁴ judgment for that reason, in the absence of anything to indicate that they were prejudiced thereby, and in case it should be found that the findings are sufficient to support the judgment, notwithstanding such omissions: *Burnap v. National Bank*, 96 N. Y. 125; *Thomson v. Bank of British North America*, 82 N. Y. 1; *Conklin v. Hinds*, 16 Minn. 457; *Foster v. Voigtlander*, 36 Kan. 572.

The pleadings in this case raised an issue of fraud on the part of the corporation in purchasing its own stock, in borrowing money for such purpose without authority, and in confessing judgments upon obligations thus incurred. The referee found, as matters of fact, that defendants Deyette and Lewis had actual knowledge, at the time they loaned the money, that the same was to be used in the purchase of the Trask stock, and that the defendant Lewis was a director and secretary of said corporation at and prior to the confession of these judgments, and as such secretary joined in their execution on behalf of said corporation, and at a time when he was chargeable with a knowledge of its insolvency and inability to pay its obligation to this plaintiff. In the absence of an opportunity to examine the evidence, and without indulging unwarranted presumptions in favor of the correctness of the conclusions of law and judgment of the court, we are disposed to believe that the action of the corporation and its officers, under the circumstances, was unwarranted in law, and constituted a fraud upon the plaintiff, and justified the court in declaring the judgments of defendants void, so far as they interfere with the rights of this plaintiff. The property and capital of a corporation gives it financial standing, because it is primarily liable for its debts. Persons extending credit to such corporations do so upon the faith that its officers and agents will conduct its affairs in a manner consistent with business principles; and when such officers devote the corporate assets to their individual use and benefit, to the exclusion of creditors, courts without hesitation characterize such acts, as to creditors, fraudulent and void. Independently of the question of actual fraud in the ⁴²⁵ case under consideration, the immediate effect of the purchase of the

Trask stock at a time when the corporation was financially embarrassed, if not, indeed, insolvent, was to increase its liability, without adding anything to its resources to which plaintiff could look for the security or payment of its claim; and such conduct is contrary to the spirit, if not the letter, of our statute, and is not upheld by the courts: *Comp. Laws*, secs. 2917, 2928. In *Currier v. Lebanon Slate Co.*, 56 N. H. 262, the court says: "The funds of an insolvent corporation cannot be taken to buy a portion of its capital stock. . . . It would be grossly inequitable to the other stockholders, and a fraud upon creditors." From *Coppin v. Greenlees etc. Ry. Co.*, 38 Ohio St. 275, 43 Am. Rep. 425, we quote the following: "The doctrine that corporations, when not prohibited by their charter, may buy and sell their own stock, is supported by a line of authorities; but, nevertheless, we think the decided weight of authority, both in England and in the United States, is against the exercise of the power, unless conferred by express grant or clear implication. . . . It is true, however, that in most jurisdictions where the right of a corporation to traffic in its own stock has been denied an exception to the rule has been admitted to exist, whereby a corporation has been allowed to take its own stock in satisfaction of a debt due to it. This exception is supposed to rest upon a necessity which arises in order to avoid loss." If a corporation, to the injury of creditors, can borrow money for the purchase of one share of its stock, or the stock held by one member, it can borrow money with which to purchase the shares of all its members, and thus destroy its very existence, as no corporation like the defendant can have an existence in this jurisdiction without stock and without stockholders. The doctrine is well established that a purchase of shares in itself by a corporation is against public policy, and *ultra vires*, whenever such purchase diminishes its ability to pay its debts, or lessens the security of its creditors: *German Sav. Bank v. Wulfekuhler*, 19 Kan. 60; *Gill v. Balis*, 72 Mo. 424; *Barton v. Port Jackson etc. Plank Road Co.*, 17 Barb. 397; *Clapp v. Petterson*, 104 Ill. 26; 1 *Spellman on Private Corporations*, 168, and cases there cited. By confessing judgments when insolvent, and for debts incurred in the purchase of its stock without authority, and in favor of the defendants, who had actual knowledge at the time of loaning the money that the same was to be thus used, the corporation attempted to give such defendants a preference over other creditors, and to defeat the collection of the plaintiff's claim, which was confessedly valid and subsisting. Without going into an extended discussion concerning the powers of and limitations upon corporations, we

are satisfied that the judgment should be sustained upon the broad principles of justice and equity, and upon the doctrine that an insolvent corporation is without power to prefer its creditors in cases like the present; and, in our opinion, its action in that regard was fraudulent in law, and ineffectual for every purpose.

In *Ford v. Plankinton Bank*, 87 Wis. 363, Newman, J., speaking for the court, says: "The law applicable to the question is well settled. The corporation, being only a fictitious body, can act only through agents, called 'directors.' The directors manage the business for the stockholders. But when insolvency of the corporation happens, then the duty and functions of the directors are changed. Then they become trustees for the creditors of the corporation of all the corporate property and rights. They are trustees for all creditors, and are bound to preserve and administer all the corporate property in the interest impartially of all the corporate creditors. Being the trustees of all the creditors, they are incapable of making any preference of their own claims, or of giving preference to the claim of any creditor." While the defendant Deyette was not a director at the time judgment was confessed in his favor, he had been in the employ of the corporation, and had actual knowledge, at the time he loaned the money, that the same was being borrowed for the purpose of buying the stock of the corporation; and, in the absence of a finding that he actually knew that the written consent of the directors had not⁴²⁷ been obtained, as required by statute, he is charged with a knowledge of the law requiring such consent, and is presumed to have known that the purchase was being made without authority. In any event, he was in possession of sufficient facts to put him on inquiry, which, if prosecuted in good faith, would have placed him in full possession of such knowledge.

In our opinion, the judgment is sustained by the findings of fact, and, as the judgments of defendants as confessed by the corporation are fraudulent and void as to this plaintiff, no rights can exist under them antagonistical to plaintiff, and the judgment of the trial court is affirmed.

APPEAL—REVIEW OF FINDINGS.—A finding of fact made by a jury or trial judge will not be disturbed by the appellate court if it is supported by competent evidence: *Edwards v. Reld*, 39 Neb. 645; 42 Am. St. Rep. 607, and note.

CORPORATIONS—POWER OF TO PURCHASE THEIR OWN CAPITAL STOCK.—The purchase of its own stock by a corporation is ultra vires and invalid as an attempt to reduce the capital of the company, and does not relieve the selling shareholder from liability for his share in the settlement of the debts of the company on a winding up of

its affairs: *Extended note to Commercial Nat. Bank v. Burch*, 33 Am. St. Rep. 339.

CORPORATIONS—INSOLVENCY—RIGHT TO PREFER CREDITORS.—An insolvent corporation may dispose of its property in good faith to pay or secure its debts, even though some creditors are given a preference over others: *Illinois Steel Co. v. O'Donnell*, 156 Ill. 624; 47 Am. St. Rep. 245; but see *Conover v. Hull*, 10 Wash. 673; 45 Am. St. Rep. 252, and *extended note*, in which case it was held that insolvent corporations have no right to make preferences between their creditors.

CARTER v. THORSON.

[5 SOUTH DAKOTA, 474.]

CONSTITUTIONAL LAW—STATE INDEBTEDNESS.—Under a statute directing the secretary of state, as ex officio commissioner of public printing, to advertise for bids therefor and to make contracts with the best and lowest bidders for doing such printing as the state may require, a contract made by him for such purpose does not incur an indebtedness on the part of the state, within the meaning of a constitutional provision prohibiting the incurring of state indebtedness, "except in pursuance of an appropriation for the specific purpose first made."

CONSTITUTIONAL LAW—STATE INDEBTEDNESS.—The legislature has supreme power to make appropriations of state money for the payment of state indebtedness, except as prohibited by the constitution of the state.

CONSTITUTIONAL LAW—STATE INDEBTEDNESS.—A constitutional provision prohibiting the incurring of state indebtedness, "except in pursuance of an appropriation for the specific purpose first made," simply confines the creation of such indebtedness to such subjects and to such amounts as are expressly approved by that department of the government which is required to provide for its payment.

CONSTITUTIONAL LAW—STATE INDEBTEDNESS.—A constitutional provision prohibiting the incurring of state indebtedness, "except in pursuance of an appropriation for the specific purpose first made," does not prevent the legislature from incurring, or directing the immediate incurring of a state indebtedness for the usual and current administration of state affairs, without a specific appropriation first being made therefor.

J. W. Carter, for the petitioner.

C. I. Crawford, attorney general, and J. L. Pyle, for the respondent.

⁴⁷⁵ **KELLAM, J.** This is an application to this court for a writ of prohibition enjoining defendant, as secretary of state and ex officio commissioner of public printing, from letting contracts for the public printing for the state under chapter 99 of the laws of 1891. It is unnecessary to refer in detail to the statements of the petition for this writ, for it is conceded by both sides that the allowance or disallowance of the writ must depend upon

whether, under our constitution, the legislature can empower the secretary to make such contract until an appropriation is made to pay for the work which may be done under it. The law referred to divides the public printing of the state into five classes, and authorizes the secretary of state, as ex officio commissioner of public printing, to advertise for proposals to do the same and to make contracts for such work with the best and lowest bidders. The five classes are as follows: "1. Printing and binding all bills for the two houses of the legislature and such resolutions, petitions, and memorials as are required to be printed for daily use of the legislative assembly; 2. Printing and binding the journals of the two ⁴⁷⁶ houses of the legislature and such reports, communications, and other documents as enter into and make up the journals; 3. Printing and binding of reports of state officers, of penal and charitable, educational and other public institutions and other documents ordered by the legislature, together with the executive documents and legislative manual; 4. Printing and binding general laws and joint resolutions, revised codes, and supreme court reports; 5. Printing of circulars and blanks for state officers and all other printed matter not in pamphlet form and not included in the foregoing classes." The secretary has duly advertised and received and opened bids, and, being about to make contracts with the successful bidders, this writ of prohibition is sought, forbidding the making of such contracts, on the sole ground that no "appropriation for the specific purpose" of meeting the expense of such printing having been made, the secretary could not, without violating the express injunction of the constitution, make such contracts on the part of the state. The constitutional prohibition relied upon by plaintiff is contained in section 9, article 11, of the constitution, and is as follows: "No indebtedness shall be incurred or money expended by the state, and no warrant shall be drawn upon the state treasurer, except in pursuance of an appropriation for the specific purpose first made. The legislature shall provide by suitable enactment for carrying this section into effect."

It is conceded that the secretary is proceeding in strict pursuance of the terms of the law, but, as already intimated, plaintiff's contention is, that to make such enactment a valid operative law, carrying authority to the secretary, was beyond the power of the legislature, unless, prior to or simultaneously with its passage, they also make an appropriation for the specific purpose of defraying any indebtedness that might be incurred under it; and so an important question is, Has the legislature, by this law,

attempted to empower the secretary to incur an indebtedness on the part of the state?

⁴⁷⁷ The law, by section 2, fixes a schedule of maximum prices for the several kinds of work enumerated in the five classes. Section 3 makes the secretary ex officio commissioner of public printing, with power to supervise and measure the work, and adjust the accounts for doing the same; section 4 requires him to advertise for bids or proposals to do the work covered by the five classifications, and to make contracts therefor with the lowest and best bidders; and section 5 provides that on the assembling of the legislature he shall submit to that body estimates of the probable cost of the printing for the ensuing two years. The purpose of the law is plain, and its procedure orderly and businesslike; and neither should be defeated, unless in contravention of the rule of the constitution. The objection is, and probably can be urged, only as to the work included in the first, second, and fourth classes, that covered by the third and fifth classes being provided for in the general appropriation act of 1893, except as to the item of supreme court reports, which will be specially noticed later. It will thus be seen that the work, the payment for which no appropriation has been made, is that which is to come immediately and directly from the legislature next to meet; but neither as to this, nor that of either of the other classes, does the contract which the secretary is authorized to make assume to create an indebtedness against the state. It simply determines and provides who shall do, and be entitled to do, the work, in either class, that may be required, and what prices shall be paid for it if done. The making of such a contract does not incur an indebtedness. We are referred to no constitutional or statutory requirement that the reports of state officers, or the other items enumerated in classes 3 and 5, shall be printed; and surely the legislature may do as it pleases about printing its bills introduced and its daily journals, except as the latter are required by the constitution to be published "from time to time." This provision, being constitutional, would not yield to the requirement for an antecedent appropriation. The legal effect of ⁴⁷⁸ making such contract is hardly more than to designate a public printer of the different classes of work named. It confers upon the contractor the right to do all the work, at the prices designated, which the state requires of the kind designated in his contract, and upon the state the right to have so done such work as it may require. It thus fixes the relations of the parties, and their respective rights and duties, and may prove the foundation upon which an indebtedness growing out of fur-

ther facts may finally rest; but we do not think it incurs an indebtedness, within the meaning of this constitutional prohibition.

There is, however, another view which we are disposed to take of this constitutional provision. The form of this prohibition is very suggestive of at least its primary purpose and scope. No indebtedness must be incurred, unless in pursuance of an appropriation previously made. Does this mean that the legislature itself can involve the state in no indebtedness for any purpose, unless, before doing so, it has made an appropriation for that specific purpose? Might the secretary of state, or an employee of the legislature, properly ignore a legislative direction, legal in form, to supply their chambers with thermometers, or clocks, or window shades, or ventilating appliances, because no appropriation for the same had first been made? With the legislature rests the right and the duty of determining, within constitutional limits, when, and for what purposes, the public moneys of the state shall be paid out. Within such limits their judgment is supreme. What they approve and appropriate for must be paid, and, except as provided in the constitution, nothing else can be paid. In this respect all other departments and agents of the state are subordinate to them. We think the primary thought and purpose of this provision were to prohibit any other department, officer, or agent of the state from involving the state in any expense or indebtedness which the legislature had not previously approved and authorized by an appropriation. It was intended to keep ⁴⁷⁹ the indebtedness of the state, and the power to incur indebtedness, strictly within and under the control of that department which would be required to provide for its payment. It was not only appropriate and reasonable, but apparently requisite, that the legislature, to which must be looked for the means to meet indebtedness, should be allowed to control the making of indebtedness. The closing sentence of the section emphasizes this thought: "The legislature shall provide by suitable enactment for carrying this section into effect." It would appear that the object of the provision which was immediately in view by the makers of the constitution was thus to be secured, and the prohibition made practically effective, by means of legislation. But the legislature could provide no enactment which would be a check upon or control itself, for what it did or passed it could at any time undo or repeal, either expressly or by implication. The legislature showed its understanding of the meaning of this section, and of its duty under it, by enacting chapter 111 of the laws of 1891, making it a misdemeanor for any state officer, or other agent of the state, "to create,

or attempt to create, any indebtedness against the state without express authority so to do." Acting upon this theory, and within the limits of their constitutional power, as they evidently thought and as we think, they expressly and specifically authorized and directed the secretary of state to make a contract for a year with the best and lowest bidders for such public printing as the state might require, postponing the making of a specific and sufficient appropriation therefor until the indebtedness should be actually created, and its amount known to them. We think the long term contract which the legislature authorized the secretary to make for the publication of the reports of this court involves the same question. By express direction of the legislature, the contract runs until October 1, 1898, and yet no appropriation was made, except for the then ensuing two years. The fact that a confessedly partial and inadequate appropriation was made would not, it seems to us, satisfy ⁴⁸⁰ the principle upon which plaintiff's contention must rest, to wit, the unconstitutionality of the incurrence of an indebtedness no provision for the payment of which had first been made. So far as the particular question here discussed is concerned, we entertain no doubt of the validity of either contract. Without undertaking to say that under no circumstances could this provision be held to affect or control the power of the legislature to incur, or to direct the incurrence of, indebtedness against the state—a question we leave to be discussed and decided when fairly presented—we are entirely satisfied that the prohibition was never intended to, and consequently does not, forbid or prevent the legislature from immediately authorizing or directing the incurring of an indebtedness in the current and usual administration of state affairs. This has been the view of the legislature since the organization of the state, and at every session it has directed the purchase of articles of convenience on the credit of the state without an appropriation having first been made. To hold that this section of the constitution prohibits the legislature from doing this would, we think, be to construe and use it as it was never intended to be construed and used, but the interpretation which would allow indebtedness to be so incurred would certainly allow the making of the contracts challenged by plaintiff.

Application for a peremptory writ of prohibition is denied.

LEGISLATURE—APPROPRIATIONS—CONSTITUTIONAL LAW. The constitutions of the different states very generally provide that money cannot be drawn from the treasury except in pursuance of an appropriation made by law: *Extended note to Carr v. State*, 22 Am. St. Rep. 638.

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MEUER v. CHICAGO, MILWAUKEE AND ST. PAUL RY. CO.

[5 SOUTH DAKOTA, 568.]

CARRIERS—CONTRACTS OF CARRIAGE—CONFLICT OF LAWS.—A contract made in one state, between a railroad company and a shipper for the transportation of freight from a point in that state to a point in another state, and limiting the liability of the carrier, must be interpreted according to the law of the state where made, but if an action upon such contract is brought in another state, the court does not take judicial notice of the law of the former state, and it must be alleged and proved the same as any other fact.

CARRIERS—CONTRACTS LIMITING LIABILITY—CONFLICT OF LAWS.—If a contract is made in one state, between a carrier and a shipper, for the transportation of freight from a point in that state to a point in another state, and an action is brought upon the contract in the latter state, the court presumes, in the absence of evidence, that the law of the place where the contract is made is the same as the state where the action is brought, and the contract must be interpreted according to the law of the latter state.

CONTRACTS—CONFLICT OF LAWS—PRESUMPTION.—If an action is brought in one state upon a contract made in another state, the court where the action is brought presumes the law of both states to be the same.

CARRIERS—CONTRACTS LIMITING LIABILITY.—A common carrier may limit his liability by express contract, except as to gross negligence, fraud, or willful wrong of himself or his servants.

CARRIERS—CONTRACTS LIMITING LIABILITY.—A contract between a carrier and a shipper, providing for the transportation of livestock at a reduced rate and stipulating that the shipper shall be entitled to pass free on the train to care for, feed, water, load, and unload his stock, at his "own risk of personal injury, from whatever cause," relieves the carrier from all liability for any injury to the shipper while a passenger or engaged in the execution of the contract, not caused by the gross negligence, fraud, or willful wrong of the carrier or his servants.

CARRIERS—CONTRACTS LIMITING LIABILITY.—A contract between a carrier and a shipper, providing for the transportation of livestock, at a reduced rate, and stipulating that the shipper shall be entitled to pass free on the train to care for, load, and unload his stock, at "his own risk of personal injury, from whatever cause" relieves the carrier from liability for personal injury received by the shipper while unloading his stock at the place of destination after he has left the cars as a passenger, although such injury is caused by the ordinary negligence of the carrier or his servants. In such case the carrier can be held liable only for gross negligence, fraud, or willful wrong of the carrier or his employees.

J. H. Perry and H. H. Field, for the appellant.

J. Bennett and W. S. Glass, for the respondent.

⁵⁷² **CORSON, P. J.** In March, 1887, the plaintiff shipped from Avoca, Wisconsin, a carload of livestock and emigrant movables over defendant's road, consigned to himself at Bristol, Dakota territory. The car containing the freight arrived at Bristol, and the plaintiff, while removing the livestock from the car, was

injured, to recover for which this action is brought. The livestock and movables were shipped under a special contract, by the terms of which the plaintiff was permitted to pass on the train to care for and look after his stock. The material parts of the contract, so far as they affect this case, are as follows:

Exhibit A.

"Chicago, Milwaukee & St. Paul Railway. Livestock Contract. . . . Persons in charge of livestock will be passed on the train with, and to care of it, as follows; One man with two or three cars, two men with four or seven cars, three men with eight cars, which is the maximum number that will be passed for one owner. Passes will be furnished, in manner provided on back of this contract, to persons, who, as above, may have been in charge of two or more ⁵⁷³ cars of stock. No return passes given on westbound shipments. No person will be passed with one car of livestock, except that one car of horses or mules or emigrant movables containing livestock will entitle the owner or man in charge to pass one way on the same train, to take care of it. . . . Such entry of persons in charge and certificate of billing agent to that effect will be the authority of conductors to pass them with the stock. All persons are thus passed only at their own risk of personal injury, from whatever cause.

A. C. BIRD,

"General Freight Agent."

"Received of Anton Meuer, one car livestock and emg. mov. as per margin, to be delivered at Bristol, Dakota, station at special rates, being \$45.00 per car; which stock is to be loaded and unloaded, watered and fed by said Anton Meuer, or his agents. . . . The Chicago, Milwaukee & St. Paul Railway Co., by D. Bohan, Agent. Anton Meuer, Shipper." Indorsement on back: "Parties actually in charge of and accompanying the within stock must write their own name in ink here. [Signed] Anton Meuer."

The contract was introduced in evidence by the plaintiff. At the close of the plaintiff's evidence, and again at the close of all the evidence in the case, the defendant moved the court to instruct the jury to return a verdict for the defendant, on the ground that, by the terms of the contract, the plaintiff assumed all risk "of injury, from whatever cause," and could not, therefore, recover in this action. These motions were denied, and exceptions duly taken.

The learned counsel for the appellant contend that, under the terms of the contract signed by the plaintiff, he agreed to assume all the risk of personal injury, from whatever cause; that such a contract was authorized by the laws of this state, and was a legal,

valid, and binding contract, exonerating the defendant from all liability for personal injuries to the plaintiff, from whatever cause received. They further contend that the contract, though made in Wisconsin, would nevertheless be ⁵⁷⁴ interpreted by the laws of this state, in the absence of evidence as to the laws of Wisconsin in relation to the contracts of common carriers, and that the law of Wisconsin will be presumed to be the same as the law of this state relating to such contracts. The contract in this case, having been made in Wisconsin, may be regarded as a contract of that state, and to be interpreted in accordance with the laws of that state: *Liverpool etc. Co. v. Phenix Ins. Co.*, 129 U. S. 397; *Hazel v. Chicago etc. Railroad Co.*, 82 Iowa, 477. This court, however, will not take judicial notice of the laws of another state. Such laws must be alleged and proven on the trial, the same as any other facts in the case. No such evidence appears from the record in the case to have been given. In the absence of such evidence, this court will presume that the law of Wisconsin as to the right of a common carrier to limit the liability of himself or servants is the same as the law of this state upon that subject: *Sandmeyer v. Dakota etc. Ins. Co.*, 2 S. Dak. 346. There is some conflict in the decisions of the different courts upon the question as to whether or not the court will presume that the law of another state is the same as the statute law of the state where the action is tried, but the weight of authority seems to support this view. In the case of *Palmer v. Atchison etc. R. R. Co.*, 101 Cal. 187, decided by the supreme court of California in the present year, the court says: "The cause, so far as can be determined from the record, was tried upon the theory that the law of California is applicable. There is no suggestion that the law of Missouri, where the contract for transportation was made, was put in evidence. Under such circumstances, we are not at liberty to assume as a fact that the state of Missouri has a special statute on the subject, but must presume, as a question of law, that the law of that state is the same as our own: *Norris v. Harris*, 15 Cal. 226; *Hill v. Grigsby*, 32 Cal. 56; *Taylor v. Shew*, 39 Cal. 540; 2 Am. Rep. 478; *Brown v. San Francisco Gaslight Co.*, 58 Cal. 426; *Marsters v. Lash*, 61 Cal. 623; *Shumway v. Leahey*, 67 Cal. 458. Judged ⁵⁷⁵ by our own statute, and by the lawful limitation which defendant might and did embrace in its bill of lading, it was bound to transport to Albuquerque, and deliver to the Atlantic & Pacific connecting road, within a reasonable time, plaintiff's goods": See, also, 19 Am. & Eng. Ency. of Law, 47; *Neese v. Farmer's Ins. Co.*, 55 Iowa, 604; *Walsh v. Dart*, 12 Wis. 635; *Hadley v. Gregory*, 57 Iowa, 157.

The first question, then, to be determined is, What is the law of this state as to the right of a common carrier to limit his liability? for the contract in this case must be interpreted by our law upon this subject. There is a direct conflict in the decisions of the various courts upon the question of the right of common carriers to limit their common-law liability for the negligence of themselves and their servants by special contracts. In *Railroad Co. v. Lockwood*, 17 Wall. 357, the supreme court of the United States held that common carriers do not possess the power to limit their liability, even by express contract, for the negligence of themselves or their servants; and this view was affirmed in *Liverpool etc. Co. v. Phenix Ins. Co.*, 129 U. S. 397. On the other hand, the court of appeals of New York, in a number of cases, has held that common carriers possess such power. This doctrine is clearly laid down in *Bissell v. New York etc. R. R. Co.*, 25 N. Y. 442, 82 Am. Dec. 369, and affirmed by that court, after the decision in *Railroad Co. v. Lockwood*, 17 Wall. 357, in *Mynard v. Syracuse etc. R. R. Co.*, 71 N. Y. 180; 27 Am. Rep. 28. This court, however, is not called upon to decide between these conflicting opinions, as the code of this state has settled the question within this jurisdiction: *Hartwell v. Northern etc. Express Co.*, 5 Dak. 463; *Hazel v. Chicago etc. Co.*, 2 Iowa, 477; *Kirby v. Western Union Tel. Co.*, 4 S. Dak. 105; 46 Am. St. Rep. 765. The sections of the code bearing upon this question constitute sections 3881 to 3888 of the Compiled Laws, and read as follows: "Everyone who offers to the public to carry persons, property, or messages is a common carrier of whatever he thus offers to carry." "Sec. 3886. The obligations of a common carrier ⁵⁷⁶ cannot be limited by general notice on his part, but may be limited by special contract." "Sec. 3887. A common carrier cannot be exonerated, by any agreement made in anticipation thereof, from liability for the gross negligence, fraud, or willful wrong of himself or his servants." "Sec. 3888. A passenger, consignor, or consignee, by accepting a ticket, bill of lading, or written contract for carriage with a knowledge of its terms, assents to the rate of hire, the time, place, and manner of delivery therein stated. But his assent to any other modification of the carrier's rights or obligations contained in such instrument can only be manifested by his signature to the same." By section 3886 it will be noticed that common carriers may, in this state, limit their liability by special contract; and by section 3887 an exception is made in cases of "gross negligence, fraud, or willful wrong." It would seem, therefore, that, subject to the exceptions specified, a common carrier by the laws of this state, may,

by special contract, limit his common-law liability in all cases not included in the excepted cases. This case seems to have been tried, and the jury instructed, upon the theory that the defendant, notwithstanding the stipulations in the contract, was liable for the ordinary negligence of itself and servants, and the question of gross negligence is eliminated from the case. The record discloses the fact that the defendant's counsel requested the court to instruct the jury that there was no evidence of gross negligence, and it was refused, the court stating "that he did not submit the question of gross negligence to the jury, but simply the question of ordinary negligence." We shall assume, therefore, for the purpose of this decision, that there was no evidence of gross negligence, fraud, or willful wrong on the part of the defendant or its servants, and that the verdict of the jury was based entirely upon the theory that the injury to the plaintiff was caused by the ordinary negligence of the defendant or its servants. Taking this view of the case, was the defendant entitled to have his motion for an instruction to the jury to find for the defendant granted ⁵⁷⁷ at the close of the plaintiff's evidence? As before stated, the special contract was introduced in evidence by the plaintiff, and was, therefore, a part of the plaintiff's case. It appears from this contract between the parties that defendant, in consideration of the plaintiff's stipulations to load and unload the car, and feed and water the livestock on the trip, agreed to transport the car of stock and household movables at a reduced rate, and to pass the plaintiff on the same train to care for and look after the livestock, but at plaintiff's "own risk of personal injury, from whatever cause."

Assuming that plaintiff's injuries occurred while such passenger upon the train, and that they occurred from the ordinary negligence of the defendant or its servants, the limitation in the contract would seem to be such a one as is permitted by the statute, and would exonerate the defendant from liability for the injuries plaintiff sustained, the contract being a special contract, and signed by the respective parties, as required by the statute. The terms of the contract are clearly stated. There is no ambiguity in its stipulations, and the intention of the parties is clearly ascertainable from the terms of the contract. The plaintiff was, by the terms of the contract, to be carried upon the same train with his livestock and movables, without extra charge, to care for and feed and water his stock, but at his own "risk of personal injury, from whatever cause." This contract the law permitted the parties to make. Section 3881 defines who are common carriers, and section 3886, in the same chapter, provides "that the obligations

of a common carrier may be limited by special contract." And section 3887 uses the same general term, "a common carrier," etc. Interpreting the contract by the law, it is difficult to perceive any valid reason for holding the defendant liable for plaintiff's injury. The contract, as we have seen, is one which the law permits the common carrier to make, and by its terms it clearly exonerates the defendant from liability for injuries caused by ⁵⁷⁸ the ordinary negligence of the defendant or its servants. The motion, therefore, should have been granted. The learned counsel for respondent contend that under the law of this state the contract is void. It is not claimed that the legislation of this state is not within the proper exercise of the legislative power, or is in violation of the organic act or the state constitution. But it is contended that under the common law a common carrier of passengers is required to exercise the utmost diligence and the highest degree of care and prudence in transferring passengers from one place to another by steam power, and that "there has never been any attempt to relax the rule requiring the utmost vigilance by the carriers of passengers in operating by this mode of conveyance." The requirement in this case being the most exact that the law imposes, no matter what the relation may be, any failure or omission of the person upon whom the duty rests is negligence, and this negligence is not subject to division into degrees; hence the courts hold that any negligence of a carrier of passengers is gross negligence. The counsel, after further argument, concludes as follows: "We therefore conclude, in view of the law, as established by the judgments of the courts, placing upon the carriers of persons the responsibility of exercising the greatest degree of care and vigilance in the conveyance of human beings, that section 3887 of the Compiled Laws does not relieve from responsibility the carriers of persons in cases where negligence is shown, even though the carrier has a pretended release from liability in the form of a special contract. That while the section apparently applies to common carriers in general, it must be limited in its operation to carriers other than those who engage in the transportation of persons." While it is true that the utmost care is required on the part of the carrier of passengers, and that such carrier is ordinarily liable for negligence, whether gross, ordinary, or slight, still there may be, in fact, degrees of negligence in the management of its business by itself or its servants; and it is ⁵⁷⁹ upon this theory that the legislature has deemed it proper to permit such carrier to limit its liability for ordinary or slight negligence, when, under the law, it would ordinarily be held for injuries to persons caused

thereby. The lawmaking power might properly permit special contracts exonerating such carriers from liability, when injury is caused to a person by ordinary or slight negligence, or even by gross negligence, if it deemed it proper. In New York, as we have seen, and other states, such contracts are permitted, and held valid, even without the aid of a statute. We are unable to discover any reason for holding that the lawmaking power may not make any provision governing the liability of common carriers, and authorizing them to limit their liability as it may deem proper.

It is further contended that the contract in this case is invalid, under the provisions of section 3578 of the Compiled Laws, which reads as follows: "All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." But the contract in this case is not a contract to violate any express law. It cannot be said that a contract permitted and sanctioned by express law is a contract to violate the law. If we are correct, the sections of the statute relating to common carriers permits common carriers of passengers, as well as common carriers of property, to make the contract in question, subject, of course, to the exceptions contained in the law. The argument of counsel would have much more weight as applied to carriers of freight than as applied to the carriers of passengers, as carriers of freight at common law were absolute insurers of the safe delivery of the property intrusted to them, except where the loss occurred "by the act of God, or the public enemy, or by their own decay from inherent infirmity, or by the fault of the owner thereof." Further exceptions are made in the carrying of live-stock not material now to be stated. If, ⁵⁸⁰ therefore, the contention of counsel is correct, the statute could have no effect, as there would be no class of carriers to which it would apply. We are of the opinion that the statute does apply to carriers of passengers as well as to carriers of freight, and we cannot assent to the contention of counsel for respondent that the contract in this case is void.

The counsel further contend that as the stipulation in the contract is general, and does not specifically limit the liability of the defendant to the negligence of itself or servants, such negligence is not included; in other words, the language of the stipulation, "risk of personal injury from any cause," does not include injury caused by the negligence of the defendant or its servants. There is force in this contention, and it has some support from the New

York decisions. The doctrine is thus stated in *Mynard v. Syracuse etc. R. R. Co.*, 71 N. Y. 180: 27 Am. Rep. 28: "When general words may operate without including the negligence of the carrier or his servants, it will not be presumed that it was intended to include it." But this doctrine has generally been applied to contracts by carriers of freight. And even in this class of cases, when there is nothing in the contract upon which the general words can operate, unless the negligence of the defendant or his servants is included, such negligence is included in the general words, "for whatever cause." This doctrine is illustrated in *Cragin v. New York Cent. R. R. Co.*, 51 N. Y. 61, 10 Am. Rep. 559, and *Holsapple v. Rome etc. R. R. Co.*, 86 N. Y. 275. In the former case the court says: "In this case the plaintiffs assumed and agreed to take the risk of injuries to the hogs in consequence of heat. Effect should be given to this stipulation. The parties must be held to have meant something by it. In consideration that the plaintiffs would assume and take certain risks, which would otherwise devolve upon the defendant, it agreed to carry at a reduced rate. If it be held that this stipulation simply exempts the defendant from liability for injuries to the hogs from heat without any fault on his part, then it gets nothing; for in such case, without the stipulation, it would not be responsible. ⁵⁵¹ Force and effect can be given to this stipulation only by holding that it was intended to exempt the defendant from negligence, in consequence of which the hogs died from heat. The judge at the trial, however, entirely ignored this special contract, and put the case to the jury upon the defendant's common-law responsibility, charging that it was liable if they found it guilty of negligence in the transportation of the hogs; and he refused to the defendant any benefit whatever from the special contract. In this I cannot doubt the learned judge erred." In the latter case the court says: "The doctrine of *Mynard v. Syracuse etc. R. R. Co.*, 71 N. Y. 180, 27 Am. Rep. 28, is decisive upon this question. It was there held that where general words limiting the liability of a carrier may operate without including his negligence or that of his servants, such negligence will not be within the exemption of the agreement. To this extent, at least, we all concur. However broad or general may be the language of the contract which does not specifically and in express terms release the carrier from the consequences of his own negligence, it will not effect such release, if the general words may operate without including such negligence. That is the case here. The precise injury might have occurred which actually happened without fault or negli-

gence on the part of the carrier. . . . It is in this respect that the present case differs from that of *Cragin v. New York etc. R. R. Co.*, 51 N. Y. 61; 10 Am. Rep. 559. In that case the injury resulted from the vitality of the animals, and their inherent nature and characteristics. For such injury the carrier was not liable at common law, and the general words of release and exemption could not operate at all, unless upon the negligence of the defendant. The case was decided upon that precise ground." In *Kenney v. New York etc. R. R. Co.*, 125 N. Y. 422, the rule was extended to a contract for the carriage of passengers, but under special circumstances. It was held in that case that the general clause in question was capable of another construction, as applied to the facts in that case, and the same rule was applied as in the ~~582~~ case of contracts for the carrying of freight. In this case there are no special circumstances taking the case out of the general rule, that in the case of a passenger the only basis of the carrier's liability is negligence, and such a stipulation in the contract would be deprived of all operation unless it would cover negligence. A carrier of passengers is not an insurer of the safety of the passengers as is a carrier of goods for the safe delivery of the goods. A carrier of passengers is only liable for negligence, and hence the stipulation in the contract has nothing to operate upon, unless negligence is included.

In the discussion thus far we have assumed that the plaintiff was injured while a passenger upon defendant's road. It is contended, however, by respondent, that he had ceased to be a passenger when the injury to him occurred, he having arrived at Bristol, the place of his destination, and left the car. It appears from the evidence that after plaintiff's car was sidetracked at the station, the plaintiff went to an hotel in Bristol to get lanterns and assistants to aid him in unloading his car; that he was absent a short time—how long does not appear, but evidently only for a short period—when he returned, and proceeded to unload his stock. While it may be true, as contended by respondent, that when an ordinary passenger arrives at his destination, and leaves the train and the depot, his relation to the carrier as passenger ceases, but when one sustains to the carrier the relation sustained by the plaintiff in this case, we think a different rule applies. Being required by his contract to load and unload his stock, we are of the opinion that by the terms of the contract it must be held to extend to the final unloading of the stock. The stipulation is not limited, but provides that "all persons are thus passed only at their own risk of personal injury, from whatever cause." This

would seem to include loading and unloading, as well as transportation in the train. The plaintiff was unloading the car, under the terms of the contract, when the injury occurred. To hold that he was acting under the contract in loading the stock, ⁵⁸³ but still absolved from the stipulations of the contract as to defendant's liability for injuries to him, would be giving to the contract a construction not warranted by its terms. The plaintiff was permitted to go on the train with, and to take care of, his stock, and he was in and about the car for that purpose when injured. In *Poucher v. New York etc. R. R. Co.*, 49 N. Y. 263, 10 Am. Rep. 364, the plaintiff was injured, before the train started from the depot, by a stick of wood thrown from the tender, and the court held that defendant was exempt from liability under its contract. In that case the court said: "The injury complained of was sustained by plaintiff while he was on the defendant's premises, moving about the train on which his animals were laden, for the purpose of taking care of them, and engaged in the performance of that duty. His only business there was to take charge of the stock in pursuance of the terms of the contract. The train was about starting, and he was to go in it according to the terms of the contract, being provided with a free pass for that purpose. The contract provided that he should go or send some person on the same train with the stock to take charge of it, who should be carried free of charge; and that such person so riding free should take all the risk of personal injury, from whatever cause, whether of negligence of the defendant or its agent, or otherwise. We do not think it necessary, to bring the plaintiff within the operation of the stipulation, that he should have been actually riding at the time of his injury. The train had been formed, and was about to start. The plaintiff was there, under the contract, as a passenger, furnished with a pass entitling him to ride free, and coming from the performance of the duties contemplated by his contract." We think that by a fair and reasonable construction of the contract the plaintiff, while unloading his stock, was within the terms of his contract, whether he was called a passenger or not. He was doing what the contract stipulated he should do—unloading his stock under the contract; and defendant's exemption from liability continued so long as the plaintiff continued to act ⁵⁸⁴ under the contract or the contract was in force. It was evidently the intention of the parties in entering into the contract that the plaintiff was to assume all risk for personal injury, from whatever cause, until the car was unloaded as provided in the contract.

There were a number of other questions discussed in the briefs of counsel and in the oral arguments, but, as these questions may not arise on another trial, we do not deem it necessary to discuss them. Our conclusion is, that under the contract construed by the law of this state and the record on this appeal, the motion of defendant that the court direct a verdict in its favor should have been granted. The judgment of the court below is therefore reversed, and a new trial is ordered.

CONTRACTS—CONFLICT OF LAWS—PRESUMPTION.—In the absence of proof, the statutory law of another state is presumed to be as in this: *Chapman v. Brewer*, 43 Neb. 890; 47 Am. St. Rep. 779, and note with the cases collected.

CARRIERS—POWER TO LIMIT LIABILITY FOR NEGLIGENCE. A common carrier cannot, by any special contract, exempt himself from liability for loss occasioned by negligence: *Georgia E. R. etc. Co. v. Keener*, 93 Ga. 808; 44 Am. St. Rep. 197, and note. A common carrier may, by contract, limit his common-law liability so far as is reasonable, but it is unreasonable to allow him to contract against his own negligence: *Davis v. Central etc. R. R. Co.*, 66 Vt. 290; 44 Am. St. Rep. 852, and note. It is contrary to public policy to permit a common carrier to stipulate for immunity from the consequences of his own negligence or that of his employees: *Willock v. Pennsylvania R. R. Co.*, 168 Pa. St. 184; 45 Am. St. Rep. 674, and note.

CARRIERS—DROVERS' PASSES—LIABILITY.—A drover riding on the defendant's railroad on a free pass, to take care of his stock, was killed by the defendant's negligence. The pass provided that he took his own risk of personal injury from any cause whatever; it was held that this did not prevent a recovery: *Carroll v. Missouri Ry. Co.*, 88 Mo. 239; 57 Am. Rep. 382, and extended note; *Ohio etc. Ry. Co. v. Selby*, 47 Ind. 471; 17 Am. Rep. 719. To the same effect see *Lawson v. Chicago etc. Ry. Co.*, 64 Wis. 447; 54 Am. Rep. 634. The contrary doctrine is maintained in *Poucher v. New York etc. R. R. Co.*, 49 N. Y. 263; 10 Am. Rep. 364, and extended note.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

BAMBERGER v. CITIZENS' STREET RAILWAY COMPANY.

[95 TENNESSEE, 18.]

NEGLIGENCE, CONTRIBUTORY, BURDEN OF PROVING.—It is not error to instruct the jury that the plaintiff must prove want of contributory negligence, where the circumstances are not such as to raise any presumption of due care on his part.

STREET RAILWAYS — NEGLIGENCE, CONTRIBUTORY, PRESUMPTION OF.—If a child is upon the tracks of a street railway, where it ought not to be at the time, and an injury occurs, in consequence of which it is killed, it is incumbent on the father suing as administrator of the child to recover compensation to show that its presence upon the track, or in a dangerous and exposed situation, was without negligence on its part or that of its custodian.

NEGLIGENCE, CONTRIBUTORY, WHAT IS.—If the custodian of a child permits it to stray away from her control so that, in the exercise of ordinary care and prudence, she could not prevent it from going into a place of danger, which she might reasonably apprehend it would do, then she is, as a matter of law, guilty of contributory negligence.

NEGLIGENCE, CONTRIBUTORY—JURY TRIAL.—Though contributory negligence is generally a question of mixed law and fact, it is the duty of the court to tell the jury what facts, if proved, constitute such negligence.

JURY TRIAL—DRAWING ATTENTION OF JURY TO ONE QUESTION.—An instruction directing the attention of the jury to the question whether the motorman might have stopped the car in time to prevent an accident cannot be regarded as prejudicial to the plaintiff, as taking away from the jury the question whether the accident might have been averted by an increase in the speed of the car, when there is no evidence tending to show that by such increase the accident might have been avoided.

THE NEGLIGENCE OF A PARENT OR CUSTODIAN OF A CHILD is not imputable to it, so as to bar its right to recover for injuries resulting from the negligence of another.

PARENT AND CHILD.—THE CONTRIBUTORY NEGLIGENCE OF A PARENT PRECLUDES HIS RECOVERING, WHEN SUING AS ADMINISTRATOR OF HIS CHILD, for injuries

resulting in its death, if he is the sole heir of his child, and the recovery must therefore be for his benefit, though the circumstances were such that the child, had he survived the injuries, might have recovered therefor.

Edgington & Edgington, Taylor & Carroll, and Bell & Horn, for Bamberger.

Eldridge Wright and Turley & Wright, for the railway company.

¹⁹ WILKES, J. This is an action for personal injuries, resulting in the death of Samuel Bamberger, a child about three years of age. The suit is brought by the father of the child, as administrator, for the benefit of the father, as next of kin of the deceased. It was tried before the judge and a jury in the court below, and resulted in a verdict and judgment ²⁰ for the defendant company, and the plaintiff has appealed and assigned errors. On a former trial the same verdict and judgment was had, which, on appeal, was set aside by this court on account of errors in the charge of the trial judge.

The facts necessary to be stated are, that the deceased was left by his father in charge of the grandmother of the child, at her place of business, and she left him temporarily in custody of her aunt, Miss Harriet Bamberger. Just prior to the accident, the child, with a companion some year or two older, was playing on the street, in front of the place of business of the grandmother in the presence of the aunt, who was standing in the doorway of the grandmother's store watching the playing of the children, who were running up and down the street. The deceased, running diagonally on the sidewalk, made a sudden break, and ran onto the street either at, on, or near a bridge. The street-car was going about eight miles an hour, down grade, approaching the bridge. The exact facts connected immediately with the accident are somewhat confused.

Miss Bamberger says she was standing in the doorway of her mother's store watching the child; that she saw Sammie, just at the bridge, run out into the street, and she ran out into the street; that she got half way between the car track and the house, and heard a car coming; looked, hallooed to the motorman, and ran as fast as she could, and just as the car got on the bridge, as nearly as she could ²¹ remember the little boy ran across, in front of the car, and the car ran over him; that this occurred on the west side of the bridge, and that the boy was three years old. She says that the motorman paid no attention to her at all; she noticed no slackening of the speed,

and that, by actual measurement, it was one hundred and five feet from where the car struck the child to where it was taken out in front of Mrs. Cole's premises. This, however, is controverted.

The motorman discloses, in his testimony, that he first saw the child on the street east of the bridge, and that the child ran some distance diagonally on the street, and, when his car was about ten feet from him, suddenly cut across the track in front of the car and was killed.

Mrs. Magnus says that the accident occurred when the child was about the middle of the bridge. The width of the street, between curb lines, is forty-six feet; from house line to house line, is sixty-six feet.

The errors assigned are to the charge of the court. The trial judge gave, among others, the following instructions to the jury:

"Defendant railroad company pleads not guilty, and pleads that the negligence of the parent and the child contributed to produce the accident. This pleading puts upon the plaintiff the burden of making out his case, on every material point, to your satisfaction, by a preponderance of evidence. Now, as to the first material fact, you should be satisfied that neither Louis Bamberger nor his child, Sammie, were ²² negligent to such a degree as to cause, or contribute to causing, the injury complained of. Second, you should be satisfied that the motorman running car No. 36 at the time of the accident was negligent, and that it was his negligence that caused the injury to Samuel Bamberger, deceased."

This charge presents the question as to where the burden of proof rests in cases where the defense is contributory negligence; in other words, is the burden upon defendants to show contributory negligence on the part of the plaintiff, or upon the plaintiff to show the absence of such negligence?

Upon the abstract question there is an irreconcilable difference of opinion. Mr. Beach, in his work upon Contributory Negligence, attempts to lay down certain rules to determine this question. He says: "When the circumstances of the case raise no presumption of either care or want of care on the part of the plaintiff, it is necessary for him to prove that he exercised ordinary care. When the circumstances raise a presumption that the plaintiff was in the exercise of ordinary care, then the burden is on the defendant. When the circumstances raise a presumption that there was a want of ordinary care on the part of plaintiff, then the burden of proving freedom from contributory negligence is upon him": Beach on Contributory Negligence, sec. 417. In Shear-

man and Redfield on Negligence, section 106, it is said: "Practically, all the courts agree that the fact of contributory negligence is fatal to the plaintiff's case (unless changed by statute), no matter ²³ how it appears, whether by affirmative evidence on the part of the defendant or by inference from the evidence on the part of the plaintiff. It is quite immaterial who proves the fact, so long as it is proved."

We think we need not, in this case, pass upon the question as an abstract proposition. Taking the entire charge together, we think the court did instruct the jury that the plaintiff must make proof of want of contributory negligence. They were told, it is true, that if the entire evidence did not preponderate in favor of the view that defendant's negligence caused the accident and injury, then the case must fail; but this did not change the previous instruction. Looking to the facts in this case, we find that the street-car was legitimately upon its own track, running its usual, ordinary line, where it had a right to be, and the child, when the injury occurred, was upon the track, where it ought not to have been, and was, in consequence, killed. Under these circumstances, no matter what the rule may be, as an abstract proposition it would be incumbent on the father to show that the presence of the child upon the track, or in a dangerous and exposed situation, was without negligence or want of proper care on his part, or the part of the child's custodian, if the negligence of either can be held to bar the right of recovery in this case, and, upon that point, the charge of the court was specific that the father could not recover if there was such contributory negligence on his part or the part of the custodian.

²⁴ In 4 American and English Encyclopedia of Law, page 93, it is said: "The burden of proving contributory negligence must, in every case, depend largely upon the facts of the particular case."

It is assigned as error that the trial judge asserted that certain concurring facts constituted negligence and invaded the province of the jury, and, moreover, charged a greater degree of diligence on the part of the plaintiff and the child's custodian than the law requires. The portion of the charge objected to is this:

"If you believe, from the evidence, that this child was in the custody of his aunt, and you further find that she allowed it to go onto the street, in front of the Bamberger grocery, on the sidewalk on the south side of Poplar street, in front of which the street-car company was running and operating its cars regularly, every ten or fifteen minutes, and you further find that she allowed the child

to stray off from under her control to a point so far distant from her that, in the exercise of ordinary care and prudence, she could not have prevented the child from getting into a place of danger, and it did go into such place, and was run over and killed, then this would be such negligence on the part of the aunt as would defeat a recovery, unless you believe that the motorman had time to stop the car and prevent the accident after the child left the sidewalk and started toward the track."

The substance of this charge is that, if the custodian ²⁵ of the child permitted it to stray away from her control, so that, in the exercise of ordinary care and prudence, she could not have prevented it from going into a place of danger, which she might have reasonably apprehended it would do, then it would be negligence, and we do not think it subject to the exceptions made. It assumes nothing as facts, but presents a hypothetical case raised by the evidence, and applies the law in such case, but does not lead the jury to infer or believe such facts to be proven.

Contributory negligence is generally a question of mixed law and fact, and in such cases it is the duty of the court to tell the jury what facts, if proved, will constitute contributory negligence. It is the duty of the jury, in such cases, to determine the facts and apply the law, as laid down by the court, to such facts: 4 Am. & Eng. Ency. of Law, 95; Thompson on Negligence, sec. 10, p. 1235.

It is also objected that the court erred in the following charge: "To state it differently, before you can find that the motorman who ran car No. 36 was negligent at the time of the accident and injury to Sammie Bamberger, you must find, from the evidence, the speed at which the car was running, and the point it was at on the track when the child left the sidewalk, gave the motorman time to stop his car before he would arrive at the point where the child ran onto the track in front of the car. To illustrate: if the evidence satisfies you that when the child left the ²⁶ sidewalk, the car was at a point, say forty feet west of where the child ran onto the track, and you find from the evidence that a car running at the speed this one was could have been stopped within forty feet, then it was carelessness, or negligence, not to have stopped this car within that forty feet, and the railroad would be liable; but if the car could not have been stopped within the forty feet, then it was not negligence on the part of the motorman not to stop within forty feet, and the railroad would not be liable for this accident. I do not mean to say that the evidence shows that the car was forty feet from the child, but only to illustrate. It is your duty

to find from the evidence the speed at which the car was running, where the car was when the child left the sidewalk, and where the car was when it struck the child."

The argument is, that this instruction limits the inquiry of the jury, and rests the question wholly upon the assumption that the duty of the motorman is to endeavor to stop the car to prevent an accident. The duty of the motorman is to exercise such degree of care, under the circumstances, as will prevent an accident; and if the distance between a point where a child would come onto a track, running in a particular direction so as to bring the child on the track in front of an approaching car, is such as to render the stopping of the car before the accident impossible or improbable, then his duty is to increase the speed of the car, and not attempt to ²⁷ stop, and thereby avert the accident. To attempt to stop the car under such circumstances inevitably produces an injury. To hasten the speed of the car inevitably leads to the prevention of an accident.

We think there is no error in this portion of the charge of which plaintiff can complain. There are no facts in this case showing that, by an increase of speed, the accident might have been avoided. It is possible such case might arise, but it is not presented by this record.

Four special requests were made, which we need not set out in full. They were all, we think, covered by the general charge, in so far as they were applicable. It is said that the general charge limited the duty of the motorman by stating that if he saw the child leave the pavement to cross the track, then he should have acted at once, whereas it was his duty to act whenever the child was, or could have been, seen exposed to danger, or in a position where it might rush into danger, whether leaving the sidewalk or in the street, or wherever it might be situated. We think the charge clearly embraced this view of the case, and did not so limit the duty of the motorman as to confine him to the time and place of the child's leaving the sidewalk and starting toward the track. This cause was before this court at a former term, when it was reversed, with instructions as to certain defects in the charge, all of which were corrected on the last trial, and their proper effect and scope was not limited.

²⁸ The only remaining question of importance is, whether this action can be defeated by proof of contributory negligence of the plaintiff, who is the administrator, and, at the same time, the father of the deceased boy. It is evident that no negligence can be charged to the deceased, on account of his tender years: Bis-

hop on Noncontract Law, sec. 586; *Chicago City Ry. Co. v. Wilcox* (Ill. May 14, 1890), 21 L. R. A. 83; *Whirley v. Whiteman*, 1 Head, 610; 4 Am. & Eng. Ency. of Law, 43, note 2.

But whether the negligence of the father or custodian can be imputed to the child, so as to bar its right to recover, is a question on which there is a conflict of decisions. The cases are too numerous to mention, and we only refer to books where they may be found collated: *Nesbit v. Garner*, 75 Iowa, 314; 9 Am. St. Rep. 486; 1 L. R. A. 153, and note; *Chicago City R. R. Co. v. Robinson*, 4 L. R. A. 126, and note; *Wymore v. Mahaska County*, 78 Iowa, 396; 16 Am. St. Rep. 449, and note; 6 L. R. A. 545, and note; *Chicago v. Wilcox*, 8 L. R. A. 494-496, and note; 21 L. R. A. 76-84, and note; *Bottoms v. Seaboard R. R. Co.*, 114 N. C. 699; 41 Am. St. Rep. 799, 811, and notes; 25 L. R. A. 784-794, and note; *Grant v. Fitchburg*, 160 Mass. 16; 39 Am. St. Rep. 450, and note; *Wiswell v. Doyle*, 160 Mass. 42; 39 Am. St. Rep. 451, and note; 4 Am. & Eng. Ency. of Law, 87, 88, and note; *Beach on Contributory Negligence*, secs. 41-44, 128; *Shearman and Redfield on Negligence*, secs. 70-83, and notes; *Wood on Railways*, sec. 322; *Bishop's Noncontract Law*, sec. 582; *Wharton on Negligence*, secs. 312, 314; *Pollock on Torts*, sec. 299; ²⁹ *Cooley on Torts*, sec. 681; 2 *Thompson on Negligence*, sec. 1184.

As will appear from an examination of these authorities, the better doctrine is that the negligence of the parent or custodian is not imputable to the child, so as to bar its right of recovery, and our own court, in *Whirley v. Whiteman*, 1 Head, 610, adopts this view, and characterizes the leading case holding the contrary (*Hartfield v. Roper*, 21 Wend. 615; 34 Am. Dec. 273) as no less opposed to the current of authority than to every principle of reason and justice.

Mr. Bishop, in his work on Noncontract Law, section 582, says: "This new doctrine of imputed negligence, whereby the minor loses his suit, not only when he is negligent himself, but when his father, grandmother, or mother's maid is negligent, is as flatly in conflict with the established system of the common law as anything possible to be suggested. The law never took away a child's property because his father was poor or shiftless or a scoundrel, or because anybody who could be made to respond to a suit for damages was a negligent custodian of it. By the new doctrine, after a child has suffered damages, which, confessedly, are as much his own as an estate conferred upon him by gift, and which he is entitled to obtain out of any of the several defendants who may have contributed to them, he cannot have them if his father,

grandmother, or mother's maid happens to be the one liable for the ³⁰ contribution (the idea, in such cases, being that the child had its remedy against the father or other custodian)."

In this connection, also, the case of *Walters v. Chicago etc. R. R. Co.*, 41 Iowa, 71, is suggestive, in which it is held that, when the parents have exercised reasonable and ordinary care, there is no good reason why the negligence of the person in actual charge of the child should be imputed to them and, through them, to the child. In *Kay v. Pennsylvania Ry. Co.*, 65 Pa. St. 269, 3 Am. Rep. 628, the doctrine of *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273, is said to be "repulsive to our natural instincts and repugnant to the condition of that class of persons who have to maintain life by daily toil." Mr. Beach says that the doctrine is an anomaly and in striking contrast with the case of a donkey exposed in the highway and negligently run down and injured, or with oysters in the bed of a river, injured by the negligent operation of the vessel, in both of which cases actions have been maintained; and, he adds, if the child were an ass or an oyster, he would secure a protection denied him as a human being. He is not the chattel of his father, but has a right of action for his own benefit when the recovery is solely for his use.

While this is the general rule, and, we think, the correct one, there is a broad distinction taken between cases in which the suit is brought in the name of the child and for the use of the child, and cases where the suit is brought by the father for damages suffered by him in his own right, and he ³¹ is entitled to the recovery, and not the child. In the latter case, it is uniformly held that the negligence of the father will bar his right to recover: 4 Am. & Eng. Ency. of Law, 88, and note; *Grant v. Fitchburg*, 160 Mass. 16; 39 Am. St. Rep. 450, and note; *Wymore v. Mahaaka County*, 78 Iowa, 396; 16 Am. St. Rep. 451, and note; 6 L. R. A. 545, and note; *Westbrook v. Mobile R. R. Co.*, 66 Miss. 560; 14 Am. St. Rep. 587; 14 L. R. A. 590, and note; *Westerberg v. Kinzua Creek R. R. Co.*, 142 Pa. St. 471; 24 Am. St. Rep. 510, and note; and many other cases too numerous to cite.

The case at bar is, however, different from these. In this case the plaintiff is the father of the deceased child, but brings the suit, not in his right as father, but as administrator of his deceased son. In case of recovery, he will, under the statute, be the sole beneficiary, as next of kin, and the right of action is so stated in the declaration, and necessarily so, for it has been held, under our statute, that the recovery is personal to the next of kin, and when there is no next of kin, there can be no recovery; and if the

next of kin die after suit is instituted, the suit abates. This suit being brought in the name of the father as administrator, and for the use of the father as sole beneficiary, the question presented is, Shall the action be defeated by contributory negligence on the part of the father or his agent, the custodian of the child, or shall he be allowed to recover, notwithstanding such negligence, as the child might do?

²³ This question was presented in the case of *Wymore v. Mahaska County*, 78 Iowa, 396, 16 Am. St. Rep. 451 (also reported in 6 L. R. A. 545), and was there discussed and directly passed upon. In that case, the court held that the suit was brought in the right of the child, and not of the father, and that, if the facts were such that the child could have recovered had its injuries not been fatal, his administrator might recover the full damages sustained by the child's estate, even though the parent was sole beneficiary of the recovery. The question was also passed upon in the case of *Norfolk etc. R. R. Co. v. Groseclose*, 88 Va. 267, 29 St. Rep. 718, in which the court said: "Where a suit is by a parent, for loss of services caused by an injury to a child, the contributory negligence of the plaintiff is a good defense, but such negligence is not imputable to the child, and is, consequently, not to be considered when the suit is by the child or its personal representative": Citing *Shearman and Redfield on Negligence*, par. 48 a; *Glassey v. Hestonville etc. Ry. Co.*, 57 Pa. St. 172. It continues: "Hence, when the facts are such that the child could have recovered had his injuries not been fatal, his administrator may recover, without regard to the negligence or presence of parents at the time the injuries were received, and although the estate is inherited by the parents. The parents' negligence is no defense, because it is regarded not as a proximate, but as a remote, cause of the injury; and the reason lies in the irresponsibility ²⁴ of the child, who, itself being incapable of negligence, cannot authorize it in another."

There is no principle, then, in our opinion, on which the fault of the parent can be imputed to the child. To do so is to deny to the child the protection of the law. Virtually, the question was presented in the case of *Cleveland etc. R. R. Co. v. Crawford*, 24 Ohio St. 641; 15 Am. Rep. 633. The action in that case was prosecuted, under the statute of Ohio, for the benefit of the next of kin of the intestate. The next of kin were children, three of whom were with their parents in the wagon at the time of the collision. On the trial, defendant requested the court to charge the jury that, if the persons for whose benefit the actions were

brought were guilty of a want of ordinary care, which contributed to the injury, a recovery could not be had for their benefit. This request, the court said, was properly refused, because: 1. The statute gives the right of action to the personal representatives upon the same condition that would have entitled the party injured to an action if death had not ensued.

In the case of *Westerfield v. Levis*, 43 La. Ann. 64, the court held that the statutes of Louisiana allowed two elements of damage: 1. The right of action for the damages suffered by the child, and which passes to the surviving parents by inheritance; 2. The action for damages suffered by the parent on account of the loss of the child. The parents inherit the first element of damages from ²⁴ the child, and it must be treated as though the child was alive and suing for an injury to himself; that the contributory negligence of the parents would not be a bar to the first element or cause of action; and that the second element of damage, being personal to the parents and not inherited from the child, they must be free from negligence contributory to the death of the child.

On the other hand, in the cases of *Chicago v. Major*, 18 Ill. 349, 68 Am. Dec. 553, *Chicago v. Starr*, 42 Ill. 174, 89 Am. Dec. 422, *Chicago v. Hesing*, 83 Ill. 204, 25 Am. Rep. 378, it is held that in such cases the negligence of the parents will bar a recovery by the administrator, when such parent is the sole beneficiary. In these cases the doctrine appears to be assumed as correct, rather than controverted and adjudicated, though necessarily involved. So, likewise, are the cases of *Grant v. Fitchburg*, 160 Mass. 16; 39 Am. St. Rep. 449; *Wiswell v. Doyle*, 160 Mass. 42; 39 Am. St. Rep. 451.

The reasoning and inclination of several of the recent text-writers is in the same direction: *Booth on Street Railways*, sec. 391; *Jones on Negligence of Municipal Corporations*, 422; *Beach on Contributory Negligence*, sec. 131.

There are many other cases bearing more or less directly upon this question, but need not be cited, and cannot be considered as controlling.

Necessarily, the peculiar provisions of the statute must exercise an important, if not controlling, influence ²⁵ in the decisions of each state. Mr. Tiffany, in his work upon *Death by Wrongful Acts*, sections 68-72, gives the statutes of several states, and discusses the rules announced by the court under them. His conclusions are, that in the Iowa, Virginia, and Louisiana cases, the reasoning of the judges who delivered the opinions above referred

to is defective; that in two of the cases no negligence was to be imputed to the plaintiffs, and in some the benefit of the recovery is not confined to the single person guilty of the contributory negligence, as, in Iowa and Louisiana, under their statutes, both parents are entitled to recover, and a similar rule prevails in Ohio. In Virginia, the recovery is for the benefit of all parties interested, to be distributed among the near relatives; and, if there is no next of kin, the administrator may still recover for the estate; and only when there is a widow, husband, parent, or child is the recovery free from creditors' claims.

By our statutes (Milliken and Ventrees' Code, sec. 3130), it is provided that the right of action of the injured intestate shall not abate by his death, but shall pass to his widow, and, if no widow, to the children or to the personal representatives, for the benefit of the widow or next of kin, free from the claims of creditors; and by section 3133 it is further provided that if the deceased had commenced an action before his death, it shall proceed without a revivor. By section 3134 of the act of 1883, the elements of damage are fixed on the basis of mental and physical suffering, ^{as} loss of time, and necessary expenses, and also the damages resulting to the parties for whose use and benefit the right of action survives.

Under this statute, in *Loague v. Railroad Co.*, 91 Tenn. 461, it was decided that the mother, as administratrix of her son, was entitled to recover whatever the deceased might have recovered, and also any damages sustained by her, as mother, for the loss of her son's services.

In the unreported case of *Andrews v. Louisville etc. R. R. Co.*, decided by this court at its December term, 1893, at Nashville, it was held that the elements of damage recoverable, under section 3134, embraced not only all that the administrator might be entitled to recover, but also all that might be recovered by the father in his own right; and, recovery having been had as administrator, it was a bar to any further action by the father, in his own right, for loss of his son's services.

It is said the right to recover by the administrator is the same right that the intestate had, if he had lived, but this is not (construing the statutes together) strictly accurate, for the right is not only as administrator, but as father, and the damages are given in view of both aspects of the case, and embrace both rights. The right is not strictly a descendible or inheritable right, but one arising out of the special statute, and, as to its scope, is governed by the statute.

27 The underlying principle in the whole matter is, that no one shall profit by his own negligence, and, to allow the father, who has been guilty of negligence, to recover, notwithstanding that negligence, when he brings the suit as administrator, although he could not do so in his own right, would be to defeat this underlying principle by a mere change of form, when the entire recovery, in either event, goes to him alone. Upon principle, we think that, no matter how the suit is brought, whether as administrator or as father, it can be defeated by the father's contributory negligence, when he is sole beneficiary. It follows there is no error in the charge of the court on this point, nor in the record, and the judgment of the court below is affirmed with costs. We are well content with the result thus reached, upon the grounds already stated, and this decision is placed on these grounds.

Upon a careful examination of the whole testimony, we have not been able to find any evidence of negligence on the part of the street-car company, and the verdict of the jury might very well have been based upon this view of the case, and, at the same time, the jury may have believed there was no contributory negligence on the part of the father or custodian of the child.

NEGLIGENCE—CONTRIBUTORY—BURDEN OF PROOF.—The burden of proving contributory negligence is in all cases on the defendant: *Georgia Pac. Ry. Co. v. Davis*, 92 Ala. 300; 25 Am. St. Rep. 47, and note; *Alabama etc. R. R. Co. v. Frazier*, 93 Ala. 45; 30 Am. St. Rep. 28, and especially the note.

NEGLIGENCE—CONTRIBUTORY OF PARENT—EFFECT OF ON CHILD'S RIGHT TO RECOVER.—The negligence of a parent or custodian of a child is no justification for others to injure it. Hence, if a suit is brought by, or in behalf of, an infant in its own right for an injury sustained through the act of another, contributory negligence on the part of the parents, or others standing in loco parentis, will not operate as a bar to recovery, or present any defense to the suit: *Atlanta etc. Ry. Co. v. Gravitt*, 93 Ga. 369; 44 Am. St. Rep. 145, and note; *Bottoms v. Seaboard etc. R. R. Co.*, 114 N. C. 699; 41 Am. St. Rep. 799, and note; *Wiswell v. Doyle*, 160 Mass. 42; 39 Am. St. Rep. 451, and note.

NEGLIGENCE—CONTRIBUTORY OF PARENT—WHEN BARS HIS RECOVERY.—A parent's contributory negligence may bar his right to recover for injuries to a minor child, but in an action by the child such negligence will not be imputed to it: Note to *Western Union Tel. Co. v. Hoffman*, 28 Am. St. Rep. 762. That the parent of a child of tender years was guilty of negligence contributing to an accident may be shown in bar to an action brought by such parent as administrator of such child: *Pekin v. McMahon*, 154 Ill. 141; 45 Am. St. Rep. 114, and note.

NEGLIGENCE.—WHAT IS CONTRIBUTORY NEGLIGENCE IS GENERALLY A QUESTION OF FACT for the jury to determine from all the circumstances of the case: *McQuillan v. Seattle*, 10 Wash. 464; 45 Am. St. Rep. 799, and note.

COLE MANUFACTURING COMPANY v. COLLIER.

[96 TENNESSEE, 115.]

ENTIRETIES. — A CONVEYANCE TO A HUSBAND AND WIFE, providing that, in the event of her surviving him, she shall have the use of the property, and at her death an estate in remainder is to go to her children by such husband, vests the fee in the estate by the entireties in the grantees, but the wife's fee is determinable upon her outliving her husband and subsequently dying leaving children by him.

ENTIRETIES—EXECUTION SALE.—Though a sale under an execution against the husband of property held by him and his wife by the entireties divests his interest, and vests it in the purchaser at the sale, the rights of such purchaser are subordinate to those of the wife, and if the statute declares that the interest of the husband in the real estate of his wife shall not be sold or disposed of by virtue of any judgment, nor shall the husband and wife be ejected from such real estate by virtue of any judgment, such purchaser is not, as against the wife, entitled to be put in possession of any part of such property, nor to receive any of the rents or profits thereof.

Thomas H. Jackson and D. E. Myers, for the manufacturing company.

Smith & Trezevant and Metcalf & Walker, for Collier.

¹¹⁶ **BEARD, J.** In 1886 a deed reciting a valuable consideration was made and delivered to the defendants, W. A. and Alice T. Collier, conveying to them, as husband and wife, the real estate which is the subject of this suit. Some time thereafter, the complainant corporation, being a judgment creditor of the husband, caused an execution to be issued and levied on the latter's interest in this real estate, and, at the sale subsequently made by virtue of this levy, became a purchaser of the same. Having received a deed from the sheriff, this bill was filed seeking the aid of the chancery court to eject Collier and wife from, and to place complainant in possession of, the entire property.

The first question presented for our consideration is, What interest did these defendants take under the deed of 1886? As it, by express terms, conveyed this property to these two grantees, as husband and wife, it is conceded that its legal effect is to create in them an estate by the entirety, unless it be that a limitation imposed upon the tenure of Mrs. Collier, should she outlive her husband, is sufficient to change the character of this estate. The clause in the deed in which this limitation is found is in these words, viz: "In the event she shall survive the said William A. Collier, she shall have the use and enjoyment of said lands and improvements," ¹¹⁷ and the rents, issues, and profits thereof, and at

her death the estate in remainder is to go to her children by the said W. A. Collier."

No limitation is imposed by the deed upon the right of survivorship of either the husband or the wife. The longest liver, as between them, will take the whole. The limitation is upon the estate of the wife after she has taken by survivorship, and is then operative only in the event she should die leaving children of herself and W. A. Collier surviving. In other words, a fee in an estate by entirety is granted to Collier and wife, but the wife's fee is determinable alone upon the event indicated, she in the mean time having outlived her husband. Such a limitation does not alter or modify the estate which the granting words have created.

In Coke on Littleton, section 285, in speaking of joint tenancy, it is said: "If lands be given to two, and to the heirs of one of them, this is a good joynture, and the one hath a freehold and the other a fee simple, and if he who hath the fee dieth, he which hath the freehold shall have the entiretie by survivor for term of life. They are joint tenants for life, and the fee simple is in one of them." And the authorities agree that "the same words of conveyance which would make two other persons joint tenants will make a husband and wife tenants of the entirety, so that neither can sever the jointure, but the whole must accrue to the survivor": *Green v. King*, 2 Wm. Black, 1213; *Martin v. Jackson*, 118 27 Pa. St. 504; 67 Am. Dec. 489; *Farmers' etc. Bank v. Gregory*, 49 Barb. 155; *Den v. Hardenburg*, 10 N. J. L. 42; 18 Am. Dec. 371; 3 Jarman on Wills, 120.

The estate thus granted being an estate by entirety, what right did complainant get by his purchase of the husband's interest?

That complainant could cause his execution to be levied on this interest, and, purchasing at the sale under this levy, could place itself so far in the room and stead of the execution debtor that, if unredeemed, it would ultimately come into possession of the whole should the husband outlive the wife, is settled law in this state: *Ames v. Norman*, 4 Sneed, 683; 70 Am. Dec. 269.

Complainant, however, insists that, having the sheriff's deed, it is entitled to immediate possession of the whole estate, though the wife is still alive, and it is urged that this is equally settled by our decisions.

This makes necessary an examination of the cases relied upon by complainant as authority for this position. *Ames v. Norman*, 4 Sneed, 683, 70 Am. Dec. 269, is the leading case. The facts there were that a deed made to a husband and wife created in them an estate by entirety in certain realty. During marriage the

husband's interest in this property was levied upon and sold. Subsequently, the wife filed her bill against her husband for divorce, and joined with him, as a defendant, Norman, who, as a judgment creditor, had redeemed from the execution purchaser. This was ¹¹⁹ done for the purpose of obtaining a decree canceling or extinguishing Norman's title, and having the land settled upon complainant. The decree thus asked for was passed by the chancellor, and Norman brought the case to this court for review. A careful reading of the reporter's synopsis of the pleadings and evidence, as well as of the briefs of the respective counsel, fails to discover any intimation that Norman was in possession of the land in controversy, or that complainant was out of possession. It is certain that, so far as the redeeming creditor was concerned, the suit was purely defensive, a defense on his part limited to the title acquired by him as the result of the execution sale. He did not by crossbill or otherwise, so far as the reporter's notes or argument of counsel indicate, set up a claim to possession or to rents and profits. The stress of his contention was that a husband has a leviable interest in an estate by entirety, which passes to the purchaser at an execution sale, and through him to the redeeming creditor, and that the interest thus acquired by the latter was not effected by the subsequent divorce of the husband and wife.

These were the only points involved in that case, and this court, upon abundant authority, resolved both of them in favor of Norman, and reversed the chancellor in so far as he had held otherwise. It is true, in the course of the opinion, that the learned judge delivering it said: "The defendant, by his ¹²⁰ purchase, became invested with the right of the husband as it existed at the time of the sale; that is, a right to occupy and to enjoy the profits of the land as owner during the joint lives of husband and wife." This statement, however, was not called for by any issue in the case. It was therefore a dictum, and not controlling as authority.

Jackson v. Shelton, 89 Tenn. 82, and Hopson v. Fowlkes, 92 Tenn. 697, 36 Am. St. Rep. 120, also relied on by complainants, have no bearing on the question now being considered. The first of these involved the right of a divorced wife to a homestead in property held with her husband prior to the divorce as an estate by entirety, while the second held that such an estate was converted into a tenancy in common by a divorce a vinculo.

We think it apparent that the farthest limit to which this court has gone is in holding that the purchaser of the husband's inter-

est in such an estate stands in his shoes, so far as ultimate survivorship is concerned, but that the question of the purchaser's right to the rents and profits of the property pending the wife's life is yet an open one in this state.

It may be conceded that, at common law, the husband, during coverture, had the unlimited right to the usufruct of this estate, and that he could loan, mortgage, or otherwise make a valid transfer of the possession of the same: *Fairchild v. Castelleux*, 1 Pa. St. 181; 44 Am. Dec. 117; *Barber v. Harris*, 15 Wend. 122 617; *Jackson v. McConnell*, 19 Wend. 175; 32 Am. Dec. 439; *Bolles v. State Trust Co.*, 27 N. J. Eq. 308.

This right necessarily resulted from the common-law view of the effect of marriage upon the wife's property rights. Marriage conferred upon the husband the dominion of the wife's real estate. The rents and profits belonged to him *jure mariti*. They were not only under his personal control, but they could be reached by his creditors. To modify this rule, and to give at least partial protection to married women owning real estate against the creditors of their husbands, as well as against husbands themselves, the act of 1849-50, embodied in section 3338 of Milliken and Ventrees' Code, was passed. That section is as follows: "The interest of the husband in the real estate of his wife acquired by her . . . shall not be sold or disposed of by virtue of any judgment; . . . nor shall the husband and wife be ejected from, or dispossessed of, such real estate by virtue of any such judgment," etc. That this section will protect the wife's realty when held in severalty is clear. Does it not also protect her interest in an estate held in entirety? What is this estate? As was said in *Ames v. Norman*, 4 Sneed, 683, 70 Am. Dec. 269, the husband and wife, in such an estate, "do not take in joint tenancy. Constituting one legal person, they cannot be vested with separate or separable interests. They are said, therefore, to take by entireties; that each is seised of the whole estate, and neither of a part."

¹²² The estate thus held is a unit of indivisible parts, differing from a joint tenancy, in that the latter is a unit of divisible parts. In the case of the latter relation, when one joint tenant dies the survivor takes *jus accrescendi*, but in the case of the former estate, upon the death of the husband or wife no new estate arises—there is a mere change in the properties of the legal person holding the originally granted estate: *Stuckey v. Keefe*, 26 Pa. St. 397. Or, as was said in *Thornton v. Thornton*, 3 Rand. 179: "The husband and wife have the whole from the moment of conveyance to them, and the death of either cannot give the sur-

vivor more." And during their joint lives the common law in the case of this anomalous estate gave to the husband the full and entire control and possession of the property and the right to collect the rents and profits, resting this right, as in the case of the wife's estate in severalty, in jure mariti: *Hall v. Stephens*, 65 Mo. 670; 27 Am. Rep. 302. This estate, therefore, being a "unit of indivisible parts," in which the wife, no less than the husband, "is the owner of the whole from the moment of the conveyance to them," and equally with him entitled to the whole (*McCurdy v. Canning*, 64 Pa. St. 39); it being apparent, also, that his right to collect the entire rent rests also in jure mariti, and there being no way for the purchaser of the husband's interest to dispossess him without at the same time dispossessing the wife, we have no hesitation in holding ¹²³ that the act of 1849-50 (*Milliken and Ventrees' Code*, sec. 3338) excludes such purchaser from possession, as against the wife.

It is urged, however, that the case of *Ames v. Norman*, 4 Sneed, 683, 70 Am. Dec. 269, is against this conclusion. It is sufficient to say in reply, that an examination of the briefs of the counsel in that case will show that the application of the statute in question was not the subject of suggestion or argument in that case. Even had it been, as the right of possession, as has been already stated, was not an issue in the case, the statement in the opinion, that this act did not apply to a wife's interest in an estate by entirety, was dictum.

It is proper to say that other courts of the highest respectability have made a similar application of statutes very much like ours: *McCurdy v. Canning*, 64 Pa. St. 39; *Corinth v. Emery*, 63 Vt. 505; 25 Am. St. Rep. 780; *Davis v. Clark*, 26 Ind. 424; 89 Am. Dec. 471; *Bruce v. Nicholson*, 109 N. C. 202; 26 Am. St. Rep. 562. Other points raised in the assignment of errors have been disposed of in our oral opinion.

A decree reversing the chancellor and embracing the conclusions of this court announced in the oral and the written opinion will be entered.

ENTIRETIES.—A devise to a husband and wife vests in them an estate by the entirety, which the husband can use during the coverture, but cannot alienate: *Phelps v. Simons*, 159 Mass. 415; 38 Am. St. Rep. 430, and note. Tenancy by the entirety is created by a conveyance of land to a husband and wife which does not state the manner in which they shall hold the land: *Stolz v. Shreck*, 128 N. Y. 263; 26 Am. St. Rep. 475, and note. See the note to *Enyeart v. Kepler*, 10 Am. St. Rep. 99, and the extended note to *Den v. Hardenberg*, 18 Am. Dec. 377-389.

ENTIRETIES.—A JUDGMENT LIEN AGAINST A HUSBAND does not extend to his contingent interest in an estate held by himself

and his wife by the entirety: *Bruce v. Nicholson*, 109 N. C. 302; 25 Am. St. Rep. 562, and especially note. Where real estate is conveyed to husband and wife jointly, they take as one person, and the husband has no interest either in the fee or the usufruct subject to execution in payment of his sole debts: *Corinth v. Emery*, 63 Vt. 505; 25 Am. St. Rep. 780, and note.

SHELLY v. STATE.

[96 TENNESSEE, 182.]

INCEST WITH RELATIVES OF THE HALF-BLOOD.—The term "sister," as used in the statutes defining incest, includes half-sister, and if such statutes make it incest for a man to have sexual intercourse with the daughter of his sister, they will sustain his conviction on a charge of such intercourse with a daughter of his half-sister.

CRIMINAL LAW — ACCOMPLICE IN INCEST.—A WOMAN WHO CONSENTS to the crime of incest knowingly, voluntarily, and with the same intent which actuated the man, is his accomplice; otherwise, if she was the victim of force, threats, fraud, or undue influence.

INCEST—ACCOMPLICE, TESTIMONY OF.—A conviction for incest cannot be sustained if based on the uncorroborated testimony of the woman who, if such testimony be true, was an accomplice, voluntarily yielding herself to the incestuous intercourse.

William J. Watson and Frank P. Smith, for Shelly.

Attorney General Pickle, for the state.

¹⁵³ **McALISTER, J.** The plaintiff in error was indicted, tried, and convicted in the circuit court of Hardin county on a charge of incestuous intercourse with the daughter of his half-sister, and upon the verdict of a jury, was sentenced by the court to imprisonment in the state penitentiary for a term of five years. He has appealed in error to this court. The indictment was based upon section 5646, of Milliken and Ventrees' Code, viz: "No man shall marry or have carnal knowledge of his mother, his father's sister, his mother's sister, his sister, his daughter, the daughter of his brother or sister," etc. Section 5647 further provides, viz: "No woman shall marry or have sexual intercourse with her father, her father's brother, her mother's brother," etc. The punishment prescribed for this offense is confinement in the penitentiary for a period not less than five nor more than twenty-one years. The first assignment of error is based upon the charge of the circuit judge in the construction of this statute, to wit: "The term 'sister,' as used in this connection, would apply as well to the half blood as to the whole blood, so that if you find, from the proof, that the mother of this girl, with whom defendant is

charged to have had carnal knowledge, was only a half-sister of defendant, still, the offense would be the same as if she had been the daughter of a full sister." We think the charge a sound construction of the statute, and in entire accord with the authorities. This precise question was before the supreme court of Vermont ¹⁸⁴ in the case of *State v. Wyman*, 59 Vt. 527, 59 Am. Rep. 753. The court said, viz: "It was objected that the indictment was not sustained by proof that the respondent committed the offense with a daughter of his half-brother, it being claimed that the word 'brother' in the statute was not broad enough to cover a brother of the half blood. In support of this claim, it is urged that, at common law, a brother of the half blood is not a brother, and cannot inherit as such. It is true that, by the common law, a brother of the half blood could not inherit, but this was a rule for the regulation of the descent of property, and had no broader scope. It did not undertake to affect the relations of brethren of the half blood any further than to prescribe, for certain reasons having their origin in the ancient system of feudal tenures, that in the descent of the inheritance, a brother of the half blood should be left out. The common-law rule, therefore, would have no force in a case of this kind, but the generally understood significance of the word 'brother,' as used in the common affairs of life, and as defined by lexicographers of recognized authority, should be adopted in the construction of the statute": See, also, *Territory v. Corbett*, 3 Mont. 50.

We find, upon an examination of the record, that this conviction is based exclusively upon the testimony of the female. She testified that the defendant began to have intercourse with her in the spring or summer of 1893, and kept it up until about ¹⁵⁵ Christmas. There was no testimony whatever to corroborate these statements. The defendant was examined as a witness, and positively denied any sexual intercourse. The question presented is whether the conviction can be sustained upon such testimony. In the case of *Mercer v. State*, 17 Tex. App. 452, it was held that if a woman consents to the crime of incest she is an accomplice, and a conviction cannot be had upon her unsupported testimony, and that she must be deemed to have consented, where she testifies that the crime was committed between her father and herself weekly for a period of eight years. Again, in the case of *Watson v. State*, 9 Tex. App. 237, the court said, viz: "It was entirely upon the testimony of the defendant's daughter, with whom the incestuous intercourse is alleged to have occurred, that the conviction was obtained. It is contended by defendant's counsel that she

was an accomplice in the offense, and that, her testimony being uncorroborated in the manner required by law, the conviction is not sustained by sufficient evidence."

"If the witness knowingly, voluntarily, and with the same intent which actuated the defendant, united with him in the commission of the crime charged against him, she was an accomplice, and her uncorroborated testimony cannot support the conviction. But if, in the commission of the incestuous act, she was the victim of force, threats, fraud, or undue influence, so that she did not act voluntarily, and ¹⁵⁶ did not join in the commission of the act with the same intent that actuated the defendant, then she would not be an accomplice, and a conviction would stand, even upon her uncorroborated testimony": Wharton's Criminal Evidence, sec. 440; *Freeman v. State*, 11 Tex. App. 92; 40 Am. Rep. 787. There is no evidence in this record of any force, threats, fraud, or undue influence practiced by the defendant in accomplishing the incestuous act. On the contrary, the evidence of the female was that the sexual intercourse was commenced in the spring or summer of 1893, and kept up until the following Christmas, which would imply that she consented to it.

The court holds that her uncorroborated testimony is insufficient to support the conviction, and; for this reason, the judgment is reversed and the cause remanded.

INCEST WITH RELATIVES OF THE HALF BLOOD.—In the statute against incest, "brother" includes a brother of the half blood: *State v. Wyman*, 59 Vt. 527; 59 Am. Rep. 753, and note.

INCEST—ACCOMPLICE.—If, in the commission of an incestuous act, the female is the victim of force, fraud, or undue influence, so that she did not willfully join therein with the same intent as the accused, she ought not to be regarded as an accomplice: *Porath v. State*, 90 Wis. 527; 48 Am. St. Rep. 954.

INCEST—ACCOMPLICE—TESTIMONY OF.—In incest the woman is an accomplice, and, on the trial of a prosecution therefor, her testimony is subject to the rule respecting accomplice testimony: *Freeman v. State*, 11 Tex. Ct. App. 92; 40 Am. Rep. 787, and note. To the same effect see *State v. Jarvis*, 20 Or. 437; 23 Am. St. Rep. 141, and note.

WILSON v. BOGLE.

[96 TENNESSEE, 290.]

PARTITION SHOULD BE BY A SALE OF THE PROPERTY AND A DIVISION of the proceeds when it consists of land principally valuable for its timber and minerals, and they are almost exclusively in one end of the tract and the minerals are undetermined in extent and value.

PARTITION, WHEN SHOULD BE BY SALE.—If by a partition in kind the value of all the shares will be much less by reason of the partition than the value of the whole tract, partition otherwise than by sale is manifestly inequitable and should be denied.

PARTITION BY SALE IS A MATTER OF ABSOLUTE RIGHT, when the conditions prescribed by the statute to authorize a sale are found to exist.

PRACTICE IN CHANCERY.—THE CONCURRENT FINDING OF THE MASTER AND chancellor upon the facts is entitled to the same weight as the verdict of a jury. When such finding is that a partition cannot be made advantageously to the parties, otherwise than by a sale, it is error for the chancery court of appeals to remand the cause for the appointment of commissioners to examine the premises and report upon the practicability of a partition in kind.

C. T. Cates, Sr., and Templeton & Cates, for Wilson.

Sam P. Rowan and McTeer & Gamble, for Bogle.

²⁹¹ **McALISTER, J.** The bill in this cause was filed in the chancery court of Blount county for the purpose of procuring a decree for the sale for partition of five thousand acres of mountain lands, situated in that county. There was an order of reference to the master directing him to hear proof and report, inter alia, "whether the premises are so situated that partition thereof cannot be made, or whether they are of such description that it would be manifestly to the advantage of the parties that the same should be sold instead of partitioned." Proof was taken, and the master reported as follows: "I report that the land, being principally valuable for its minerals and timber, and the minerals and water being almost exclusively on one end of the tract, and the minerals being undetermined in extent and value, no equitable or advantageous partition thereof can be made, and that it would be manifestly to the advantage of all the parties that the same should be sold instead of partitioned." Defendants excepted to this report, but, on the hearing, the chancellor overruled the exceptions, confirmed the report, and ordered the land sold. The defendants appealed, and, upon a hearing by the honorable court of chancery appeals, the decree of the chancery court of Blount county was reversed. The cause is now before this court upon the appeal ²⁹² of complainants. The first assignment of error is that the decree of the chancellor should have been affirmed,

because of the concurrent finding of the master and chancellor upon a controverted question of fact.

The court of chancery appeals was of opinion that the master and chancellor had drawn an erroneous conclusion of law from the facts stated in the report. In the opinion of that court, the facts, as stated by the master, "that the land is principally valuable for its timber and minerals, and the minerals and water are almost exclusively on one end of the tract, and the minerals are undetermined in extent and value, furnish no sufficient reason why the land should be sold instead of partitioned in kind."

We differ with the court of chancery appeals, and think that, upon the postulate stated, the land would not be susceptible of an equitable apportionment in kind, and would present a case where it would be manifestly to the interest of all parties that the division should be made by sale.

It is true that each tenant in common of land has a right to a partition of the premises, except where such partition is impracticable, or where, from the situation of the premises, a sale would be manifestly advantageous to all the parties interested: *Reeves v. Reeves*, 11 Heisk. 673.

"Actual partition," says Mr. Freeman, in his work on Cotenancy and Partition, "was, by the common law, a matter of absolute right, irrespective of the ²⁰³ fact whether the partition would prove beneficial or ruinous. . . . The object of the statutes authorizing a sale was to obviate the manifest hardship, and even destruction, which arose in some cases in making a division of property": Freeman on Cotenancy and Partition, secs. 539-542. However, as stated by Mr. Freeman: "A sale will not be ordered without good cause being shown. It is not sufficient that some, or even a majority, of the cotenants prefer a sale to a partition. The applicants for a sale must show the existence of such a state of facts as, under the statute, will be sufficient to rebut the presumption of law that each of the parties is entitled to an actual partition. The onus is always on him who seeks a sale. . . . The mere fact that the land may be divided into equal parts, and thus partitioned equally among the cotenants, is not conclusive that a sale should not be ordered."

"If, by a partition, the value of all the shares would be much less by reason of the partition than the value of the whole tract, . . . a partition would be manifestly inequitable, and a sale would be decreed": *Branscomb v. Gillian*, 55 Iowa, 235.

"The true question," said Chancellor Walworth, "to be decided by the master, under the statute, is whether the whole property,

taken together, will be greatly injured or diminished in value if separated into parts in the hands of different persons, according to their several rights and interests in the whole; ²⁹⁴ in other words, whether the aggregate value of the several parts, when held by different individuals in severalty, would be materially less than the whole value of the property if owned by one person": *Clason v. Clason*, 6 Paige, 545.

A sale must be decreed when necessary to enable the court to divide the property upon the principle that "equality is equity": *Higginbottom v. Short*, 25 Miss. 160; 57 Am. Dec. 198.

A mine must necessarily be partitioned through the instrumentality of a sale: *Lenfers v. Henke*, 73 Ill. 405; 24 Am. Rep. 263.

So we think that in a case where it appears, as stated by the master, that the land is principally valuable for its minerals and timber, and the minerals and water are almost exclusively on one end of the tract, and the minerals are undetermined in extent and value, and that no equitable or advantageous partition thereof can be made, it would be manifestly to the advantage of all the parties that the same should be sold. When the conditions prescribed by the statute authorizing a sale instead of a partition are found to exist or affirmatively appear, then a sale is a matter of absolute right. This is evident from section 4024 of Milliken and Ventres' Code, which provides that any person entitled to a partition of premises is equally entitled to have such premises sold for division in the following cases: 1. If the premises are so situated that partition thereof cannot be made; 2. Where the premises are of such ²⁹⁵ description that it would be manifestly for the advantage of the parties that the same should be sold instead of partitioned.

We have in this case a concurrent finding of the master and chancellor upon the facts, which, under the uniform and well-established practice of this court, is entitled to the same weight as the verdict of a jury. The conclusion to be drawn from those facts, and whether they authorize a sale, is, of course, a matter of law. We are constrained to believe that, upon the facts found, the conclusion of law drawn by the chancellor was fully warranted. It further appears that the court of chancery appeals ordered that the cause be remanded to the chancery court of Blount county for the appointment of commissioners, who should examine the premises and report upon the practicability of a partition in kind. This reference was ordered for the purpose of acquiring additional light upon the subject, and because the court was not satisfied with the concurrent finding of the master and the chancellor upon

the facts. We think this reference was manifestly erroneous, because in contravention of the rule that the finding of the master and chancellor upon controverted questions of fact is entitled to the weight of the verdict of a jury.

The decree of the court of chancery appeals is reversed, and the decree of the chancery court of Blount county is affirmed.

PARTITION IS A RIGHT which a tenant in common may claim from his cotenant at any time: *Higginbottom v. Short*, 25 Miss.160; 57 Am. Dec. 198, and note.

PARTITION BY SALE.—Where division in partition cannot be made without manifest injustice, the commissioners may recommend a sale and the court will judge of the propriety of confirming such return: *Steedman v. Weeks*, 2 Strob. Eq. 145; 49 Am. Dec. 660. A sale of the premises on partition is resorted to only to prevent a sacrifice of the property by division: *Striker v. Mott*, 2 Paige, 387; 22 Am. Dec. 646. See, also, the note to *Higginbottom v. Short*, 57 Am. Dec. 200.

BYRD v. BYRD.

[26 TENNESSEE, 364.]

A CONVEYANCE TO A WIFE THEN LIVING IN SECRET ADULTERY, professing to be loyal and true to her marriage vows, made by her husband in consideration of love and affection, is procured by fraud, and will be canceled in equity and the title revested in him.

Templeton & Cates and J. C. Parker, for Joseph Byrd.

Young Brothers, for Emma Byrd.

364 WILKES, J. This bill was filed by the husband against the wife to obtain a divorce and to cancel a deed made to her for a consideration of love and affection while the marital relation existed. The chancellor granted the divorce, but refused to cancel and set aside the deed to the wife, and the husband has appealed to this court.

365 The cause was assigned for hearing, under the act of 1895, to the court of chancery appeals, and that court has reported the facts and reversed the decree of the chancellor and directed the deed to be canceled, and the wife has appealed to this court.

It appears from the finding of the court of chancery appeals that the deed was drawn up and dated August 28, 1890, and purported to convey a house and lot in Helenwood, Tennessee, being all the property of the husband.

The husband is an illiterate man, and can neither read nor write.

He procured one of his neighbors to write the deed, and it is

in the usual form, as follows: "Know all men by these presents, that I, Joseph Byrd, hath sold, and do hereby give, grant, convey, and confirm to Emma Byrd, my wife," etc. The deed was not signed until January, 1894, but was, soon after it was made, to wit, September 1, 1890, acknowledged before the county court clerk of Scott county in the usual manner, and admitted to registration without being signed.

In January, 1894, the husband and wife went to the deputy clerk and requested him to sign complainant's name to the deed, which he did, and, also at their request, inserted the husband's name upon the register's books as though it had been there when originally registered.

A short time prior to this, complainant and his wife had separated, and he had filed a bill for divorce, ³⁰⁶ on the ground of the wife's adultery with one Phillips. This bill was dismissed upon the wife's confession of her fault and agreement to mend her life, and they were again united as man and wife, and were so living when the signature was inserted in the deed and on the register's books. The husband was an old man and somewhat decrepit, and the defendant was a young woman and his second wife. Shortly after her return to her husband and the dismissal of the first bill for divorce, the wife prevailed upon the husband to cure the defects in the deed in the manner stated, and the next day, having gotten the deed into her possession, she again left him and returned to her adulterous life with Phillips and others.

It is said that while this may be all so, still the deed was, in fact, executed and acknowledged in 1890, and took effect from that date, although the grantor had not signed his name to the deed. It is insisted that a deed need not be subscribed by the grantor, and that if his name is inserted in the body of the deed by his authority it will be sufficient, and that the acknowledgment of the instrument will cure the defect of want of signature.

It is, perhaps, true that an actual subscription of the deed by the grantor is not required if the instrument is written by himself, and has his name in the body of it, and it is probable that if the writing is done and the name is inserted by another by the grantor's authority, and not by himself, it will ³⁰⁷ also be sufficient. But this is only in cases where the intention is that the name thus inserted should operate as a signature, and give vitality to the instrument as a completed transaction, and not to cases where an attorney or neighbor is employed to write the deed, and merely inserts the grantor's name as one of the parties to it, with the expectation that he shall afterwards sign it to make it complete and

give it vitality. Here there was evidently a purpose to sign, but an omission to do so by oversight.

It does not appear that the deed was actually delivered to the wife until after the name was inserted, though it was registered. What the effect of this may be we need not, however, consider, as the court of chancery appeals finds that, before the deed was originally executed and registered, and during the whole of their married relation, the wife was leading a life of deception and double dealing with her husband, living in secret adultery while professing to be loyal and true to her marriage vows, thus imposing upon him and inducing him to convey to her all the property he owned in the world in consideration of a love, loyalty, and fidelity that had no existence on her part. Such a course of conduct constitutes the grossest and most outrageous fraud, more pernicious and reprehensible than if based on any money consideration. It would shock the conscience of mankind to allow a shameless woman to thus prostitute the most sacred of all earthly relations into a fraudulent device and ^{see} scheme to obtain the money of a confiding husband, and if the courts, as insisted by counsel, cannot relieve from this class of fraud as fully and completely as that based on dollars and cents, they are indeed impotent in their power to remedy and obviate fraud.

The chancellor was in error, and his decree is reversed, and the decree of the court of chancery appeals is affirmed, and the deed from the husband to the wife is canceled, and all right, title, interest, and estate seemingly vested in her under the deed is divested out of her and revested in the husband. The costs will be paid by the husband, and he will have judgment over against the wife for the same.

FRAUD IN OBTAINING PROPERTY—EFFECT OF.—A woman fraudulently and without intending to fulfill her promise, by false professions of love and false pretenses of wealth, and by a promise to marry the plaintiff, induced him to convey land to her, with the further agreement that after the marriage she would convey it to a certain other person. The man was already married at the execution of the agreement, but procured a divorce before the execution of the deed. It was held that the deed should be set aside: *Douthitt v. Applegate*, 33 Kan. 395; 52 Am. Rep. 533.

QUEEN v. DAYTON COAL AND IRON COMPANY.

[95 TRINIMEX, 459.]

STATUTORY NEGLIGENCE.—The employment of a minor under twelve years of age, when forbidden by statute, is an act of negligence on the part of the employer rendering him liable for any injury received by the minor while in such employment and as a consequence thereof, but the employer is not precluded from asserting the defense of contributory negligence on the part of the child.

NEGLIGENCE, CONTRIBUTORY.—THOUGH AN EMPLOYER HAS VIOLATED A STATUTE intended for the protection of his employees, and is therefore guilty of negligence per se, such negligence does not give an injured employee a right of action, where his own negligence directly contributed to the injury.

CONTRIBUTORY NEGLIGENCE ON THE PART OF A MINOR is to be measured by his age and his ability to discern and apprehend circumstances of danger. He is required to exercise only such prudence as one of his age may be expected to possess.

Givens & Locke, for Queen.

Beerket, Mansfield & Miller, for Dayton Coal and Iron Company.

⁴⁵⁹ **McALISTER, J.** This suit was commenced in the circuit court of Rhea county by the plaintiff in error, a minor suing by his next friend, against the defendant company, to recover damages for personal injuries.

The record discloses that the plaintiff in error, a boy about ten years of age, was employed by the defendant company to work in its mines in the capacity of a trapper. His duties were to open and close the gates for the cars to pass through, and, in addition, to keep the track between the two gates clear of coal and slate. The plaintiff testified "that, at the time of his employment, he was told by the superintendent to mind the cardriver, and do whatever he told me; that on the day of the injury Jim Carter was cardriver, and was coming on his last trip with empty cars, and he told me to prop open the gates and go with him to the headway of the entry and hold his mule while he got out the loaded cars. I did as he told me, and after he got the loaded car he told me to get on the car, which I done, and he then started on the return trip. When he got to the gate, on his way to the main line, he told me to jump off, but this I refused to do, and asked him to stop the car, but after he told me several times to jump off, I did so, and fell under the wheels of the car, which ⁴⁶⁰ crushed my right leg and knee." He further states he had been in the habit of riding on the cars a greater part of the time, but the driver, prior to this trip, always stopped for him to get off.

The superintendent of the company denied that he had placed

the boy under the orders of the cardriver, and stated that he had repeatedly forbidden the plaintiff in error to ride on the cars. The theory of the company was, that at the time of the accident the boy was attempting to get on the car, but his foot missed the bumpers, and was caught beneath the car. It was claimed by the company that the boy frequently boarded the car, and had been repeatedly warned of the danger, but that he persisted in violating the rules of the company. The cause was tried by the circuit judge and a jury, resulting in a verdict and judgment in favor of the defendant company. The plaintiff appealed, and has assigned errors.

The act of 1881, entitled "An act to provide for the ventilation of coal mines and collieries, and the protection of human life therein," provides, in the tenth section, viz: "And no boy under twelve years of age shall work or enter any mine, and proof must be given of his age, by certificate or otherwise, before he shall be employed; and no father or other person shall conceal or misrepresent the age of any boy knowingly." A violation of the act is then declared a misdemeanor, punishable ⁴⁶¹ by fine or imprisonment, or both, at the discretion of the court trying the same.

The record discloses that, at the time of his employment, the plaintiff in error was a boy only ten years of age. The superintendent states that, at the time he hired him, he did not know his age, and did not inquire; that he did not demand from him or anyone else a certificate of his age, and did not receive one. He claims, however, that he hired the boy at the request of his mother, who called to see him frequently on the subject. As applicable to this state of facts, counsel for plaintiff in error requested the court to charge as follows: "I instruct you that the laws of the state of Tennessee prohibit the employment of any child under twelve years of age in any mine in this state, and any such employment by the defendant company would be gross negligence."

The circuit judge refused the instruction, and, in lieu thereof, submitted the following remarks to the jury, viz: "I instruct you that the statute in question has no application to the facts of this case. It makes it a misdemeanor to employ a child under twelve years of age, and, if defendant did so, it would be guilty of a misdemeanor, and liable to be punished therefor, but the statute does not provide that one failing to comply with its provisions shall answer civilly for all damages that may result to any such child in its employment; hence, it does not apply to the facts of this case. Neither does ⁴⁶² it appear that the statute prohibits anything in or about which plaintiff was injured. If it did, and defendant

disobeyed it, and, as a consequence thereof, plaintiff was injured, then such failure to obey might be actionable negligence, but such are not the facts of this case."

The refusal of the court to give the instruction asked, and the remarks made in refusing it, constitute the basis of the principal assignment of error. The question presented is one of first impression in this state, but it has been frequently adjudged in other states, and is well settled upon principle. It is laid down in Comyn's Digest "that, in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage or for the recompense of a wrong done to him contrary to the said law." Mr. Francis Wharton, the eminent text-writer, in his work on Negligence, section 443, states the rule thus: "Where a statute requires an act to be done, or abstained from, by one person for the benefit of another, then an action lies, in the latter's favor, against the former for neglect in such act or abstinence, even though the statute gives no special remedy. Thus, in an action against a public officer for neglect, whereby the plaintiff was injured, it is no defense that the defendant contracted, not with the plaintiff, but with the government, the action being founded, not on contract, but on breach of duty. Even the ⁴⁶³ imposition of a penalty by the statute does not oust the remedy by indictment, nor, a fortiori, by suit for negligence, unless the penalty be given to the party injured in satisfaction for injury."

Says Mr. Bishop, in his work on Noncontract Law, section 132: "Whenever the common law or a statute imposes on one a duty, if of a sort affecting the public within the principle of the criminal law, a breach of it is indictable, and a civil action will lie in favor of any person who has suffered especially therefrom; or, if the matter of the law involves only the interests of individuals, anyone who has received harm from another's disobedience may have his suit against him for the damages." This question was considered in *Pauley v. Steam Gauge etc. Co.*, 131 N. Y. 90. In that case it appeared that a statute of New York required that fire escapes should be provided on the outside of all factories three or more stories in height. The act imposed penalties for a disobedience of its provisions. The defendant failed to construct fire escapes on its building, as required by the statute. It caught fire, and plaintiff, intestate, was burned to death. The court said: "I am unable to agree with the contention of appellant that the sole remedy, under the statute, was the public remedy, which consisted of an enforcement of the penalties provided. The re-

quirement of fire escapes was for the direct and special benefit of the operatives in such factories, and intended for their protection, and the rule applies ⁴⁶⁴ that when a statute commands or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his benefit, or for a wrong done him contrary to its terms": See, also, *Willy v. Mulledy*, 78 N. Y. 310; 34 Am. Rep. 536.

As another illustration of the rule, it has been repeatedly held that the running of a railroad train within city limits at a rate of speed prohibited constitutes negligence per se, and gives a right of action to anyone suffering injuries in consequence thereof: 1 Thompson on Negligence, sec. 8, p. 506.

So we think the employment of this minor, in violation of the provision of the statute in question, was an act of negligence on the part of the defendant, and a causal connection between the employment and the injuries sustained by the boy being shown, a case of liability is made out. Of course, we do not hold that if the boy had died of organic disease of the heart, or from a stroke of paralysis, or from some cause wholly disconnected with his employment, the company would have been liable in damages simply on account of the employment in violation of the statute. But we do hold that the breach of the statute is actionable negligence whenever it is shown that the injuries were sustained in consequence of the employment.

This view of the case does not preclude the defense of contributory negligence on the part of the plaintiff. ⁴⁶⁵ Says Mr. Bishop in his work on Noncontract Law, section 140: "It suits the argument in many of the cases for the judges to look upon disobedience to a legal command as an act of negligence. Thereupon, the doctrine of contributory negligence applies to the plaintiff, precluding his recovery in cases within its rules."

Says Mr. Thompson (2 Thompson on Negligence, sec. 23, p. 1175): "Statutes exacting special precautions on the part of the owners of dangerous machinery are generally construed as not abrogating the ordinary rules of contributory negligence, etc. The effect of such statutes is simply to make the failure to comply with their requirement negligence per se, and not to excuse negligence in other persons. Thus, a statute of Iowa requiring the tumbling rods of threshing machines to be boxed, and providing that the owners of such machines shall be answerable in damages to any person injured by a failure to do so, does not give a right of action where the negligence of the party injured directly contributed to the injury."

Again, it was held, in an English case, that although a shafting was unfenced, in violation of a statute, yet, if the plaintiff, contrary to the commands of the proprietor, took hold of it and set it in motion, whereby he was injured, he could not recover damages: *Caswell v. Worth*, 5 El. & B. 848.

It is hardly necessary to add that contributory negligence on the part of a minor is to be measured ⁴⁰⁰ by his age and his ability to discern and appreciate circumstances of danger. He is not chargeable with the same degree of care as an experienced adult, but is only required to exercise such prudence as one of his years may be expected to possess.

We think the charge of the court is objectionable in not fully explaining to the jury the degree of care which is required of an infant of tender years, but we would not reverse for this reason, since there was no request for additional instructions, and more especially because the assignment of error in respect of this subject is fatally defective.

We are also of opinion that the request submitted by counsel for plaintiff in error in respect of the violation of the statute was not strictly accurate, in that it assumed that the employment of the boy was gross negligence, which charge would have constituted in itself a basis for the assessment of exemplary damages. A proper request would have made the breach of the statute actionable negligence or negligence per se. It appears, however, that the circuit judge, in refusing the instruction submitted by counsel, undertook to give an exposition of the statute which we hold to be erroneous, and, for this reason, the judgment is reversed, and the cause is remanded.

STATUTORY NEGLIGENCE.—One who neglects to perform a duty imposed on him by statute or ordinance for the benefit of others is liable to those for whose benefit it was imposed for any injuries of the character which the law was designed to prevent, and which were proximately produced by such neglect: *Osborne v. McMasters*, 40 Minn. 103; 12 Am. St. Rep. 696, and note. It is negligence, as a matter of law, for railway companies not to use the precautions for safety at public crossings definitely prescribed by statute or valid municipal ordinance: *Western etc. R. R. Co. v. Young*, 81 Ga. 397; 12 Am. St. Rep. 320, and note. A railroad is guilty of negligence when, in disobedience of an ordinance, it backs a train along a frequented track in such city at a rate of speed forbidden by such ordinance, without ringing any bell or giving any signal of its approach: *Virginia Midland Ry. Co. v. White*, 84 Va. 498; 10 Am. St. Rep. 874, and note.

NEGLIGENCE—CONTRIBUTORY, OF MINOR, HOW MEASURED.—The measure of a child's responsibility is his capacity to see and appreciate danger: *Greenway v. Conroy*, 160 Pa. St. 185; 40 Am. St. Rep. 715, and note.

SAYLES v. COX.

[95 TENNESSEE, 579.]

BANKS AND BANKING—COLLECTIONS AS TRUST FUNDS.

If a collection is intrusted to a bank, with instructions to receive the money due and forward a draft for the balance, after deducting charges, and such bank is insolvent at the time, of which fact its officers are aware and its customer is ignorant, and such moneys are collected and not paid over, they do not constitute a trust fund, which the customer can recover from an assignee for the benefit of the creditors of the bank, in preference to other creditors, out of moneys on hand at the time of the assignment, unless there is some agreement or course of dealing whereby the funds are to be held separate and the identical proceeds remitted.

PAYMENT TO A BANK IN ITS OWN CHECK of a claim placed in its hands for collection is equivalent to a payment in money, though it falls on the same day.

BANKS AND BANKING.—THE QUESTION OF FRAUD OF A BANK IN RECEIVING A NOTE FOR COLLECTION when it is insolvent is not material, when the contest is between the owner of the note and other creditors of the bank, and cannot entitle the former to any preference over the latter out of moneys on hand when the bank makes an assignment for the benefit of its creditors.

Kirkpatrick, Williams & Bowman, for Sayles.

Faw & Cox, for Cox.

580 **WILKES, J.** Complainant's bill is filed to have a debt due her declared a preferential claim, to be paid in full out of the funds in the hands of defendant as receiver. There was a demurrer to the bill, raising the question of the right of complainant to any priority or preference, and it was sustained, and decree rendered in the court below fixing the amount of complainant's debt, and directing that it share pro rata in the funds in the receiver's hands, but denying it any preference or priority, and dividing the costs equally between the parties. Complainant, by leave of the court, appealed, and assigned errors. The cause was heard by the court of chancery appeals, and the facts were found, and decree of the chancellor was affirmed, and complainant has appealed to this court.

The facts as found are, so far as necessary to be stated, that complainant is a resident of Connecticut, and sent to the First National Bank of Johnson City a note and mortgage on George and wife, citizens of Washington county, inclosed in a letter in the following words:

"I inclose herewith note and trust deed and insurance policy on loan of Phebe S. Sayles to F. M. George and wife; also a release of the trust deed. The amount due on the note is \$900, with interest to be added from February 2, 1894. Will you

please notify Mr. George and wife that the papers have been sent you for collection, and upon his paying to you the amount due, deliver to him the ⁵⁸¹ release, and forward draft to me for balance, less your fee.

Very respectfully yours,

"ARTHUR G. BELL."

November 6, 1894, Mr. George delivered to the First National Bank a check, drawn by the Magnetic Building & Loan Association on said bank, for one thousand dollars, which the president and acting cashier received, and an entry was made on the books of the bank showing a collection of complainant's debt.

It appears that the president of the bank made out an incomplete certificate of deposit, which was found in the bank a few days afterwards, when its doors were closed.

On November 12, 1894, the bank was placed in the hands of a national bank examiner, as an insolvent concern. Before the court of chancery appeals, the contention was that the bank was hopelessly insolvent when the note was received, and this was well known to its president, and that it was a wrongful act to receive the note for collection under such circumstances; and it was further insisted by complainant that the bank, from the time the note was collected until it went into the hands of the bank examiner, as receiver, had in cash and cash items largely more than the sum collected on the note, and it was insisted, therefore, that when the money was received from George by the bank, the latter acted as complainant's agent, and became liable to her as a trustee, and the fund collected became a trust fund; that, being insolvent when the ⁵⁸² money was collected, the bank never had any title to the funds, because of the fraud practiced in withholding information of its condition; that, having funds sufficient to pay the note and interest all the while after it was received, such funds were presumably the funds of complainant, and payments made by the bank on other accounts were presumably funds derived from other sources; and, finally, that if complainant's funds were wrongfully commingled with the funds of the bank, it was the duty of the bank to separate them, and not to devolve that task upon the complainant.

We think the question involved in this case is fairly presented and adjudicated in the case of *Akin v. Jones*, 93 Tenn. 353, 48 Am. St. Rep. 921, where the general rule is held to be that an indorsement for collection vests no title to the paper in the bank, etc., and it "may be recovered in specie before collection made; . . . but if the bank make collection before it makes an assignment, even though it be in fact insolvent, it simply becomes an

ordinary contract debtor of the owner, and he cannot impress any trust character upon the proceeds": Citing *Morse on Banking*, 248.

There may be special facts which will take the case out of the general rule, and create a trust in the funds collected, and the learned judge who delivered that opinion cited the case of *Continental Nat. Bank v. Weems*, 69 Tex. 489, 5 Am. St. Rep. 85, and which is relied on in this case as presenting a case with special facts, and he ⁵⁸³ continues: "But the rule undoubtedly is, that unless there is some agreement or course of dealing whereby the funds are to be held separate and the identical proceeds remitted, the owner of the draft stands on no higher ground than the other creditors of the bank in a case where the bank collects the draft prior to making a general assignment."

In that case the parties directed the Bank of Columbia to send them its check on New York in payment of the proceeds of collection, and this was held to be the determining fact in the record. It was virtually a direction not to send the identical moneys collected, nor to hold them separate, but was an agreement that the bank might use the money collected, and pay the creditors by its own check on New York. In the present case the direction is to "forward draft to me for balance, less your fee," which clearly implies that the bank, after collection, should retain its charges, and forward the balance, in its own draft, to the sender of the note.

The fact that George paid his note to the bank in a check upon itself can make no difference, as it was equivalent to a payment in money, even if the bank had failed the same day: *Randolph on Commercial Paper*, secs. 1395, 1456; *Howard v. Walker*, 92 Tenn. 452.

It is said in this court that the question was not raised in the pleadings whether the complainant and bank stood in the relation of principal and ⁵⁸⁴ agent or that of debtor and creditor. We think the question of trust fund is fairly presented by the demurrer, and is, in effect, the same as to whether the bank must hold the funds separate and apart from all others, and remit them in specie, or whether it was authorized to hold the specific money collected in its own vaults, and remit its own check.

The question of the fraud of the bank in receiving the note to collect when it was insolvent cannot alter the rule. The contest is not between the complainant and bank alone, but between complainant and the other creditors of the bank, all of whom probably occupy the same position of having been misled into a belief in the solvency of the bank and its reliability for its acts.

We can see no error in the decree of the chancellor nor of the court of chancery appeals, and they are affirmed, with costs, against the complainant.

BANKS—INSOLVENCY—COLLECTION AS TRUST FUND.—If a collection indorsed to a bank is collected by it, and it afterward makes an assignment for the benefit of creditors, the relation between it and the owner of the property is that of debtor and creditor, and he cannot impose any trust upon the proceeds in the hands of the assignee, unless there is some agreement or course of dealing whereby the funds were to be held separate: *Akin v. Jones*, 93 Tenn. 353; 42 Am. St. Rep. 921, and note. A transaction by which a draft is sent to a bank for collection and remittance, collected, and the proceeds placed in its vaults by the bank, it forwarding a draft in payment, establishes, as between the correspondent and the bank, the relation of debtor and creditor and not that of trustee and cestui que trust: *Bowman v. First Nat. Bank*, 9 Wash. 614; 43 Am. St. Rep. 870, and note.

BANKS—INSOLVENCY—FRAUD.—To permit a deposit in a bank, in reliance upon its supposed solvency, is a gross fraud if its officers know at the time of its insolvency, and the depositor is entitled to reclaim the deposit or the proceeds: *Grant v. Walsh*, 145 N. Y. 502; 45 Am. St. Rep. 628, and note.

TRADESMAN PUBLISHING COMPANY v. KNOXVILLE CAR WHEEL COMPANY.

[95 TENNESSEE, 634.]

CORPORATIONS, INSOLVENT, PREFERENCES BY.—Though a corporation has become insolvent and its liability greatly exceeds its assets, if it continues to be a going concern and conducting its business in the ordinary way, its assets are not trust funds for equal distribution among its creditors, so that it has not power to make preferences or preferential payments to some of such creditors.

CORPORATIONS—PREFERENCES.—If it appears that a corporation has suffered continuous losses in its business for more than a year, that it cannot obtain moneys to meet its maturing obligations, and, finding it cannot continue business, it suspends, and then executes trust deeds of the greater part of its assets, with a view of preferring certain creditors, such preferences will not be permitted to stand, as against the objection of other creditors. The corporation, under such circumstances, must be regarded as having attained such a state of insolvency that all its creditors are entitled to share equally in the distribution of its assets.

A CORPORATION IS INSOLVENT, SO AS TO ENTITLE A CREDITOR to maintain a bill to wind up its affairs, if it has executed trust deeds of its entire property, under which possession has been taken, and it has outstanding large floating and bonded indebtedness, either matured or about to mature, and, on account of the general depression in business, it cannot sell its property and thereby nor otherwise obtain moneys with which to discharge its obligations, though such assets before such depression were valued at a sum much in excess of the corporate liabilities.

CORPORATIONS, INSOLVENT.—THOUGH A CREDITOR HAS NOT OBTAINED JUDGMENT at law upon his demand, he

may, under the statutes of Tennessee, maintain a suit to wind up an insolvent corporation, to set aside preferences made by it, and to have its assets distributed ratably among its creditors.

CORPORATIONS.—CAPITAL STOCK IS the sum fixed by the corporate charter as the amount paid in, or to be paid in, by the stockholders for the prosecution of the business of the corporation and for the benefit of its creditors. Capital stock is to be clearly distinguished from the amount of property owned by the corporation.

CORPORATION, DIRECTORS, LIABILITY OF.—Under a statute declaring that directors shall be liable for indebtedness in excess of capital stock, they are not entitled to treat the whole assets of the corporation as capital stock, and to be held liable only for the difference between the value of such assets and the amount of the corporate indebtedness. "Capital stock," as the term is here used, is limited to the amount of such stock as stated in the charter or articles of incorporation.

CORPORATIONS—DIRECTORS, FOR WHAT INDEBTEDNESS ANSWERABLE.—Under a charter providing that if the indebtedness of the corporation shall exceed at any time the capital stock paid in, the directors assenting thereto shall be individually liable to the creditors for such excess, bonded as well as floating indebtedness is included. The liability of the directors cannot be limited to the latter.

CORPORATIONS—DIRECTORS, PERSONAL LIABILITY OF, HOW AND BY WHOM ENFORCEABLE.—If a statute makes the directors of a corporation personally liable for its indebtedness in excess of its capital stock, the liability can be enforced only at the suit of creditors whose debts were not lawfully contracted. Each of such creditors cannot maintain a separate action for himself, but the rights of all must be enforced in a single proceeding, to which all interested have been made parties.

CORPORATIONS—DIRECTORS' LIABILITY—CONSTRUCTION OF STATUTE.—Statutes imposing personal liability on directors of corporations for indebtedness in excess of their capital stock, being in derogation of the common law, must be strictly construed.

CORPORATIONS.—TO A DIRECTOR'S LIABILITY FOR INDEBTEDNESS, CONTRACTED WITH HIS assent, beyond the amount of capital stock, it is essential that the assent be given officially in his capacity as director, acting concurrently with a majority of the official board. It is not, however, necessary that such assent be found in the minutes of the board, but there must have been an official meeting when assent was given, whether it appears from the minutes or otherwise.

CORPORATIONS—EVIDENCE.—THE OFFICIAL MINUTES of a board of directors of a corporation do not constitute the only evidence of their official assent to the creation of indebtedness in excess of its capital stock.

CORPORATIONS—DIVIDENDS, DIRECTORS' LIABILITY FOR PAYING.—If a charter provides that if the directors declare and pay a dividend when the corporation is insolvent, or which would diminish the amount of the capital stock, they shall be liable to creditors for the amount of dividends thus paid, they are not liable for declaring and paying dividends when the amount of the indebtedness of the corporation exceeds its capital stock, if the assets are reasonably worth, or are honestly believed to be worth, largely more than the corporate indebtedness, and upon this basis profits are estimated.

LANDLORD AND TENANT—PURCHASER OF LEASEHOLD INTEREST, LIABILITY OF FOR RENT.—If the tenant's leasehold

interest in property is sold by a receiver, under direction of the court, the purchaser does not become answerable for the rent which would subsequently fall due according to the terms of the lease, but the amount thereof remains a debt due from the original lessee.

LANDLORD AND TENANT—RECEIVER OF TENANT, LIABILITY OF FOR RENT.—If a receiver is appointed for a tenant and takes possession of the leased premises, he does not thereby become the assignee of the term in any proper sense of the word. Unless he elects to accept the lease, the lessor is not entitled to hold him liable for the rent stipulated for in the lease, nor to an order that such rent accruing after his appointment shall be paid as a preferred claim out of funds which may come into his hands. Such rents are not chargeable against such funds as operating expenses, when it does not appear that the receiver either carried on business on the leased premises, or rented them out, or made any use of them other than for the protection and preservation of the property.

L. A. Gratz and Tully R. Cornick, for publishing company.

Lucky & Sanford, Comfort & Spilman, Green & Shields, and McCampbell & Johnson, for creditors.

Webb & McClung, and Washburn, Pickle & Turner, for directors.

637 McALISTER, J. This is a creditors' bill, filed: 1. To have the Knoxville Car Wheel Company declared an insolvent corporation and its assets equally distributed among all its creditors; and 2. To hold the directors of said company, who are made defendants, individually liable for all debts created in excess of the capital stock paid in. The complainant also seeks to have annulled certain mortgages, for the reason: 1. That they were executed by said corporation after its ascertained insolvency; and 2. Because preferences are thereby created in favor of certain debts for which the directors are ⁶³⁸ sureties. The directors are also sought to be held liable, upon the ground that they had declared and received certain dividends from said corporation at a time when it was insolvent. It is alleged in the bill that, on June 19, 1882, said car wheel company issued bonds to the amount of \$100,000, and, to secure said bonds, executed a trust deed on all of its real and personal property to R. C. Jackson, as trustee, and that this trust deed would mature July 1, 1892. It is then alleged that, on January 27, 1892, said corporation, being then insolvent, executed a trust deed to R. S. Payne, trustee, conveying other real and personal property to secure the sum of \$31,872.23, due the East Tennessee National Bank, the Mechanics' National Bank, the City National Bank, and Daniel Briscoe & Co. It is further alleged that, on January 27, 1892, said corporation, being insolvent, executed to L. H. Spillman, trustee, a deed of trust on other real and personal property to secure the sum of \$23-

025.77, due to Knoxville Savings Bank, City National Bank, McNulty & Ransom, and Peter Staub. It is then charged that the last two deeds of trust were executed for the purpose of giving the creditors therein secured an illegal preference, and, having been made by an insolvent corporation, are fraudulent in law. There is no charge of fraud or bad faith. On the contrary, the bill recites, viz: "Complainant expressly disclaims any reflection upon the integrity and high character of the individuals who compose ^{the} the directors of said defendant, the Knoxville Car Wheel Company, or of the individuals and officers of the corporation who constitute its creditors of the preferred class, but the charge is that the effort to thus prefer one class of creditors of a corporation over others less favored and influential is illegal and void, and will not be tolerated by a court of equity."

It is next alleged that the capital stock of said company is \$107,000, while its indebtedness amounts to \$190,000 (less \$10,000 paid by said Spillman, trustee), and that said directors assented to the creation of said indebtedness, and are therefore liable for the sum of \$73,000, the excess of debts over the paid-in capital stock; that it will be necessary to sell all of the property of said company to pay debts, and, if that shall not suffice, then said directors are liable for the excess of the indebtedness above the capital stock. The bill asks the appointment of a receiver, the marshaling of assets, and the sale of the corporate property, and that the trust deeds to Payne and Spillman be adjudged void. L. H. Spillman was appointed temporary receiver for the corporation.

The defendant car wheel company answered the bill, and, among other defenses, denied its insolvency, and averred that its assets were worth more than double its debts, and that its business had been uniformly profitable until the recent panic which swept over the country, causing the railroads to cut ^{off} off their purchases and to default in the payments of goods already purchased; that this fact so depleted its revenues that it was deemed best to temporarily suspend operations until business should resume its normal conditions; that it had always done a good business, and paid the interest on its bonded debt, and promptly met all of its obligations; that it was in no sense insolvent, and its suspension of business was only temporary, and was not intended to be permanent.

On May 23, 1892, the directors filed a joint demurrer and answer to the bill. The defenses are, that they never assented to the creation of complainant's debt, and they further deny that

the indebtedness of the company exceeds the capital stock in the sense of the statute, denying that the bonded debt of the company can be computed in ascertaining the liability of the directors under the statute, but that only the floating debt is to be considered. They further insist that the company has assets sufficient to pay all its bonded and floating debt, and to redeem all its stock.

On May 23, 1892, the Mechanics' National Bank, City National Bank, Knoxville Savings Bank, and Daniel Briscoe & Co., beneficiaries under the trust deeds aforesaid, filed their answers to the original bill, in which they deny the insolvency of the car wheel company, affirm the validity of the trust deeds securing their debts, and resist the appointment of a receiver, and reserve the right to insist upon the ⁶⁴¹ liability of the directors for their debts, if it should become necessary.

It appears that on June 6, 1892, upon motion of complainant, and upon the pleadings hereinbefore stated, the chancellor declared the car wheel company an insolvent corporation, appointed L. H. Spillman permanent receiver, enjoined the company from exercising its corporate franchises, and assumed jurisdiction to wind up the affairs of said company as an insolvent corporation. A reference was ordered to ascertain assets and debts. On July 20, 1893, the clerk and master filed his general report, showing, viz: 1. The assets of the car wheel company, on May 1, 1892, were \$317,424.73; 2. The secured debts, including bonds and the debts mentioned in the trust deeds to R. S. Payne and L. H. Spillman, \$162,100.51; 3. The unsecured debts, \$17,468.03. Total debts, \$179,568.54. Complainants excepted to so much of the clerk's report as fixed the assets of the company at \$317,424.93.

On June 25, 1894, a decree was pronounced by the chancellor adjudging the trust deeds to Payne and Spillman void, and that the directors were warranted in paying the dividends to stockholders and were not liable to the creditors of the company on that account. The court reserved the question of liability of the directors, upon the ground that the debts exceeded the assets, and referred the cause to the master to report: 1. The paid-up capital stock of the corporation; 2. What debts were created ⁶⁴² in excess of the capital stock with the assent of the directors. August 7, 1894, the clerk reported, viz: 1. The paid-up capital stock of the car wheel company was \$107,000; 2. The indebtedness has exceeded the paid-up capital stock at all times since April 30, 1885, and that all the debts were created with the assent of the directors at a time when the indebtedness exceeded the

paid-up capital stock, though there were assets sufficient to pay the debts. August 10, 1894, a decree was entered overruling the exceptions filed to this report by the directors, the chancellor adjudging that the capital stock was \$107,000, and that all debts created after April 30, 1885, were created at a time when the debts exceeded the capital stock, and were created with the assent of the directors.

The car wheel company and the directors, C. H. Brown, W. P. Washburn, W. W. Woodruff, D. A. Carpenter, and M. L. Ross, appealed, and have assigned errors. The defendant banks whose debts were preferred in the deeds of trust have brought the case up by writs of error, and assign errors upon the action of the chancellor in adjudging their preferences illegal and in ordering said deeds to be set aside.

The second assignment is that the chancellor erred in adjudging the car wheel company an insolvent corporation at the date of the execution of the second trust deeds herein attacked, and in holding the latter void for that reason, and on account of ⁶⁴³ illegal preferences. It is insisted that the car wheel company was solvent and a going concern, and it had the right to make preferential assignments to its creditors, and that said deeds of trust are therefore valid.

Mr. Morawetz, in his work on Private Corporations, referring to the cases which hold that corporate preferences are valid, says: "This doctrine, in the opinion of the writer, is wholly indefensible on principle. The capital provided for the security of the creditors of a corporation is a fund held for the benefit of all the creditors equally. That the unsecured creditors of a corporation are entitled to an equal distribution of the common security has often been recognized by the courts of equity in adjusting the rights of creditors among themselves and in relation to the company's shareholders. After a corporation has become insolvent, and has ceased to carry on business, the rights of its creditors become fixed. If a corporation, whose assets are not sufficient to satisfy all of its creditors in full, can prefer certain creditors, leaving others unpaid, this must be by virtue of a power reserved by implication to the company and its agents. But this power cannot justly be included in the general powers of management which a corporation must necessarily possess over its property in order to carry on its business and further the purposes for which the company was formed. The purposes of a corporation are not furthered in any manner by giving ⁶⁴⁴ it or its agents the power, after the company has become insolvent and has ceased

to carry on business, and after the shareholders have lost their interests in the corporate estate, to prefer a portion of the creditors, according to interest or mere whim, and to pay their claims in full, leaving the others wholly without redress": 2 Morawetz on Corporations, sec. 803.

The settled law of this state is that the assets of an insolvent corporation become, from the date of its assured insolvency, a fixed trust fund for equal pro rata distribution among its creditors, unless otherwise provided by law or fixed by a valid contract: *Marr v. Bank of West Tennessee*, 4 Cold. 471; *Moseby v. Williamson*, 5 Heisk. 286; *Comfort v. Patterson*, 2 Lea, 672; *Bank v. Lumber etc. Co.*, 91 Tenn. 15; *Smith v. Insurance Co.*, 2 Tenn. Ch. 737. It has been held, however, in this state that, although the liabilities of a corporation may greatly exceed its assets, it is not insolvent in such sense as that its assets become a trust fund for pro rata distribution among its creditors, so long as it continues to be a going concern and conducts its business in the ordinary way. There must be some positive act of insolvency, such as the filing of a bill to administer its assets, or the making of a general assignment, or the permanent cessation to do business: *Comfort v. McTeer*, 7 Lea, 660.

With this preliminary statement of the law, we proceed to inquire whether, at the date of the execution ⁶⁴⁵ of the trust deeds in question, to wit, on the 27th of January, 1892, the Knoxville Car Wheel Company was an insolvent corporation, and if this fact had been signalized by a suspension of its corporate business and the transfer of all its available assets.

The complainants took the deposition of Charles H. Brown, the president, secretary, treasurer, and general manager of the corporation. It appears, from the testimony of Mr. Brown, that this corporation had lost money continuously since October, 1890. This witness further testified that, about January 30, 1892, the company suspended business. He was then asked: "Why did you suspend?" His answer was: "Because I did not have the money, outstanding notes went to protest, and bills became payable faster than we could make collections. The railroads were all in a cramped condition, and, instead of paying their bills at the first of the month, as they had done, they kept us waiting, and we are waiting for some of them yet." The witness was then asked if the deeds of trust were executed for the purpose of giving preferences. He answered: "I believe it to be construed that way." Question: "Did you, before suspending, consult with the directors as to the advisability of suspending?"

Answer: "Yes, sir; I called the directors together, explained the financial situation, that notes were coming due and no funds to meet them, and the East Tennessee National Bank had refused to let us have any more ⁶⁴⁶ money. We then decided to assign, or, at least, to execute trust deeds. The trust deeds were not executed until after the company suspended." Witness states his impression, without giving actual figures, that the company had sufficient assets to cover the liabilities left unsecured after the execution of the deeds of trust. He is asked to specify any assets reserved by the company to pay the unsecured debts. The witness is unable to mention any item, but says: "The only way to find out would be to take the deeds of trust and the balance sheet and check them off." When the balance sheet is checked off, it is ascertained that the principal items not contained in the deeds of trust are the items of account due from the Georgia Railroad Company and the Ducktown Sulphur, Copper & Iron Company, and which had been transferred by authority of the directors, January 25, 1892, to the Mechanics' National Bank, and the item of account against the Richmond Locomotive & Machine Works, transferred to W. R. Turner, to secure the payment of a note in favor of William Fain, administrator, which was then past due.

The record discloses that in these deeds of trust the company had conveyed its entire plant, including the wheels on hand and those in process of manufacture, its tools, stock in trade, all accounts and bills receivable, and lands owned by the company which were not then under mortgage. The property conveyed in the deeds of trust apparently embraced ⁶⁴⁷ everything owned by the corporation. The trustees were placed in possession of the property conveyed to them, and the business of the company was suspended.

It further appears that, during the year ending April 30, 1891, the company had sustained a net loss of \$12,831.04, and during nine months from April 30, 1891, to February 1, 1892, it had sustained a net loss of \$20,987.83, making a total loss sustained by the company during the twenty-one months preceding the suspension of business on January 30, 1892, of \$33,818.87. On the latter date the directors ordered the factory to be closed, stopped all salaries, except the salary of a book-keeper, which was to be continued only until such time when the books were written up. The president of the company was requested to remain in charge during the month of February, the salary to be arranged hereafter, and he was authorized to reopen the machine shop, and to

complete such unfinished work as was on hand, and also empowering him to sell the Carter county property, which was all covered by the trust deeds made to Jackson and Payne. On March 30, 1892, the directors authorized the execution of an additional deed of trust to secure payment of claim of Jennifer Iron Company for \$1,080.

It further appears that no meetings of the directors were held from March 30, 1892, to May 10, 1892, when the present bill was filed. During ⁶⁴⁸ this time no preparations were made for the resumption of business, but there was every indication of permanent suspension and a final liquidation of the affairs of the company.

The claim of the company that it was solvent is, in our opinion, based largely upon extravagant valuations of its assets, and especially upon an overestimate of the value of certain lands owned by the company in Carter county. The valuation put upon this land by the stockholders was entirely arbitrary, and without any sufficient reason to justify such an exaggerated figure. The evidence shows that there was no market for such real estate in 1892; that, on account of the general depression in business, it was impossible to sell real estate, and that such an asset was entirely unavailable. When this bill was filed, the company's matured and unsettled floating indebtedness exceeded \$70,000; its bonded indebtedness of \$100,000 would mature in two months; the entire assets of the company were covered with deeds of trust, and the company was entirely without resources to liquidate this heavy indebtedness.

The question, then, is whether a creditor, on May 10, 1892, after the trust deeds had been executed and the assignees had taken possession of the entire property of the company, could file and maintain a bill to wind up the affairs of the company as an insolvent corporation. We think the right to maintain the bill is clear and unquestionable.

Complainant, without obtaining a judgment at law ⁶⁴⁹ upon its demand, had the undoubted right to file this bill and have the company wound up as an insolvent corporation, and its assets distributed ratably among all the creditors. As stated in the brief, "while this bill was originally filed only to collect a debt of \$400, there are now before the court \$190,000 of creditors, on whose behalf it was also filed, and who now join with the original complainant in the demand that it be sustained, and the assets of this insolvent corporation applied to the payment of its just debts."

The bill is clearly maintainable under the following sections of Milliken and Ventrees' Code:

"Sec. 5037. The creditors of a corporation may also, without first having obtained a judgment at law, file a bill in the court of chancery to attach the property of the corporation, and subject the same, by sale or otherwise, to the satisfaction of their debt, when the corporate franchises are not used, or have been granted to others in whole or in part."

"Sec. 5038. In such cases the court may appoint a receiver, take an account of the affairs of the corporation, and apply the property and effects to the payment of debts pro rata, and divide the surplus, if any, among the stockholders."

"Sec. 4168. A corporation is not dissolved by the nonuse or assignment to others, in whole or in part, of its powers, franchises, and privileges, unless all the corporate property has been appropriated to the payment of its debts; and any creditor, for himself ⁶⁵⁰ and other creditors, whether he has recovered judgment or not, or any stockholder, for himself and other stockholders, may file a bill, under the provisions of this chapter, to attach the corporate property, and have such property applied to the payment of the debts of the corporation, and any surplus divided among the stockholders."

In *Smith v. St. Louis etc. Ins. Co.*, 6 Lea, 569, it was said that, under these sections of the code, "the court may find [as] a fact that the corporation is insolvent, or has ceased to do business, or has granted its franchises, in whole or in part, to others, and, upon the adjudication of any of these facts, the right to administer its effects for the benefit of creditors follows."

We are also of the opinion that the execution of these deeds of trust, under the circumstances, was an overt act of insolvency, and was a preferential diversion of the corporate assets to the payment of debts of one class to the exclusion of other classes. The execution of the deeds of trust, under the circumstances, was a confession of insolvency. We therefore adjudge the several deeds of trust executed by the car wheel company to Payne, Spillman, and McMillan void, and the decree of the chancellor in setting them aside was correct.

We do not decide, and do not wish to be so understood, that a corporation, although actually insolvent, so long as it is a going concern, may not deal with its property and transfer it for value, in ⁶⁵¹ due course of business, to general creditors. A mere excess of liabilities over assets would not alone be sufficient to justify an interference and stoppage of business at the suit of a creditor. "A corporation is authorized to continue the management of its affairs, to deal with its property, and to assign it for value, in due course of business, notwithstanding its actual insolvency,

so long as there is an honest intention and a reasonable expectation on the part of the company of redeeming its fortunes; and it is only when a corporation is about to defraud its creditors by waste of its assets, or when the insolvency of the company is hopeless, so that further prosecution of the enterprise would clearly be at the expense of the creditors, that the latter may interfere to protect their lien": 2 Morawetz on Corporations, 2d ed., sec. 786; Wait on Insolvent Corporations, sec. 34, quoting the above with approval; 2 Spelling on Corporations, sec. 712. "It has accordingly been held that a corporation which is insolvent and unable to pay all of its creditors in full may continue its operations, and pay off debts in regular course of business, though a part of the creditors be thereby deprived of their security": 2 Morawetz on Corporations, 786.

We hold, however, that this corporation, at the date of the filing of the bill, was not only actually insolvent, but had committed an overt act of insolvency by preferential assignments to creditors.

The next question presented is in respect of the ⁶⁵³ individual liability of the directors. The charter of the Knoxville Car Wheel Company contains the following clause, to wit: "If the indebtedness of said company shall at any time exceed the capital stock paid in, the directors assenting thereto shall be individually liable to the creditors for said excess." The chancellor found that the capital stock of the company subscribed and paid in amounted to \$107,000, and that all debts created after April 30, 1885, were in excess of the capital stock paid in; that the directors had assented to the creation of such indebtedness, and were individually liable. He decreed, however, that this liability upon the part of the directors was secondary, and that the sum could not be ascertained until the property of the corporation was sold and its proceeds distributed. The finding of the chancellor that the capital stock of the company was \$107,000 is fully sustained by the record. The capital stock is shown by the first report made by the secretary and treasurer of the company to stockholders, on May 19, 1882, to be \$107,000, and it appears at the same sum in every subsequent annual report from that time to February 1, 1892, upon which date the last report was made. The capital stock is proven to have been \$107,000 by C. H. Brown, who was secretary and treasurer, or president of the corporation from its organization.

It is insisted in behalf of complainants that the excess of indebtedness over capital stock for which ⁶⁵³ the directors are liable amounts to the sum of \$73,000. It is conceded by defendants

that if the term "indebtedness," employed in the statute, should be held to embrace the fixed bonded indebtedness of the company, as well as its floating debts, then its indebtedness does exceed the capital stock paid in. The insistence in behalf of the directors on this branch of the case is twofold, to wit: 1. That the term, "capital stock paid in," includes not merely the capital stock paid in by the subscribers, but the entire capital and available assets of the company; 2. That the term "indebtedness," used in the statute, does not include the bonded indebtedness, but merely the floating debts, of the company. The proper solution of this question involves the determination of the correct meaning of the terms, "indebtedness" and "capital stock paid in," as employed in the charter of the company. What, then, is the meaning, in this connection, of the term "capital stock paid in"?

The insistence of defendants' counsel is that the assets on hand and available for payment of debts, no matter how derived, must constitute the fund called "capital stock paid in." In support of this contention, counsel cites Beach on Corporations, volume 2, section 465, viz: "In respect to corporate capital, the word 'capital' is, in general, used in signifying the sum paid in by the subscribers, with the addition of all gains and profits realized, with such diminutions as have resulted from losses incurred ⁶⁵⁴ in transacting business. In this sense, the capital of a corporation is the fund with which it transacts its business, and embraces all its property, real and personal, constituting the assets of the corporation, such as are subject to execution at law. So much of the capital as is represented by the capital stock issued must be kept unimpaired during the existence of the corporation; but that portion of the capital which represents the surplus arising from the operation of business of the corporation is subject to the discretion of the managers in regard to its disposition. Therefore, profits remain a part of the fund constituting the capital until actually divided among the stockholders."

We do not think the quotation from Beach on Corporations sustains the position. It will be observed that Mr. Beach, in this quotation, is dealing with the word "capital," and he does not treat this term as synonymous with "capital stock." In the very next section the same author says, viz: "There is a distinction between the capital of a corporation and its capital stock, though they are often used as interchangeable terms."

The capital stock is clearly not the same as property possessed by the corporation, for the capital stock remains fixed, although the actual property of the corporation varies in value, and is con-

stantly increasing or diminishing in amount. What the amount of the capital shall be is in the discretion of the managers, but the amount of the capital stock ⁶⁵⁵ is limited, and determined by the charter and the laws governing it. It follows, therefore, that the limit imposed upon the capital stock of the corporation does not restrict the amount of property which it may own: 2 Beach on Corporations, sec. 466. This distinction is clearly shown in section 791 of Morawetz on Corporations, in these words: "The amount of the capital stock of a corporation is usually fixed at a definite sum by the charter, or other instrument, which has been agreed to by the shareholders as containing the essential conditions of their association. It is so fixed, partly for the purpose of determining the scope of the company's business and the relative rights and obligations of its shareholders as among themselves, and partly, also, for the purpose of obtaining commercial credit on behalf of the corporation by indicating to it what security has been provided with those who deal with it. Every person who becomes a shareholder in a corporation and every person who deals with the corporation, understands that the fund contributed, or agreed to be contributed, as the company's capital shall be charged with the payment of corporate debts. It is likewise understood, where there is no express provision to the contrary, that the funds so charged shall be the only security for creditors, and that the shareholders shall not be individually liable for the corporate debts and obligations. Every contract entered into by the corporation, therefore, includes: 1. An implied agreement ⁶⁵⁶ that the company's capital shall be held and used as a trust fund, equitably pledged as security for the corporate debts; 2. An implied representation that the company's capital has been paid in, or subscribed, as indicated by the company's charter, and that the fund contributed or subscribed has been preserved for the purposes for which it was provided." "Capital stock is the sum fixed by the corporate charter as the amount paid in, or to be paid in, by the stockholders, for the prosecution of the business of the corporation and for the benefit of corporate creditors. The capital stock is to be clearly distinguished from the amount of property possessed by the corporation. Occasionally it happens that, under the terms of statutes relating to 'taxation' which have been drawn without regard to the technical meaning of words, the courts will construe the capital stock to mean 'all the actual property of the corporation.' But this is for the purpose of carrying out the intent of the statute, and is not the real meaning of the term. At common law the actual stock does not vary, but re-

mains fixed, although the actual property of the corporation may fluctuate widely in value, and may be diminished by losses or increased by gains": 1 Cook on Stockholders, sec. 9. See, also, *Railroad Cos. v. Gaines*, 97 U. S. 697; *Ohio Life Ins. Co. v. Merchants' Ins. Co.*, 11 Humph. 1; 53 Am. Dec. 742; *Union Bank v. State*, 9 Yerg. 490; *Street Railroad Co. v. Morrow*, 87 Tenn. 406; *Memphis v. Ensley*, 6 ⁶⁵⁷ Baxt. 553; 32 Am. Rep. 532; *Nashville Gaslight Co. v. Mayor of Nashville*, 8 Lea, 406. We therefore conclude that the term "capital stock paid in" means the amount subscribed and paid by the stockholders, and that amount is clearly shown by the proof to have been \$107,000.

The next question presented is whether the word "indebtedness," in the clause of the charter imposing personal liability on the directors assenting to an indebtedness in excess of the capital stock paid, includes bonded indebtedness. The chancellor so held. The contention of the directors' counsel is, that the term means the floating indebtedness, and does not embrace the bonded debt. Counsel, in order to support this contention, go into a history of previous legislation on this subject, but we have been unable to derive much light from that source. The only material difference we note between the former acts and the statute in question is that, in the latter, the words "paid in" have been added. The former acts simply provided that the indebtedness should not exceed the capital stock. We think the addition of the words "paid in" strengthens, rather than diminishes, the force of the argument that bonded indebtedness is within the meaning of the statute. The construction contended for by counsel for the directors would lead to this anomaly, that directors, having contracted indebtedness to the limit allowed by the charter, may fund this liability in bonds, secure them by a recorded mortgage, and then, without risk to themselves, incur additional ⁶⁵⁸ indebtedness, and repeat the process toties quoties. We have been furnished with no direct authority on the point now being adjudged. Counsel, however, cite *Stone v. Chisolm*, 113 U. S. 302, where it appears that the indebtedness with which the directors were sought to be charged under a North Carolina statute was a registered bonded indebtedness, but the precise point raised here was not presented or decided. We think this section of the charter of the car wheel company is unambiguous, and the term "indebtedness" clearly includes the bonded debt.

It is insisted by defendants' counsel that the directors' liability does not constitute a fund for the benefit of creditors generally, but that it is a specific liability in favor of individual creditors

whose debts were illegally contracted, and that other creditors, whose debts were legally contracted, cannot avail themselves of it. That proposition is true; but, in conceding this, we do not wish to be understood as agreeing that each creditor whose debt has been illegally contracted may maintain a separate suit against the directors for the assertion of his individual claim. We held in *Moulton v. Connell-Hall-McLester Co.*, 93 Tenn. 377, that the liability of the directors is a fund created by the statute for the benefit of all the creditors whose debts were incurred in excess of the capital stock paid in with the assent of directors, and that the bill must be filed for the benefit of all creditors so situated. In this view, the present bill is properly framed: ⁶⁵⁹ *Horner v. Henning*, 93 U. S. 231; *Stone v. Chisolm*, 113 U. S. 302; *Pollard v. Bailey*, 20 Wall. 520. In *Stone v. Chisolm*, 113 U. S. 302, Justice Matthews, in stating the reason of the rule, said, viz: "The conditions of the personal liability of the directors of the corporation, expressed in the statute, are that there shall be debts of the corporation in excess of the capital stock paid in, to which the directors sought to be charged shall have assented. . . . To ascertain the extent of the liability in a given case requires an account to be taken of the amount of the corporate indebtedness, and of the amount of the capital stock actually paid in, facts which the directors, upon whom the liability is imposed, have a right to have determined once for all in a proceeding which shall include all who have an adverse interest and a right to participate in the benefit to result from enforcing the liability. . . . The evident intention of the provision is, that the liability shall be for the common benefit of all entitled to enforce it, according to their interest, an apportionment which, in case there cannot be satisfaction for all, can only be made in a single proceeding, to which all interested can be made parties. It is immaterial," continues the court, "that, in the present case it does not appear that there are other creditors than the plaintiff in error. There can be but one rule for construing the section, whether the creditors be one or many."

⁶⁶⁰ The next assignment is that the chancellor erred in decreeing that all the debts of the company contracted after April 30, 1885, were created with the assent of the directors. It may be conceded that this assignment presents a question of some difficulty, and probably the determining issue in the case. The language of the statute is, viz: "If the indebtedness of said company shall at any time exceed the capital stock paid in, the directors assenting thereto shall be individually liable to the creditors for

said excess." It may be remarked that this clause is peculiar to charters of mining and manufacturing companies, and is a discrimination, to some extent, against this class of domestic corporations. It has been uniformly held that such statutes, being in derogation of the common law, must be strictly construed. As stated by Mr. Cook in his work on Stocks and Stockholders: "They [such statutes] are a wide departure from established rules, and, though founded on considerations of public policy and general convenience, are not to be extended beyond the plain intent of the words of the statute": *Hand v. Cole*, 88 Tenn. 402, 403; 2 *Spelling on Corporations*, sec. 921; *Allison v. Coal Co.*, 87 Tenn. 62, 63.

Says Mr. Thompson in his *Commentaries on Private Corporations*, section 4271: "It is a principle of legal procedure that, when a party sues to enforce a liability created by statute in derogation of the common law, he must not only distinctly ⁶⁸¹ aver, but he must make strict proof of, a case within the terms of the statute. The principle operates, if possible, more strongly where, as in the case under consideration, the statute creates a liability in the nature of a penalty. The principle is believed to be a rule of right rather than a rule of procedure, and hence applicable in the equitable as well as the legal forum." Where the liability is imposed upon the directors assenting thereto, "the creditor . . . must both allege and prove that the directors against whom he proceeds did assent to the unlawful contract": *Thompson on Private Corporations*, 4206.

Again, the same author, at section 4264, says: "On the other hand, where the liability . . . is for the excess, an interpretation has been fallen into which assimilates their liability to that of guarantors of final payment, which is believed to comport best with the real policy of all such statutes, by holding that the effect of the statute is to make the directors individually liable for such specific debts only as were contracted with their assent in excess of the paid-up capital, and which remained unpaid after the exhaustion of the corporate assets": 3 *Thompson on Private Corporations*, sec. 4264.

These principles have all been recognized and applied by this court in the case of *Allison v. Coal Co.*, 87 Tenn. 62, 63. The liability of a director is contingent, and is made to depend upon four conditions, viz: 1. Assent by him to the creation of ⁶⁸³ the particular debt upon which he is sued; 2. That the debt has not been paid; 3. That the assets of the corporation have been exhausted; 4. That the particular debt is in excess of the capital

stock. Judge Lurton, in delivering the opinion of this court in *Allison v. Coal Co.*, 87 Tenn. 62, said: "Unless the very debt upon which it is sought to hold the director to individual liability was created by the assent of the director, it is not the case provided for by the charter." The cardinal inquiry, then, upon this branch of the case is whether there is proof in this record of assent by the directors to the creation of the particular debts for which the directors are sought to be held individually liable under this statute. It is insisted by counsel for the directors that the assent contemplated by the statute must be given by the directors, not as individuals, nor even as stockholders, but in their capacity as directors. We are constrained to believe, upon mature consideration, that this construction is the proper one to be given this statute. This construction accords with the general rule that directors must act as an official body. Mr. Cook, in his work on *Stocks and Stockholders*, states the rule thus: "Moreover, the directors can contract and act only as a board duly notified and assembled. The members of the board cannot agree separately and outside of the meeting, and thereby bind the corporation. Nor can a minority of the body meet and bind the board. A majority must be present, and then a majority of that majority binds the corporation." ⁶²³ A single director has no power to contract for the corporation": 2 Cook on *Stocks and Stockholders*, sec. 712. So we think, when it is sought to hold a director to individual liability under the provisions of this highly penal statute, it must be shown that his assent was given in his capacity as director, acting concurrently with a majority of the official board. We do not hold that the only evidence of this official assent must be found in the minutes of the board, but we do hold there must have been an official meeting when assent was given, whether it appears in the minutes or otherwise. In other words, we hold the official minutes do not constitute the only evidence of official assent provided it is made otherwise to appear that, at a meeting of the official body, the directors sought to be charged assented to the creation of the particular debt. Tested by this rule, we find, upon an examination of the record, that only one of the debts with which the directors are sought to be individually charged was officially assented to, viz., that in favor of Peter Staub for lease of foundry.

It is next assigned as error that the chancellor refused any relief against the directors on account of the payment of dividends, amounting to \$28,000. It is contended by counsel that said dividends were paid at a time and under circumstances that rendered the payment unlawful, and was a diversion of the assets of

the corporation. The charter of this company provides, viz., "If the directors declare and ⁶⁶⁴ pay any dividend when the company is insolvent, or which declaration of a dividend would diminish the amount of the capital stock, they shall be jointly and severally liable to creditors for the amount of dividends thus declared. Any director may avoid liability by voting against the dividend, or by filing his objections, in writing, as soon as he ascertains a dividend has been made."

The dividends in question were paid, viz: April 30, 1884, four per cent, \$4,280; April 30, 1886, four per cent, \$4,280; April 30, 1887, four per cent, \$4,280; April 30, 1888, four per cent, \$4,280; April 30, 1889, five per cent, \$5,350; April 30, 1890, six per cent, \$6,420. It is insisted that the first dividend, paid April 30, 1883, was paid out of the proceeds of the bonds which had been sold by the company at a discount of twenty-two per cent, and that the remaining dividends were paid at a time when the corporation was insolvent, and when its indebtedness exceeded the amount of its paid-up capital stock. The chancellor, upon the hearing, was of opinion that the directors were warranted in the payment of these dividends, and that the defendants were not liable to the creditors of the corporation. It is true, as argued by counsel, that when these dividends were declared, the indebtedness of the corporation did exceed the amount of capital stock paid in, but, under the statute last cited, this fact does not determine the liability of directors. The inhibition of the statute is against declaring ⁶⁶⁵ dividends when the company is insolvent or when such dividend will diminish the amount of the capital stock. If the assets are reasonably worth, or are honestly believed to be worth, largely more than the company's indebtedness, and upon this basis profits are estimated, the company is not insolvent, although its indebtedness may exceed its capital stock paid in. The record discloses that when these dividends were declared, this company was engaged in a very extensive business, and was realizing large receipts from the sale of the products of its manufacture. Its assets were estimated by its directors to be largely in excess of the company's liabilities, and the proof shows that said assets, which consisted largely of mineral lands, were largely more valuable then than at a later period. The proof indicates that during the years covering the declaration of dividends the company was realizing enough profit on its business, and there was no reason why those profits should not have been distributed among its stockholders. The conduct of the directors is to be viewed in the light of the financial status of the company at that period, and is not to be determined by its ultimate

insolvency, precipitated, doubtless, by the universal paralysis of business then prevailing throughout the country. When the large volume of business transacted by this company is considered, it is not perceived how its insolvency could have been superinduced by the small dividends declared. We are of opinion there was no ^{error} error in the action of the chancellor upon this branch of the case.

The next matter for consideration arises upon the answer and crossbill of Peter Staub. As a creditor of the car wheel company, Staub, on May 13, 1892, became a party to the original proceedings, and filed an answer, in which he admitted the material allegations of the bill. His answer was also filed as a crossbill, in which it was alleged that, on December 31, 1890, he leased to the car wheel company his foundry property on Hardee street, in the city of Knoxville for a term of five years, at a rental of \$4,000 per annum, payable in monthly installments of \$333.33.

It was then alleged that the company is indebted to him in the sum of \$1,500 on account of accrued rents, which he seeks to recover, and also asks a decree for the rents for the unexpired term as the same mature.

It is further alleged that the directors of the company assented to the lease, and are individually liable to him, for the reason that at the time this lease was contracted, the indebtedness of the company exceeded its paid-in capital stock. Complainant in the crossbill also joined in the prayer of the original bill for the appointment of a receiver.

It further appears that, on November 28, 1892, Staub filed a petition in said cause, stating that, by reason of nonuser, the foundry property was getting out of repair, and asking that proper repairs be ^{made} made by the receiver. Petitioner further prayed that the leasehold be sold, alleging that the value of the lease was being deteriorated each day.

It further appears that, upon motion of counsel for Staub, the chancellor allowed, as a preferred claim, all rents accrued and accruing upon the leasehold property from May 10, 1892, date of appointment of temporary receiver, up to date of confirmation of sale of leasehold, which the receiver was ordered to pay out of any funds in his hands belonging to the company. In accordance with the decree of the chancellor, the unexpired term of the lease was sold by the clerk and master, and purchased by the Clark Foundry & Machine Company at the price of \$4,500. This amount not being sufficient to discharge balance of rent for the unexpired term, the chancellor decreed that the company should

be liable for the difference between the amount realized from the sale of the leasehold and the sum contracted to be paid in the lease, and he accordingly pronounced a judgment against the company for this deficit, amounting to the sum of \$3,600.

Two assignments of error are based upon the action of the chancellor in his disposition of the matters presented in this lease. The first is, that he erred in decreeing that the car wheel company was indebted to Peter Staub in the sum of \$3,609 on account of the unexpired term of the lease; that this unexpired term had been sold to the Clark Foundry & Machine Company, and the purchaser became ^{est} operated with the payment of the entire rental. We think the proposition embodied in this assignment, that the purchaser, after buying the unexpired term of the lease at chancery sale, should, nevertheless, be charged with the contract rental of the original lease for balance of term, carries on its face its own refutation.

The second assignment is that the court erred in holding that the rents accruing from the Staub lease, after the appointment of the receiver up to date of confirmation of sale of leasehold, constituted a first charge upon the funds and property in the receiver's hands, and ordering same paid, as an expense of the receivership. In support of this assignment, counsel for appellant argue that complainant, Staub, became a party to the original bill in this cause, by which the car wheel company was enjoined from prosecuting its business or using its leasehold property, and had a permanent receiver appointed and the leasehold sold. In a word, that the possession and holding of the leasehold estate from May 10, 1892, until it was sold and sale confirmed, was all done at the instance and for the benefit of Staub, the lessor. It is contended, however, by counsel for Staub that the receiver took possession of the property and proceeded to rent some of it to tenants. The evidence wholly fails to show any renting of the property by the receiver, nor is there any proof that the receiver has ever charged or received any rent for such occupation. At most, the record ^{est} shows that one or two persons were permitted to occupy a part of the premises temporarily. As suggested by counsel, for aught that appears in this record, "this temporary use may have been for the protection and preservation of the property." It is insisted by counsel that such temporary occupation of the property by permission of the receiver would not be an adoption of the lease by the receiver so as to bind the assets in his hands. Again, it is insisted that the receiver had no authority to adopt this lease, and, even if he had attempted to do

so, it would not bind the complainant or the creditors. It is then suggested that complainant, Staub, in none of his pleadings had ever claimed that the receiver was liable for the rents, or that he had adopted the lease. "A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed, and the utmost effect of his appointment is to put the property, from that time, into his custody as an officer of the court for the benefit of the parties ultimately proved to be entitled, but not to change the title or even right of possession in the property": *Union Bank of Chicago v. Kansas City Bank*, 136 U. S. 223.

As observed in another case, "the ordinary chancery receiver, such as we have in this case, is clothed with no estate in the property, but is a mere custodian of it for the court, and, by special ⁶⁷⁰ authority, may become an officer of the court to effect a sale of the property, if that be deemed necessary for the benefit of the parties concerned. If the order of the court under which the receiver acts embraces the leasehold estate, it becomes his duty, of course, to take possession of it; but he does not, by taking such possession, become assignee of the term in any proper sense of the word. He holds that, as he would hold any other property involved, for and as the hand of the court, and not as assignee of the term": *Gaither v. Stockbridge*, 67 Md. 222; *Quincy etc. Ry. Co. v. Humphreys*, 145 U. S. 82.

"In order to bind a receiver, or one standing in a like relation to a leasehold estate, for rents, he must elect to accept the lease, and he thereby becomes vested with the title to the leasehold interest": *In re Otis*, 101 N. Y. 585.

We infer, from briefs of counsel filed in this cause, that the chancellor allowed these rents to Staub as a preferred claim, upon the idea that they were properly chargeable to the receiver as an operating expense. We find nothing in the record to warrant such an assumption, nor is there any basis for the other contention that there was in fact an adoption of this lease by the receiver. In our opinion, the action of the chancellor in allowing, as a prior charge upon the funds in the hands of the receiver, rents that accrued from the appointment of the receiver until the confirmation of the sale of ⁶⁷¹ the leasehold, was clearly erroneous. The result is, that complainants are entitled to a decree against Staub on his refunding bond for the rents so improperly allowed him.

The decree of the chancellor in the particulars herein indicated will be modified, but in all other respects affirmed.

CORPORATIONS—INSOLVENT—PREFERENCES BY.—The directors and officers of an insolvent corporation may dispose of its property in good faith to pay or secure its debts, even though some creditors are thus given a preference over others: *Illinois Steel Co. v. O'Donnell*, 156 Ill. 624; 47 Am. St. Rep. 245; but the contrary doctrine is maintained in *Conover v. Hull*, 10 Wash. 678; 45 Am. St. Rep. 810, and extended note discussing the subject.

CORPORATIONS—WHEN INSOLVENT.—Insolvency, in its general and popular meaning, denotes the insufficiency of the entire property of a corporation or individual to pay its or his debts, but, under insolvency proceedings, it denotes inability to pay debts as they become due in the ordinary course of business: *Sabin v. Columbia Fuel Co.*, 25 Or. 15; 42 Am. St. Rep. 756.

CORPORATIONS—POWER OF CREDITORS TO WIND UP ITS AFFAIRS.—A creditor may proceed to have the dissolution of an insolvent corporation judicially declared and to wind up its affairs: *Mickles v. Rochester City Bank*, 42 Am. Dec. 108.

CORPORATIONS.—CAPITAL STOCK is the sum fixed by the corporate charter as the amount paid in, or to be paid in, by the stockholders for the prosecution of the business of the corporation, and it is a trust fund for the benefit of the corporate creditors: *Commercial etc. Ins. Co. v. Board of Revenue*, 99 Ala. 1; 42 Am. St. Rep. 17, and note; *Shields v. Clifton Hill Land Co.*, 94 Tenn. 123; 45 Am. St. Rep. 700, and note.

CORPORATIONS—DIRECTORS—LIABILITY OF.—An ultra vires act of the directors of a corporation in executing accommodation paper in the name of the corporation, or in loaning its funds, is an act by the corporation, within the meaning of a statute giving a creditor a right of action against the directors for a violation of the charter causing its insolvency: *Patterson v. Stewart*, 41 Minn. 84; 16 Am. St. Rep. 671, and especially note. Directors are personally liable as trustees for a loss occasioned by willful abuse of their trust, or by the misapplication of the funds of a moneyed corporation: *Robinson v. Smith*, 8 Paige, 222; 24 Am. Dec. 212, and note; *Hodges v. New England Screw Co.*, 1 R. I. 812; 53 Am. Dec. 624, and extended note. The directors of a corporation are personally liable as trustees for any ordinary neglect of their official business: *Bank v. Hill*, 56 Me. 385; 96 Am. Dec. 470, and note. See, also, the extended note to *Marshall v. Farmers' etc. Bank*, 17 Am. St. Rep. 98.

LEASE—ASSIGNMENT—LIABILITY FOR RENT.—The assignee of a leasehold estate is liable for the rent according to the terms of the lease, but the fact of his liability after the assignment does not discharge the original tenant from his covenant to pay rent: *Grommes v. St. Paul Trust Co.*, 147 Ill. 634; 37 Am. St. Rep. 248, and note. The subject is thoroughly discussed in the extended notes to *Washington etc. Gas Co. v. Johnson*, 10 Am. St. Rep. 557, and *Coburn v. Goodall*, 1 Am. St. Rep. 83.

LEASE—RENT—LIABILITY OF RECEIVER FOR.—A receiver taking possession of a leasehold estate does not become the assignee of the term nor liable on the covenants of the lease. He is answerable only for reasonable rent during the time he retains possession: *Bell v. American Protective League*, 163 Mass. 556; 47 Am. St. Rep. 481.

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2. TORTS.—THE INTENTIONAL CAUSING OF LOSS by one man to another, without justifiable cause and with malicious purpose to inflict it, is of itself a wrong. (*Graham v. St. Charles etc. R. R. Co.*, 366.)

3. TORTS—INFLUENCING ONE NOT TO DEAL WITH ANOTHER.—While a person has an absolute right to refuse to have business relations with any person, though without reason, or as the result of whim, caprice, prejudice, or malice, yet he has not a right, from pure motives of malice, to influence another person to do the same thing without incurring legal liability, which would, however, depend upon the varying conditions, relations, and special facts of each particular case. (*Graham v. St. Charles etc. R. R. Co.*, 366.)

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ADULTERATION.

1. CONSTITUTIONAL LAW—POLICE POWER—ADULTERATION OF FOOD.—The legislature, or a city under delegated power, has authority to forbid the sale of impure or adulterated food or milk, and to fix a standard by which it shall be judged. (*State v. Dupaquier*, 834.)

2. ADULTERATION—MUNICIPAL ORDINANCE—POLICE POWER.—A city ordinance requiring public milk vendors to furnish gratuitously, on the application of sanitary inspectors, samples of their milk for inspection and analysis, or suffer a penalty for refusal, is not unreasonable, vexatious, or oppressive, but is a legitimate exercise of the police power for the benefit of the public health. (*State v. Dupaquier*, 834.)

3. CONSTITUTIONAL LAW—ORDINANCES TO PREVENT SALE OF ADULTERATED MILK.—A city ordinance requiring public milk vendors to furnish gratuitously, on the application of sanitary inspectors, samples of milk for inspection and analysis, is not unconstitutional, as forcing such vendors to furnish evidence against themselves, as taking private property for public use without compensation or due process of law, as denying them the equal protection of law and the enjoyment of their property, as denying them protection in person and property against unreasonable seizure or search, and authorizing invasion thereof without warrant founded on oath or affirmation, or as subjecting them to odious, oppressive, and unreasonable exactions in a lawful vocation. On the contrary, such ordinance is but a reasonable regulation for the public health. (*State v. Dupaquier*, 834.)

ADVANCES.

See Factors, 3-5.

ADVERSE POSSESSION.

See Assumpsit, 2; Cotenancy.

AGENCY.

See Banks, 3; Corporations, 22; Factors, 1, 2; Forgery, 2, 3; Insurance, 14; Landlord and Tenant, 4; Usury, 3.

ALIENATION.

See Devise, 3-6; Estates, 2, 3; Trusts, 6.

ALIENATION OF AFFECTIONS.

See Husband and Wife, 1.

AMENDMENT.

See Appeal, 2; Religious Societies, 5-7.

ANIMALS.

1. ANIMALS—LIABILITY OF OWNER.—The owner of a domestic animal is not in general liable for an injury committed by it while in

a place where it rightfully may be, unless it is shown that the animal was vicious in the particular complained of, and that the owner had notice of such vicious propensity. (*Morgan v. Hudnell*, 741.)

2. ANIMALS—LIABILITY OF OWNER FOR TRESPASSES OF. If a domestic animal breaks into the close of another, and there damages the real or personal property of one in possession, the owner of the animal is liable without reference to whether such animal is vicious, or whether such viciousness was known to the owner. (*Morgan v. Hudnell*, 741.)

See Trespass, 3.

APOTHECARIES.

1. APOTHECARIES—REFUSAL TO FILL PRESCRIPTION.—The mere refusal of a druggist to fill prescriptions does not render him liable in damages to the physician who gives the prescriptions. (*Tarleton v. Lagarde*, 353.)

2. APOTHECARIES—SLANDER—REFUSAL TO FILL PRESCRIPTION.—A druggist, while exercising his privilege of declining to fill a physician's prescriptions, must abstain from any comments, not based on good cause, calculated to convey impressions damaging to the physician's character and standing as a professional man, and if he impugns the physician's professional capacity without cause, he must respond in damages. (*Tarleton v. Lagarde*, 353.)

APPEAL.

1. APPEAL—WHAT MAY BE CONSIDERED ON.—On appeal from a judgment sustaining the validity of an ordinance, only questions as to the legality or constitutionality of the law can be passed upon. Questions within the supervisory jurisdiction of the appellate court cannot be considered. (*State v. Paysan*, 390.)

2. MOTION TO AMEND A COMPLAINT, first made upon the hearing of exceptions to a master's report sustaining a demurrer, comes too late and cannot be considered. (*Milhaus v. Sally*, 334.)

3. APPELLATE PROCEDURE. An exception that a declaration in an action to recover for the death of plaintiff's intestate did not show that there was any next of kin for whose benefit there might be a recovery cannot be taken for the first time on appeal. (*Hicks v. New York etc. R. R. Co.*, 471.)

4. APPEAL.—OBJECTION TO THE ADMISSION OF EVIDENCE which contains no reference to the admitted evidence cannot be entertained nor reviewed on appeal. (*Skaggs v. Martinsville*, 206.)

5. EVIDENCE—ADMISSION OF, AS AFFECTING VERDICT. The admission in evidence of what the jury must have been instructed as matter of law if the evidence had been excluded, is not ground for setting aside the verdict. (*Walt v. Nashua Armory Assn.*, 630.)

6. EVIDENCE—ADMISSION OF, AS AFFECTING VERDICT.—The improper admission in evidence of the by-laws of a corporation, to show that the president thereof has no authority to act as its agent, is not ground for setting aside a verdict based on such want of authority. (*Walt v. Nashua Armory Assn.*, 630.)

7. APPELLATE PRACTICE—FINDINGS—PRESUMPTION.—If the evidence upon which a referee bases his findings of facts is not preserved in the bill of exceptions, and its insufficiency to sustain such findings is not assigned as error, it must be presumed on appeal that the findings of fact fully accord with, and are sustained by, the evidence. (*Adams etc. Co. v. Deyette*, 387.)

8. APPELLATE PRACTICE—FINDINGS TO SUPPORT JUDGMENT.—A judgment fully sustained by findings of fact and conclusions of law cannot be disturbed on appeal on the ground that a referee has failed to find on all of the issues raised by the pleadings, when no findings of fact were presented by the appellant, and no request made for additional or more specific findings, or different conclusions of law. (*Adams etc. Co. v. Deyette*, 887.)

9. JUDGMENTS.—PRESUMPTIONS IN FAVOR OF, instead of those against, the regularity and validity of a judgment are indulged on appeal, and when the date of the commencement of an action is material to the validity of such judgment, and the record fails to show when summons was served or the action commenced, the appellate court will presume, in favor of the judgment, that the summons and return thereon were judicially noticed in the lower court, and that the judgment therein was supported by such notice. (*Searls v. Knapp*, 878.)

10. PRACTICE.—It is not error for the court to refuse to submit a special issue to the jury if their answer could not have tended to anything decisive in the case. (*Norton v. Volzke*, 167.)

11. PRACTICE.—It is not error for the court on its own motion to submit special issues to the jury proper in form and pertinent to the cause. (*Norton v. Volzke*, 167.)

12. APPEAL—DIRECTING JUDGMENT.—If the supreme court is able, from an examination of the admitted facts, to direct judgment, it will do so without sending the case back for a new trial. (*Taylor v. Bleakley*, 233.)

See Certiorari; Damages, 4; Elections, 11; New Trial.

APPROPRIATIONS.

See Statutes, 2-4.

ARBITRATION AND AWARD.

ARBITRATION AND AWARD—RESORT TO AVERAGE.—Under an agreement that if two arbitrators named are unable to agree they shall choose a third, and that the decision of any two of these shall be binding, no other mode of procedure can be adopted. Hence, if, instead of choosing a third, the two named each marks down a sum, and they report the average as their award, the resort to average, as well as the violation of the terms of submission, makes the award invalid, and it will be set aside in an action of debt brought thereon. (*Luther v. Medbury*, 753.)

ARREST.

See False Imprisonment.

ASSAULT.

ASSAULT TO RAPE—WOMAN'S STATEMENTS AS PART OF RES GESTÆ.—In a prosecution for an assault with intent to commit rape, what the woman said about the affair immediately after its occurrence is a part of the *res gestæ* and is admissible evidence against the man. (*State v. Fittsimon*, 766.)

ASSESSMENTS.

See Definitions; Municipal Corporations, 19.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—CONFLICT OF LAWS.—The validity of an assignment for the benefit of cred-

itors, made, so far as signing and delivery is concerned, in one state to a resident thereof by a nonresident debtor, of property wholly within the state of his residence, and finally executed by being recorded in that state, is to be determined by the law of that state. (McKibbin v. Ellingson, 499.)

2. ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY—CONFLICT OF LAWS.—If the validity of an assignment for the benefit of creditors appointing a nonresident assignee is not determined by the law of the state where it is executed, its validity must be decided by the rules of common law, when questioned in another state. (McKibbin v. Ellingson, 499.)

3. ASSIGNMENT FOR BENEFIT OF CREDITORS—CONFLICT OF LAWS.—An assignment for the benefit of creditors, valid by the law where the debtor resides and where the property is situated, passes the title to the assignee, and the subsequent removal of the property to another state does not displace such title as to creditors residing therein, and seeking to recover on their claims. (McKibbin v. Ellingson, 499.)

4. ASSIGNMENT FOR BENEFIT OF CREDITORS—EVIDENCE OF FRAUD.—By the common law, the appointment of an unfit assignee for the benefit of creditors, as distinguished from one incapacitated by law to take and execute the trust, is a badge of fraud, but does not render the assignment void ipso facto. (McKibbin v. Ellingson, 499.)

See Banks, 1, 4; Factors, 2; Insurance, 6; Limitations of Actions, 1.

ASSOCIATIONS.

See Banks, 15: Building and Loan Associations; Religious Societies; Trademarks, 1-3.

ASSUMPSIT.

1. ASSUMPSIT.—A MERE NAKED TRESPASS, although creating a liability for damages cannot be the basis of an implied assumpsit. Assumpsit does not lie to recover damages for the tort, but to recover the value of that which the wrongdoer has appropriated to his own use, the law implying a promise to pay its reasonable value. (Downs v. Finnegan, 488.)

2. ASSUMPSIT AGAINST TRESPASSER—ADVERSE POSSESSION.—If the occupancy of a trespasser, who severs trees or stone from the land of another and converts the property taken to his own use, is such as to create an adverse possession, assumpsit does not lie for the value of such property. (Downs v. Finnegan, 488.)

3. ASSUMPSIT—WAIVER OF TORT TO SUE IN.—The right to waive a tort and sue on an implied assumpsit extends to cases where there has been a wrongful conversion of the property of one person to the use of another, whether sold by the latter or not, and also to cases where a trespasser has severed trees from land in possession of the owner, or has quarried stone thereon, and has afterward taken the trees or stone, converting such property to his own use, so that trover or replevin might be maintained. (Downs v. Finnegan, 488.)

4. ASSUMPSIT—WAIVER OF TORT TO SUE IN—COUNTERCLAIM.—If a party may sue in tort or in assumpsit, and he elects to waive the tort and sue in assumpsit, his demand may be counterclaimed against a plaintiff's cause of action arising on another contract, or, if itself set up by a plaintiff as arising on contract, it may be opposed by a counterclaim arising out of another contract. (Downs v. Finnegan, 488.)

See Factors, 1.

ATTACHMENT.

See Insolvency, 2.

ATTESTATION.

See Wills, 3-5.

ATTORNEYS.

See Executors and Administrators, 5; Treaties, 3.

AUSTRALIAN BALLOT LAW.

See Elections, 2-3.

AWARD.

See Arbitration, etc.

BAILMENT.

BAILMENT.—A DRESSMAKER, BEING A BAILEE FOR HIRE, IS HELD TO THAT DEGREE OF SKILL AND CARE which will enable her to do her work in a reasonable and proper manner. Her understanding that it was proper to make a dress up wrong side out cannot relieve her from liability for doing so, if, in the exercise of a proper degree of skill and care, the dress ought not to have been made up in that way. (*Lincoln v. Gay*, 480.)

BALLOT-BOXES.

See Elections, 3.

BALLOTS.

See Elections.

BANKS.

1. BANKS AND BANKING—COLLECTIONS AS TRUST FUNDS. If a collection is intrusted to a bank, with instructions to receive the money due and forward a draft for the balance, after deducting charges, and such bank is insolvent at the time, of which fact its officers are aware and its customer is ignorant, and such moneys are collected and not paid over, they do not constitute a trust fund, which the customer can recover from an assignee for the benefit of the creditors of the bank, in preference to other creditors, out of moneys on hand at the time of the assignment, unless there is some agreement or course of dealing whereby the funds are to be held separate and the identical proceeds remitted. (*Sayles v. Cox*, 940.)

2. BANKS AND BANKING—TRUST FUNDS.—If money is placed in a bank to be paid to a certain person upon the happening of a certain event, the depositor taking a receipt reciting the purpose for which the money is deposited, after which such money is mingled with the other deposits in the bank without the depositor's knowledge or consent, and, before the event happens or the money is paid over, the bank fails and goes into the hands of a receiver, the money so deposited is a trust fund, and not assets of the bank, and the depositor has a right to follow and recover it in the hands of the receiver. (*Kimmel v. Dickson*, 869.)

3. BANKS, LIABILITY FOR AGENTS SELECTED FOR COLLECTION.—If a bank takes a bill or note for collection at a distant place, a collecting bank selected by it at the latter place is not regarded as its agent, but as the agent of the owner, and the former bank is not answerable for the default or misappropriation by the latter, where due care was used in selecting the corresponding bank. (*Waterloo Milling Co. v. Kuenster*, 150.)

4. BANKS AND BANKING.—THE QUESTION OF FRAUD OF A BANK IN RECEIVING A NOTE FOR COLLECTION when it is insolvent is not material, when the contest is between the owner of the note and other creditors of the bank, and cannot entitle the former to any preference over the latter out of moneys on hand when the bank makes an assignment for the benefit of its creditors. (*Sayles v. Cox*, 940.)

5. BANKS, RIGHT OF TO RECOVER MONEYS PAID ON WORTHLESS DRAFTS.—If a bank to which drafts are confided for collection transmits them to another bank at the place where they are payable, and receives from the latter drafts, the amount of which it pays over to its customer, and such drafts being immediately forwarded for collection, are dishonored, the moneys so paid may be recovered from the customer receiving them. (*Waterloo Milling Co. v. Kuenster*, 156.)

6. BANKING—CREDITING A FORGED CHECK, WHEN REVOCABLE.—If a person named as payee in a check indorses it to a bank, which in turn forwards it to the bank on which it was drawn for collection, and the latter credits it to the former, it may, on discovering that the check has been fraudulently altered after it was issued, by changing the name of the payee and raising the amount, cancel such credit, and the indorser, in an action by the discounting bank, cannot defend on the ground that such check has been paid by the drawee. (*Birmingham Nat. Bank v. Bradley*, 17.)

7. BANKS—NO ESTOPPEL FROM PROVING UP CLAIM.—A bank is not precluded from recovering from its customer the amount of drafts which it had paid over to him, and which are subsequently dishonored, by the fact that it proved up and claimed and received dividends in its own name on account of such drafts. (*Waterloo Milling Co. v. Kuenster*, 156.)

8. PAYMENT TO A BANK IN ITS OWN CHECK of a claim placed in its hands for collection is equivalent to a payment in money, though it falls on the same day. (*Sayles v. Cox*, 940.)

9. CORPORATIONS, IMPERFECT—LIABILITY OF AS COMMERCIAL PARTNERSHIPS.—The members of an unincorporated association conducting the banking business are liable as commercial partners. (*Williams v. Hewitt*, 394.)

10. CORPORATIONS.—UNINCORPORATED BANKERS ARE LIABLE to the full extent of their engagements. (*Williams v. Hewitt*, 394.)

11. CORPORATIONS, IMPERFECT—ESTOPPEL.—If an unincorporated association is conducting a banking business, the fact that the bank is sued along with the individual members of the association does not estop the plaintiff from denying the corporate capacity of the bank. (*Williams v. Hewitt*, 394.)

12. CORPORATIONS, IMPERFECT—ESTOPPEL.—The plaintiff is not estopped from denying the corporate capacity of a defendant bank by the fact that in a prior litigation, where the present plaintiff was then defendant, and one of the present defendants was then plaintiff, he averred that the then plaintiff was president of the bank, as this did not admit that the bank was a corporation. (*Williams v. Hewitt*, 394.)

13. CORPORATIONS, IMPERFECT—ESTOPPEL.—One who has deposited money with an unincorporated association doing a banking business is not estopped from holding the individual members thereof liable as commercial partners by the fact that the association assumed to be a de facto bank, with a president and cashier, and received deposits and paid checks. (*Williams v. Hewitt*, 394.)

14. CORPORATIONS, IMPERFECT—BURDEN OF PROOF AS TO FACT OF INCORPORATION.—If the individual members of an unincorporated association doing a banking business are sued as commercial partners, the burden is upon defendants, if they claim exemption from liability because of being a corporation, to prove that they had become a corporation by complying with the requisites of the law. (*Williams v. Hewitt*, 894.)

15. CORPORATIONS, IMPERFECT—PLEADING—MISJOINDER OF PARTIES.—If suit is brought against the individual members of an unincorporated association doing a banking business, there is no misjoinder in including the bank itself as a defendant. (*Williams v. Hewitt*, 894.)

See Checks.

BICYCLES.

See Highways.

BOUNDARIES.

1. BOUNDARIES.—IF A BOUNDARY LINE IS DESCRIBED AS RUNNING TO THE MOUTH OF A CREEK AND THENCE ASCENDING SUCH CREEK, giving a large number of courses and distances, and then as crossing the creek, the thread of the stream is the boundary, and the calls for courses and distances must be disregarded, if they do not follow such thread. (*Freeman v. Bellegarde*, 76.)

2. BOUNDARIES.—THE MEANDERING OF A STREAM by a surveyor, and the giving of the courses and distances of such meanders in a conveyance, do not prevent the title of the grantee from extending to the thread of the stream. (*Freeman v. Bellegarde*, 76.)

3. BOUNDARIES—CROSSING A STREAM.—The fact that in a conveyance, after mentioning several courses and distances in ascending a creek, the line is described as crossing the creek, does not show that the true boundary is at the side or bank of the stream nor elsewhere than in the thread thereof. (*Freeman v. Bellegarde*, 76.)

4. BOUNDARIES.—THE TERM "SHORE" ordinarily indicates lands periodically covered and uncovered by the tide, but is sometimes applied to a river or pond as synonymous with "bank." (*Freeman v. Bellegarde*, 76.)

5. BOUNDARY, SHORE AS A.—In the absence of any qualification, a grant bounded by the shore of a river or other stream, when the grantor is the owner of the bed thereof, conveys the land to the lowest point of the shore at any time, in order that the grantee may at all times have access to the stream. If, in the conveyance, any point is designated as being on the shore, this shows what point the parties understood to be designated by that term, and the boundary must be run accordingly, though to do so requires the disregarding of specified courses and distances. (*Freeman v. Bellegarde*, 76.)

6. BOUNDARIES.—A GRANT OF RIPARIAN TIDAL LANDS by the owner must receive the same construction as the grant by him of any other riparian lands. (*Freeman v. Bellegarde*, 76.)

7. BOUNDARIES UPON TIDAL STREAMS.—If the owner of lands in which a tidal stream is included makes a grant of land, describing the boundary as ascending the stream, such boundary extends to the thread of the stream. (*Freeman v. Bellegarde*, 76.)

BRIDGES.

See Counties.

BROKERS.

1. A BROKER IS NOT ENTITLED TO COMMISSIONS UNLESS he finds and produces to the vendor a purchaser who is ready, willing, and able to complete the purchase as proposed. (*Wilson v. Mason*, 162.)

2. A BROKER IS NOT ENTITLED TO HIS COMMISSIONS when the purchaser found and produced by him does not enter into a valid, binding, and enforceable contract, and refuses or fails to complete the purchase. (*Wilson v. Mason*, 162.)

3. A BROKER EARNS HIS COMMISSION WHEN he produces a purchaser between whom and the vendor a valid contract to purchase is entered into, mutually obligatory upon both, though the purchaser afterwards refuses to comply with his part of the contract. (*Wilson v. Mason*, 162.)

4. BROKERS—STATUTE OF FRAUDS.—If a contract is of such a character that the vendee may successfully plead the statute of frauds against its performance, then it is not a valid contract entitling the broker to commissions. (*Wilson v. Mason*, 162.)

BUILDING AND LOAN ASSOCIATIONS.

BUILDING AND LOAN ASSOCIATIONS—WITHDRAWAL OF NONBORROWING MEMBER—RIGHT TO RECOVER.—A nonborrowing member of a mutual building association, who has brought himself within the rules by notice of withdrawal, cannot bring an action and take judgment against the association when, by reason of its by-laws and the statute, there is no money in the treasury legally applicable to the payment of his claim. He must abide by the condition of the treasury and take his money when funds properly applicable for the purpose are on hand, and not until then, in the absence of fraud on the part of the association. (*Heinbokel v. National Savings etc. Assn.*, 519.)

PURDIN OF PROOF.

See *Elections*, 12, 13; *Homicide*, 3; *Insurance*, 16, 17; *Municipal Corporations*, 11; *Negligence*, 7.

BURGLARY.

BURGLARY—DISTINCT OFFENSES—EVIDENCE.—If the evidence in a burglary case shows that the defendant twice entered the house on the same night within a space of two hours, it is not error to refuse to rule that this constituted two separate burglaries, and that the prosecuting officer should be compelled to elect upon which one he would go to the jury. Even if the breakings were separate and distinct felonies, evidence of the second breaking is competent to show the whereabouts of the defendant during the night in question. (*State v. Fitzsimon*, 763.)

See *Indictment*, 3.

BURIAL RIGHTS.

BURIAL RIGHTS—REMOVAL OF REMAINS.—A widow, and not the next of kin, has the right to control the burial of her deceased husband, dependent, however, upon the peculiar circumstances of the case, or the waiver of such right by consent or otherwise. If her right has not been waived, she may remove the body, after interment, to another place of sepulture. (*Hackett v. Hackett*, 762.)

BY-LAWS.

See *Appeal*, 4.

CANCELLATION.

See Equity, 2.

CAPITAL STOCK.

See Corporations, 9-15.

CARRIERS.

1. CARRIERS—CONTRACTS OF CARRIAGE—CONFLICT OF LAWS.—A contract made in one state, between a railroad company and a shipper for the transportation of freight from a point in that state to a point in another state, and limiting the liability of the carrier, must be interpreted according to the law of the state where made, but if an action upon such contract is brought in another state, the court does not take judicial notice of the law of the former state, and it must be alleged and proved the same as any other fact. (*Meuer v. Chicago etc. Ry. Co.*, 898.)

2. CARRIERS, TO WHOM LIABLE FOR LOSS OF GOODS.—If goods are sold to be delivered by a vendor f. o. b. at a place designated, such delivery terminates the title of the vendor, and he cannot sustain an action for subsequent injury to the goods through the negligence of the carrier. (*Capehart v. Furman Farm etc. Co.*, 60.)

3. PLEADING.—ONE WHO SUES AS OWNER of property to enforce the common-law liability of a carrier upon his failure to deliver it, cannot recover on the proof that he had a mere lien thereon. (*Capehart v. Furman Farm etc. Co.*, 60.)

4. CARRIERS—CONTRACTS LIMITING LIABILITY.—A common carrier may limit his liability by express contract, except as to gross negligence, fraud, or willful wrong of himself or his servants. (*Meuer v. Chicago etc. Ry. Co.*, 898.)

5. CARRIERS—REGULATION LIMITING LIABILITY.—Common carriers may by regulation make rates for the transportation of live animals to depend upon their value as given by the shipper, and may restrict his claim for damages for injury or loss to the value he places upon his property for transportation with notice of such regulation. (*Duntley v. Boston etc. R. R.*, 610.)

6. CARRIERS—CONTRACTS LIMITING LIABILITY.—A contract between a carrier and a shipper, providing for the transportation of livestock at a reduced rate and stipulating that the shipper shall be entitled to pass free on the train to care for, feed, water, load, and unload his stock, at his "own risk of personal injury, from whatever cause," relieves the carrier from all liability for any injury to the shipper while a passenger or engaged in the execution of the contract, not caused by the gross negligence, fraud, or willful wrong of the carrier or his servants. (*Meuer v. Chicago etc. Ry. Co.*, 898.)

7. CARRIERS—CONTRACTS LIMITING LIABILITY.—A contract between a carrier and a shipper, providing for the transportation of livestock, at a reduced rate, and stipulating that the shipper shall be entitled to pass free on the train to care for, load, and unload his stock, at "his own risk of personal injury, from whatever cause" relieves the carrier from liability for personal injury received by the shipper while unloading his stock at the place of destination after he has left the cars as a passenger, although such injury is caused by the ordinary negligence of the carrier or his servants. In such case the carrier can be held liable only for gross negligence, fraud, or willful wrong of the carrier or his employees. (*Meuer v. Chicago etc. Ry. Co.*, 898.)

8. CARRIERS—CONTRACTS LIMITING LIABILITY—CONFLICT OF LAWS.—If a contract is made in one state, between a carrier and

a shipper, for the transportation of freight from a point in that state to a point in another state, and an action is brought upon the contract in the latter state, the court presumes, in the absence of evidence, that the law of the place where the contract is made is the same as the state where the action is brought, and the contract must be interpreted according to the law of the latter state. (*Meuer v. Chicago etc. Ry. Co.*, 898.)

9. CARRIERS—REGULATION OF FREIGHT CHARGES.—A common carrier may prescribe just and reasonable regulations to protect himself against fraud, and fix a rate of charges for freight proportionate to the magnitude of the risk he assumes. (*Duntley v. Boston etc. R. R.*, 610.)

See Railroads, 10-14, 28.

CAVEAT EMPTOR.

See Fraud, 4.

CERTIORARI.

CERTIORARI IS THE ONLY REMEDY in the appellate court, if the amount involved in a civil suit is less than the minimum limit of that court's jurisdiction. (*State v. Payssan*, 390.)

CHANCERY.

See Equity; Partition, 5.

CHARACTER.

See Homicide, 2.

CHARTERS.

See Corporations, 3.

CHASTITY.

See Rape.

CHATTEL MORTGAGES.

See Fraudulent Conveyance; Statutes, 2.

CHECKS.

1. A BANK CHECK IS PAYABLE IMMEDIATELY on presentation and demand. (*Industrial Trust etc. Co. v. Weakley*, 45.)

2. BANKING.—THE DRAWER OF A CHECK IS LIABLE THEREON WITHOUT PRESENTMENT or notice if he had not moneys on deposit to meet the check when drawn, or, if then having them on deposit, he subsequently withdraws them. (*Industrial Trust etc. Co. v. Weakley*, 45.)

3. BANKING.—IF A CHECK IS NOT PRESENTED WITHIN A REASONABLE TIME, and the bank fails, the payee must suffer the loss if the drawer has moneys on deposit sufficient to pay it. (*Industrial Trust etc. Co. v. Weakley*, 45.)

4. BANKING.—LACHES IN THE PRESENTMENT OF A CHECK DO NOT DISCHARGE the drawer from liability thereon, except to the extent he has suffered injury thereby. (*Industrial Trust etc. Co. v. Weakley*, 45.)

5. A BANK CHECK SHOULD BE PRESENTED FOR PAYMENT within bank hours on the day on which it is received, or on the day following if the bank on which it is drawn is in the same place

where the payee receives it. If, within that time, the bank fails, the loss must be borne by the drawer. (*Industrial Trust etc. Co. v. Weakley*, 45.)

6. A BANK CHECK SHOULD BE PRESENTED FOR PAYMENT within reasonable time. Otherwise the delay is at the peril of the payee. (*Industrial Trust etc. Co. v. Weakley*, 45.)

7. BANKING—OVERDRAFTS—LACHES IN NOT PRESENTING. If, when a check is drawn, it is in excess of the amount which the drawer has in bank, but he has made arrangements with the bank to be permitted to overdraw, and the check, if presented in due time, would have been paid in full, the payee is answerable to the drawer for all damages which he may have suffered from the laches in the presentment of the check. (*Industrial Trust etc. Co. v. Weakley*, 45.)

8. BANKING.—IF A CHECK IS DRAWN IN EXCESS OF THE AMOUNT WHICH THE DRAWER HAS ON DEPOSIT at the bank, this deficiency excuses the drawee for want of presentment for payment, and renders the drawer liable on such check without any demand or notice, unless he was authorized to make overdrafts. (*Industrial Trust etc. Co. v. Weakley*, 45.)

9. OVERDRAFT—DAMAGES FOR LACHES IN PRESENTING. If a check is drawn in excess of the amount which the drawer has on deposit under an agreement that the bank will pay the overdraft, and the payee fails to present it within a reasonable time, and the bank becomes insolvent and suspends business, he must accept the check as payment of the full amount named therein, though it exceeds the amount which the drawer had on deposit when it was drawn. (*Industrial Trust etc. Co. v. Weakley*, 45.)

10. BANKING—CHECKS.—An indorser of a check who receives the amount thereon warrants the genuineness of the check, both as to the drawer's signature and as to the amount of the check. (*Birmingham Nat. Bank v. Bradley*, 17.)

11. BANKING.—THE DRAWING OF A CHECK ON A BANK PRESUPPOSES A DEPOSIT of a sum in bank to the credit of the drawer sufficient to pay it, and amounts to an absolute appropriation by the drawer of so much money in the hands of the bank to the holder of the check which he cannot properly withdraw. (*Industrial Trust etc. Co. v. Weakley*, 45.)

12. BANKING.—PAYEE OF A FORGED CHECK WHO INDORSES it and receives the money acquires no title to such moneys. (*Birmingham Nat. Bank v. Bradley*, 17.)

13. BANKING—RIGHT TO RECOVER MONEY PAID ON A FORGED OR ALTERED CHECK.—If a payee named in a check indorses it to a bank other than the one on which it was drawn, and receives the amount thereof, he is liable in an action of assumpsit for the moneys so received if the check has been forged, or, though genuine when issued, has been altered by changing the name of the payee and by raising the amount. That he paid over the moneys so received to another person does not constitute any defense to the action. (*Birmingham Nat. Bank v. Bradley*, 17.)

14. BANK—RAISING OF ALTERED CHECK—LACHES.—The discounting bank and the drawee bank have a right to rely on the indorsement of a check by a person named as payee therein, and against him are not required to exercise any diligence to discover whether the check has been raised. (*Birmingham Nat. Bank v. Bradley*, 17.)

See Banks, 6, 8.

CHILDREN.

See Infants; Marriage and Divorce, 5.

CHRISTIAN SCIENCE.

See Marriage and Divorce, 1.

CHURCHES.

See Religious Societies.

CLERK OF COURT.

See Records, 3.

COLLATERAL SECURITIES.

See Pledge.

COLLECTION.

See Banks, 1, 3-5.

COMMISSIONERS.

See Mandamus.

COMMISSIONS.

See Brokers.

CONDEMNATION.

See Eminent Domain.

CONFLICT OF LAWS.

CONFLICT OF LAWS—NEGLIGENCE CAUSING DEATH—DISTRIBUTION OF SUM RECOVERED.—In case of recovery in one state for the negligent destruction of life in another, pursuant to a statute of the latter, the sum recovered must be distributed according to the law of the latter state, where the cause of action accrued. (*McDonald v. McDonald*, 289.)

See Assignment for the Benefit of Creditors, 1-3; Carriers, 1, 3; Contracts, 5; Insolvency; Limitations of Actions, 8.

CONSTITUTIONS.

CONSTITUTIONAL LAW.—THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, providing that no person shall be compelled to be a witness against himself in any criminal case, was not intended to limit the powers of the states in respect to their own people. (*St. Joseph v. Levin*, 577.)

See Elections, 14; Police Power; Religious Societies, 3-7; States; Statutes, 4.

CONSULS.

See Treaties, 2, 3.

CONTEMPT.

See Prohibition.

CONTRACTS.

1. ACCEPTANCE.—A PROPOSITION MUST BE ACCEPTED before it is withdrawn or it becomes inoperative. (*Lincoln v. Gay*, 480.)

2. THE OBLIGATION OF A CONTRACT is that which binds a party to do or not to do a particular thing. (*Beverly v. Barnitz*, 257.)

3. CONTRACTS.—PRESENT LIABILITY IS INCURRED when a contract is made to be performed in a future series of years. (*Klich v. Minnesota etc. Electric Co.*, 528.)

4. STATUTE OF FRAUDS—CONTRACT BY LETTERS.—A contract binding under the statute of frauds, though signed by only one of the parties thereto, may be gathered from letters between them relating to the subject matter, and so connected with each other as to fairly constitute one paper. (*Hickey v. Dole*, 614.)

5. CONTRACTS—CONFLICT OF LAWS—PRESUMPTION.—If an action is brought in one state upon a contract made in another state, the court where the action is brought presumes the law of both states to be the same. (*Meuer v. Chicago etc. Ry. Co.*, 898.)

6. TRADE, COMBINATIONS IN RESTRAINT OF.—Combinations for mutual advantage which do not amount to a monopoly, but leave the field of competition open to others, are not void as in restraint of trade, although they may have the effect of diminishing the number of competitors in business. A mere consolidation of firms is not illegal, on the ground of reducing competition in business. (*Oakdale Mfg. Co. v. Garst*, 784.)

7. TRADE, RESTRAINT OF.—A contract between competing railroads to destroy and prevent competition, but not raising the prices of transportation above a reasonable standard, is not void as against public policy. (*Manchester etc. R. R. v. Concord R. R.*, 582.)

8. CONTRACTS IN RESTRAINT OF TRADE are not necessarily void by reason of universality of time or of place. Their validity depends upon the reasonableness of the restrictions under the conditions of each case, and the test of reasonableness in contracts of this kind is the test of validity. (*Oakdale Mfg. Co. v. Garst*, 784.)

9. CONTRACTS NOT TO ENGAGE IN BUSINESS, ESTOPPEL TO DENY VALIDITY OF.—One who enters into an agreement not to engage, or be concerned, in the manufacture or sale of butterine or oleomargarine for a period of five years from the date of the agreement, and which agreement is mutually beneficial and equally restrictive upon the parties, is estopped from setting up its invalidity in proceedings to enjoin him from violating it. (*Oakdale Mfg. Co. v. Garst*, 784.)

10. CONTRACTS NOT TO ENGAGE IN BUSINESS, VALIDITY OF.—An agreement that one will not engage, or be concerned, in the manufacture or sale of butterine or oleomargarine for the period of five years from the date of the agreement is not void. An injunction will therefore lie to restrain the violation of such agreement. (*Oakdale Mfg. Co. v. Garst*, 784.)

11. CONTRACTS—ILLEGALITY AS DEFENSE.—If an executed agreement is void by reason of some statutory or common-law prohibition, either party thereto who has received anything from the other party thereunder, and has failed to perform the agreement on his part, must account to the latter for what has been so received, and cannot set up the illegality of the agreement as a defense, unless it involves some positive immorality or is against public policy. (*Manchester etc. R. R. v. Concord R. R.*, 582.)

12. CONTRACTS—ILLEGALITY—RELIEF.—Parties to illegal contracts, whether mala prohibita or mala in se, are not generally entitled to relief in equity, but it may grant relief though both parties are in delicto, provided they do not stand in pari delicto. (*Manchester etc. R. R. v. Concord R. R.*, 582.)

13. CONTRACTS—RESCISSION.—The party against whom a contract, made under a mutual mistake of material facts cannot be

specifically enforced, is in general entitled to rescind. (*Newton v. Tolles*, 538.)

See Infants; Specific Performance; Statutes, 8-10; Wills, 9, 10.

CONTRIBUTORY.

See Negligence, 6-12.

CONVERSION.

See Assumpsit, 3; Larceny, 3-6; Trespass, 1.

CORPORATIONS.

1. CORPORATIONS MAY BE FORMED IN ONE STATE TO DO BUSINESS IN ANOTHER.—It is not a violation of the laws or policy of the state of Rhode Island for citizens thereof to procure an act of incorporation in another state for the purpose of carrying on business as a corporation in Rhode Island. (*Oakdale Mfg. Co. v. Garst*, 784.)

2. CORPORATIONS DE FACTO—INDIVIDUAL LIABILITY.—Though persons do business as a de facto corporation, they may be held liable as individuals. Hence, if they assume to do a banking business, they are liable in their individual capacities, if there is a want of the publication required by statute, or an absence of any statement of the number of shares held by shareholders. (*Williams v. Hewitt*, 894.)

3. CORPORATIONS—FORFEITURE OF CHARTER.—Independently of statute, it is incumbent upon a private corporation to keep its principal place of business, its books and records, and its principal offices, in the state in which it is incorporated, to an extent necessary to the fullest jurisdiction and visitatorial power of the state and its courts, and the efficient exercise thereof in all proper cases. A forfeiture of its charter may be adjudged for a violation or failure to substantially comply with such obligation. (*State v. Park etc. Lumber Co.*, 516.)

4. CORPORATIONS—CHANGE OF NAME—PARTNERSHIP.—Members of a corporation who voluntarily change or alter the corporate name selected, without recourse to such formal proceedings as are prescribed by law, thereby abandon the old corporation and become liable as partners in the new concern, as to parties who deal with it or give it credit. (*Cincinnati Cooperage Co. v. Bate*, 300.)

5. CORPORATIONS—CONTRACT ULTRA VIRES AS DEFENSE TO ACCOUNTING.—If one railroad company has used the road, rolling stock, and equipments of another under a contract, it is estopped to set up that such contract is ultra vires when sued for an accounting and return of the property. (*Manchester etc. R. R. v. Concord R. R.*, 582.)

6. ULTRA VIRES—ESTOPPEL TO PLEAD.—In equity, neither party to a contract ultra vires simply will be heard to allege its invalidity while retaining its fruits. (*Manchester etc. R. R. v. Concord R. R.*, 582.)

7. CONTRACTS—ILLEGALITY AS DEFENSE.—If one railway company has used the roadbed, rolling stock, and equipments of another under an illegal contract, and has received great benefits therefrom, it cannot set up the illegality of the contract as a defense to a bill in equity for an accounting and a return of the property. (*Manchester etc. R. R. v. Concord R. R.*, 582.)

8. AN ELECTRIC CORPORATION OWES TO EVERY PERSON who lawfully comes for a business purpose upon premises on which it

maintains a dangerous electric wire the duty of exercising reasonable diligence in seeing that the wire is kept in a state of repair. (*Griffin v. United Electric Light Co.*, 477.)

9. CORPORATIONS.—CAPITAL STOCK IS the sum fixed by the corporate charter as the amount paid in, or to be paid in, by the stockholders for the prosecution of the business of the corporation and for the benefit of its creditors. Capital stock is to be clearly distinguished from the amount of property owned by the corporation. (*Tradesman Pub. Co. v. Car Wheel Co.*, 943.)

10. CORPORATIONS.—TO A DIRECTOR'S LIABILITY OR INDEBTEDNESS, CONTRACTED WITH HIS assent, beyond the amount of capital stock, it is essential that the assent be given officially in his capacity as director, acting concurrently with a majority of the official board. It is not, however, necessary that such assent be found in the minutes of the board, but there must have been an official meeting when assent was given, whether it appears from the minutes or otherwise. (*Tradesman Pub. Co. v. Car Wheel Co.*, 943.)

11. CORPORATIONS — DIRECTORS' LIABILITY — CONSTRUCTION OF STATUTE.—Statutes imposing personal liability on directors of corporations for indebtedness in excess of their capital stock being in derogation of the common law, must be strictly construed. (*Tradesman Pub. Co. v. Car Wheel Co.*, 943.)

12. CORPORATIONS—DIRECTORS, PERSONAL LIABILITY OF, HOW AND BY WHOM ENFORCEABLE.—If a statute makes the directors of a corporation personally liable for its indebtedness in excess of its capital stock, the liability can be enforced only at the suit of creditors whose debts were not lawfully contracted. Each of such creditors cannot maintain a separate action for himself, but the rights of all must be enforced in a single proceeding, to which all interested have been made parties. (*Tradesman Pub. Co. v. Car Wheel Co.*, 943.)

13. CORPORATIONS — DIRECTORS, FOR WHAT INDEBTEDNESS ANSWERABLE.—Under a charter providing that if the indebtedness of the corporation shall exceed at any time the capital stock paid in, the directors assenting thereto shall be individually liable to the creditors for such excess, bonded as well as floating indebtedness is included. The liability of the directors cannot be limited to the latter. (*Tradesman Pub. Co. v. Car Wheel Co.*, 943.)

14. CORPORATION, DIRECTORS, LIABILITY OF.—Under a statute declaring that directors shall be liable for indebtedness in excess of capital stock, they are not entitled to treat the whole assets of the corporation as capital stock, and to be held liable only for the difference between the value of such assets and the amount of the corporate indebtedness. "Capital stock," as the term is here used, is limited to the amount of such stock as stated in the charter or articles of incorporation. (*Tradesman Pub. Co. v. Car Wheel Co.*, 943.)

15. CORPORATIONS — DIVIDENDS, DIRECTORS' LIABILITY FOR PAYING.—If a charter provides that if the directors declare and pay a dividend when the corporation is insolvent, or which would diminish the amount of the capital stock, they shall be liable to creditors for the amount of dividends thus paid, they are not liable for declaring and paying dividends when the amount of the indebtedness of the corporation exceeds its capital stock, if the assets are reasonably worth, or are honestly believed to be worth, largely more than the corporate indebtedness, and upon this basis profits are estimated. (*Tradesman Pub. Co. v. Car Wheel Co.*, 943.)

16. CORPORATIONS — PERSONAL LIABILITY OF TRUSTEES AND REMEDY TO ENFORCE IT.—A statute providing that the di-

rectors of a stock corporation creating, or consenting to the creation of, any debt of the corporation, unsecured by mortgage, in excess of its paid-up capital stock, "shall be personally liable therefor to the creditors of the corporation," imposes a liability upon the trustees, creating or assenting to debts in excess of the capital, to the extent of such excess, not for the benefit of any particular creditor, but for the benefit of all. This liability is, however, secondary, and can be resorted to only after the usual remedies against the corporation have been exhausted. It follows that it must be enforced in equity in a suit where all the creditors and the corporation itself are parties, or represented, where an accounting can be had, all the facts ascertained, and the equities adjusted. (*National Bank v. Dillingham*, 692.)

17. CORPORATIONS—PERSONAL LIABILITY OF TRUSTEES.—An action at law by a single creditor to recover his own debt as a primary liability of the trustees cannot be maintained against the trustees of a stock corporation, who have disregarded a statute forbidding the creation of debts in excess of capital stock. (*National Bank v. Dillingham*, 692.)

18. A CORPORATION CANNOT SUBSCRIBE FOR OR INVEST its capital in shares in other corporations either directly, as by becoming in its own name the incorporator of another corporation, or indirectly, by subscribing the names of persons acting as its agents or trustees, unless expressly authorized by its charter. (*Lanier Lumber Co. v. Rees*, 57.)

19. CORPORATIONS.—PURCHASE OF SHARES OF STOCK IN ITSELF by a corporation is against public policy, and ultra vires, whenever such purchase diminishes its ability to pay its debts, or lessens the security of its creditors. (*Adams etc. Co. v. Deyette*, 887.)

20. CORPORATIONS—EVIDENCE.—THE OFFICIAL MINUTES of a board of directors of a corporation do not constitute the only evidence of their official assent to the creation of indebtedness in excess of its capital stock. (*Tradesman Pub. Co. v. Car Wheel Co.*, 948.)

21. CORPORATION, EQUITABLE TITLE OF IN STOCK OF OTHER CORPORATIONS—CREDITOR'S BILL.—Where a stockholder subscribes for stock in another corporation, intending to act as trustee for his own corporation, and pays for such stock out of the property of the latter, it being incompetent to acquire stock in another corporation, it has no interest in such stock which can be reached by a creditor's bill. The court will not, at the demand of the creditor, enforce a contract which the corporation had no power to make. (*Lanier Lumber Co. v. Rees*, 57.)

22. CORPORATIONS—AUTHORITY OF PRESIDENT AS AGENT. The president of a corporation has no authority as such, to act as its agent. (*Walt v. Nashua Armory Assn.*, 630.)

23. CORPORATIONS—CONVEYANCES IN NAME OF OFFICER.—An assignment purporting to be made and signed by a certain person as treasurer of a corporation, to which the corporate seal is affixed, is not the act of the corporation. One having authority to act for another should act in the name of the latter. (*Norris v. Dains*, 716.)

24. CORPORATIONS, INSOLVENT.—THOUGH A CREDITOR HAS NOT OBTAINED JUDGMENT at law upon his demand, he may, under the statutes of Tennessee, maintain a suit to wind up an insolvent corporation, to set aside preferences made by it, and to have its assets distributed ratably among its creditors. (*Tradesman Pub. Co. v. Car Wheel Co.*, 948.)

25. A CORPORATION IS INSOLVENT, SO AS TO ENTITLE A CREDITOR to maintain a bill to wind up its affairs, if it has executed trust deeds of its entire property, under which possession has

been taken, and it has outstanding large floating and bonded indebtedness, either matured or about to mature, and, on account of the general depression in business, it cannot sell its property and thereby nor otherwise obtain moneys with which to discharge its obligations, though such assets before such depression were valued at a sum much in excess of the corporate liabilities. (*Tradesman Pub. Co. v. Car Wheel Co.*, 943.)

26. CORPORATIONS—PREFERENCES.—If it appears that a corporation has suffered continuous losses in its business for more than a year, that it cannot obtain moneys to meet its maturing obligations, and, finding it cannot continue business, it suspends, and then executes trust deeds of the greater part of its assets, with a view of preferring certain creditors, such preferences will not be permitted to stand, as against the objection of other creditors. The corporation, under such circumstances, must be regarded as having attained such a state of insolvency that all its creditors are entitled to share equally in the distribution of its assets. (*Tradesman Pub. Co. v. Car Wheel Co.*, 943.)

27. CORPORATIONS, INSOLVENT, PREFERENCES BY.—Though a corporation has become insolvent and its liability greatly exceeds its assets, if it continues to be a going concern and conducting its business in the ordinary way, its assets are not trust funds for equal distribution among its creditors, so that it has not power to make preferences or preferential payments to some of such creditors. (*Tradesman Pub. Co. v. Car Wheel Co.*, 943.)

28. CORPORATIONS — INSOLVENT — RIGHT TO BORROW MONEY TO PURCHASE STOCK.—An insolvent corporation cannot borrow money with which to purchase its own stock, and give to the party advancing the money a preference over other bona fide creditors and defeat their claims by confessing judgment in his favor, when he has actual knowledge of the purpose for which the money was borrowed. (*Adams etc. Co. v. Deyette*, 887.)

29. CORPORATIONS, FOREIGN—SERVICE OF PROCESS.—Under the South Dakota statute (Comp. Laws, sec. 4898), service of process may be made on the managing agent of a foreign corporation when it has property in the state or the cause of action arises therein, and, when neither of these conditions exist, service can be made only upon the president, secretary, or duly authorized agent. (*Foster v. Betcher Lumber Co.*, 859.)

30. CORPORATIONS, FOREIGN—MANAGING AGENT, WHO IS.—One who has sole control of the business of a foreign corporation within a state, and who corresponds with, accounts to, and receives instructions from the main office of such corporation in the state of its domicile, and who, with the knowledge and under the instruction of such corporation, holds himself out and advertises as its manager, in the former state, is its managing agent therein. (*Foster v. Betcher Lumber Co.*, 859.)

31. CORPORATIONS, FOREIGN—SERVICE OF PROCESS.—If a foreign corporation fails to comply with the laws of a state, but is still engaged in business therein, it must transact such business subject to the laws of the state, and its assent to service of process upon its managing agent is implied. (*Foster v. Betcher Lumber Co.*, 859.)

32. CORPORATIONS, FOREIGN—FAILURE TO COMPLY WITH STATE LAW—SERVICE OF PROCESS.—The failure of a foreign corporation engaged in business in the state to comply with its law by filing a copy of its articles of incorporation and the certificate of the appointment of an agent authorized to accept service of process, cannot be taken advantage of by the corporation. In such case valid service of process may be made upon its managing agent. (*Foster v. Betcher Lumber Co.*, 859.)

§3. CORPORATIONS, FOREIGN—FAILURE TO COMPLY WITH STATE LAW.—The state in its sovereign capacity is the only party who can take advantage of the failure of a foreign corporation to comply with its laws. (*Foster v. Betcher Lumber Co.*, 859.)

See Appeal, 6; Banks, 9-15; Fraud; Penalties.

COTENANCY.

1. COTENANCY—OUSTER BY ADVERSE POSSESSION.—A conveyance by one cotenant, purporting to include the entire land and estate, followed by possession and claim of title, taken, continued, and asserted as adverse for the period of limitation with intent to oust the other cotenants, constitutes an ouster as to them, and bars their right to recover. (*Price v. Hall*, 196.)

2. COTENANCY—OUSTER BY ADVERSE POSSESSION.—A purchaser from a cotenant in possession by a conveyance purporting to include the entire estate, who, after his purchase, and while in possession, executes notes to protect the interests of the cotenants out of possession, does not, by mere occupancy for the period prescribed by statute, thereby oust them, nor acquire their title by adverse possession. (*Price v. Hall*, 196.)

See Husband and Wife, 10, 11; Trespass, 2, 3.

COUNTERCLAIM.

See Assumpsit, 4.

COUNTIES.

COUNTIES—LIABILITY FOR NEGLIGENCE—DEFECTIVE BRIDGES.—A county is not liable in a private action, for an injury resulting from a defect in a bridge upon a public highway within its limits, in the absence of a statute expressly imposing such liability; and a statute imposing upon counties the duty of keeping in repair the bridges upon the public highways, and conferring upon them the power to raise by taxation the funds necessary to keep such bridges in repair, does not impose upon them the implied liability to answer in damages for injuries sustained from a defective or unsafe bridge. (*Bailey v. Lawrence County*, 881.)

See Execution.

COURTS.

See Records, 2, 3; Removal of Causes; Treaties, 1.

COVENANTS.

1. WARRANTY.—THE MEASURE OF DAMAGES FOR BREACH of a covenant of warranty, after eviction, is that fixed by the statute in force when the covenant is made, and not by the statute in force when the eviction takes place. (*Aiken v. McDonald*, 817.)

2. WARRANTY—MEASURE OF DAMAGES.—IN CASE OF A PARTIAL BREACH of a covenant of warranty by reason of a failure of title to a portion of the estate conveyed, there must be an apportionment of the damages fixed by the statute, based upon the relative value of that portion to which the title falls, and of that portion to which the title proves good. (*Aiken v. McDonald*, 817.)

3. WARRANTY—PARTIAL BREACH—MEASURE OF DAMAGES.—If a grantor is seised of an estate for a life only, and not of the fee warranted, the value of the life estate must be deducted from the value of the fee in estimating the measure of damages for a breach of the covenant of warranty. (*Aiken v. McDonald*, 817.)

See Landlord and Tenant, 10.

CREDITORS' SUIT.

See Corporations, 21.

CRIMINAL LAW.

INDICTMENT FOR FELONY—CONVICTION OF LESSER OFFENSE.—At common law there could not be a conviction of a misdemeanor on an indictment for a felony; but, by virtue of statutory provisions the jury may, on an indictment for felony, convict of any lesser offense included therein. (*State v. Fitzsimon*, 766.)

See Assault; Burglary; Evidence, 5; Forgery; Homicide; Indictment; Judgments, 9; Larceny; New Trial; Rape.

CROSSINGS.

See Railroads, 20-37, 42.

CRUELTY.

See Marriage and Divorce, 1-3.

CUSTOM.

DEEDS—USAGE OF WORD "MINERALS."—IN A CONVEYANCE of mineral lands, the legal meaning of the word "minerals" cannot be changed by evidence that the word is understood in the locality, or "about there," to mean iron ores, without proof of any transaction based upon such usage, or that such usage was known to either of the parties. (*Armstrong v. Lake Champlain Granite Co.*, 683.)

See Mines, etc., 6.

DAMAGES.

1. PUNITORY DAMAGES MAY BE GIVEN in an action by one person against another for an injury to his business. (*Graham v. St. Charles etc. R. R. Co.*, 436.)

2. DAMAGES—SMART MONEY IS NOT GIVEN AGAINST THOSE LIABLE, if at all, by reason of their relation to the wrongdoer. (*Graham v. St. Charles etc. R. R. Co.*, 436.)

3. DAMAGES—INADEQUATE.—An allowance of three thousand dollars against an electric street railway company for negligently running over a child three years of age, and resulting in the loss of an arm, is not enough, and will be increased on appeal to five thousand dollars. (*Barnes v. Shreveport etc. R. R. Co.*, 400.)

4. APPEAL—EXCESSIVE DAMAGES.—If a passenger, while endeavoring to alight from a moving railroad train, is not seriously injured, and works at his business after the accident with no diminution of his physical ability apparent to his fellow workmen, though he is subsequently made sick from the effects of the fall, a verdict of three thousand dollars is excessive, and the appellate court will reverse the judgment, but will allow five hundred dollars, to cover the expenses of sickness and loss of time, with some allowance for suffering. (*Brashear v. Houston etc. R. R. Co.*, 382.)

5. DAMAGES—DEATH CAUSED BY NEGLIGENCE.—One suing to recover for the death of another caused by negligence, is entitled to such damages only as the deceased himself could have recovered at the moment when he died; that is, compensation for the suffering endured. (*Mattise v. Consumers' Ice Mfg. Co.*, 356.)

6. DAMAGES IN AN ACTION FOR DEATH.—In an action brought for the death of a person who is shown to have been capable of

earning a small amount of money, all of which he had been appropriating to the comfort and support of himself and his family, such family have no pecuniary interest in his life, except by way of support and maintenance, and the jury should not be authorized in the instruction of the court to give damages based upon the probability that he might have accumulated an estate which would have gone to his family at his death. (Louisville etc. R. R. Co. v. Markee, 21.) See Covenants; Eminent Domain, 8; Libel, 2, 3; Municipal Corporations, 33, 34; Railroads, 2-5; Telegraph Companies, 2.

DAMNUM ABSQUE INJURIA.

See Railroads, 6.

DEAF-MUTES.

See Railroads, 3.

DEATH.

See Conflict of Laws; Damages, 5, 6; Negligence, 16, 17; Parent and Child; Privacy.

DECEIT.

See Fraud.

DECLARATIONS.

See Homicide, 1.

DEDICATION.

1. DEDICATION OF REAL ESTATE to a public use may be made by parol, but there is no such thing as a parol dedication of real estate to a private use. (Louisville etc. Ry. Co. v. Stephens, 303.)

2. DEDICATION FOR RAILWAY PURPOSES.—A railroad corporation is a private institution, created and operated for private gain, and cannot acquire land for railway purposes by dedication. (Louisville etc. Ry. Co. v. Stephens, 303.)

DEEDS.

1. DEEDS TO TAKE EFFECT AFTER DEATH OF GRANTOR.—A deed duly executed and recorded which "conveys and warrants" certain land, and then provides that it shall be of no effect until after the death of the grantor, and then to be in full force, conveys a present interest in the land, but postpones its enjoyment and is not void as a testamentary disposition. (Wilson v. Carrico, 213.)

2. CONSTRUCTION.—IF AN INSTRUMENT IS AMBIGUOUS, the subsequent acts of the parties are to be considered in construing it. (Wilson v. Carrico, 213.)

3. A CONVEYANCE NOT TO TAKE EFFECT UNTIL THE DEATH OF THE GRANTOR is an attempt to make a testamentary disposition without complying with the statute of wills, and is void. (Wilson v. Wilson, 176.)

4. DEED—DELIVERY.—THE MERE PLACING OF A DEED IN THE HANDS OF ONE OF THE GRANTEEES does not necessarily constitute a delivery. (Wilson v. Wilson, 176.)

5. DEED.—TO CONSTITUTE THE DELIVERY OF A DEED it must appear that it was the intention of the grantor that the deed should pass title at the time, and that he should lose control of it. (Wilson v. Wilson, 176.)

6. DEEDS—DELIVERY.—The placing of a deed in the hands of one

of the grantees with the understanding that it shall be returned to the grantor if he should call for it, but if not it was to be placed upon record upon his death, does not constitute a delivery. (*Wilson v. Wilson*, 176.)

See Custom; Duress; Evidence, 3, 4; Judgments, 8; Trial, 1.

DE FACTO.

See Corporations, 2.

DEFINITIONS.

1. **ASSESSMENT—DEFINITION.**—An assessment is a charge laid upon individual property for the reason that the property upon which the burden is imposed receives a special benefit different from the general one enjoyed by the owner in common with others as a citizen. An assessment is levied only upon the property benefited, and is uniformly restricted to the means for paying local burdens arising by reason of the wants of small communities. (*Walker v. Jameson*, 222.)

"Bank." (*Freeman v. Bellegarde*, 76.)

"Capital Stock." (*Tradesman Pub. Co. v. Car Wheel Co.*, 943.)

"Forthwith." (*Harnden v. Milwaukee etc. Ins. Co.*, 467.)

"Full, fair and impartial trial." (*State v. Fitzsimon*, 766.)

"Issue." (*Pearce v. Rickard*, 755.)

"Minerals." (*Armstrong v. Lake Champlain Granite Co.*, 683.)

2. **DEFINITIONS.—THE WORD "ORE" SIGNIFIES** a compound of metal and other substances. (*Armstrong v. Lake Champlain Granite Co.*, 683.)

3. **ORIGINAL PACKAGES ARE BUNDLES** put up for transportation or commercial handling, and usually consist of a number of things bound together convenient for handling and conveyance. (*State v. Board of Assessors*, 318.)

4. **A PERPETUITY** is any limitation or condition which may take away or suspend the absolute power of alienation for a period beyond the continuance of lives in being. The absolute power to alienate is equivalent to a power to convey the absolute fee. (*In re Walkerly*, 97.)

"Shore." (*Freeman v. Bellegarde*, 76.)

"Sister." (*Shelly v. State*, 926.)

"Treatment injuring health or endangering reason." (*Robinson v. Robinson*, 632.)

DEL CREDERE.

See Factors, 1, 2.

DELIVERY.

See Deeds, 4-6; Sales.

DEPOSITS.

See Trusts, 2-5

DEVISE.

1. **PERPETUITIES.—THE EFFECT OF A DEVISE OFFENDING THE LAW AGAINST PERPETUITIES** is that the property descends to the testator's heirs, though his will clearly shows that such was not his intention. (*In re Walkerly*, 97.)

2. **PERPETUITY, EQUITABLE CONVERSION.**—When lands are devised to trustees to be held for a period of years and then to be

sold, they cannot be regarded as converted into personalty prior to the time when their sale is authorized by the terms of the trust. Hence, the direction to sell cannot rescue the trust from the operation of the law against perpetuities. (In re Walkerly, 97.)

3. ALIENATION, UNLAWFUL RESTRAINT—DEVISE, CONSTRUCTION OF.—A devise of certain property to trustees for a specified purpose, accompanied by a provision that no final sale or distribution of the trust estate shall take place during the life of the testator's wife, but only after the expiration of twenty-five years after his death, and after her death shows a purpose to preserve the property inalienable for at least twenty-five years, and for a longer period should she live longer. It is therefore an attempt to restrain the alienation of property for a period which may be greater than the duration of lives in being. (In re Walkerly, 97.)

4. ALIENATION, RESTRAINT UPON—DIRECTION TO SELL.—If property is devised to trustees to be held by them for specified purposes, and also to be sold, this direction to sell cannot exclude the trust from the operation of the law against perpetuities, if the trustees are by its terms to retain the proceeds of the sale, and not to distribute them until after a fixed period not measured by lives in being. (In re Walkerly, 97.)

5. RESTRAINTS UPON ALIENATION APPLY TO PERSONAL PROPERTY as well as to real by the code of California, and any trust or other disposition of personalty which suspends the power of transferring it for any period which may be beyond lives in being is void. (In re Walkerly, 97.)

6. TRUST ESTATES, RESTRAINT UPON ALIENATION—CONDITIONS WHICH MAY NOT BE REJECTED AS REPUGNANT. If property is devised in trust for specific purposes, provided that no final sale or distribution thereof shall be made until after the expiration of twenty-five years, this provision cannot be treated as a condition which may be rejected as void because repugnant to the estate devised. It therefore constitutes an unlawful restraint upon the power to alienate. (In re Walkerly, 97.)

7. DEVISE—VOID ESTATE FOR LIFE—ACCELERATED REMAINDERS.—If a devise of land to a specified person for life is void, because the devisee signs the will as a subscribing witness, the remainders declared by the will, after the termination of the life estate, vest in the remaindermen in possession immediately upon the death of the testator. (Key v. Weathersbee, 846.)

8. DEVISE—LIMITATION OF ESTATE—BENEFICIAL INTEREST.—If a tenant for life is directed by will to pay over the rents and profits of the estate to his children after the death of the testator and his own death, the estate and income therefrom then to go to a third person, the life tenant has no beneficial interest in the estate and is only a trustee for his children as to the income. (Key v. Weathersbee, 846.)

See Estates.

DIRECTING JUDGMENT.

See Appeal, 12.

DIRECTORS.

See Corporations, 10-15.

DISCOVERY.

DISCOVERY.—IF PROSECUTION FOR A PENALTY IS BARRED by the statute of limitations, a person cannot refuse to

make discovery of matters connected with the transaction out of which the penalty arises, on the ground that such discovery will expose him to prosecution. (*Manchester etc. R. R. v. Concord R. R.* 582.)

DISSOLUTION.

See Partnership, 4, 5.

DISTRIBUTION.

DISTRIBUTION—WHEN TO BE MADE PER CAPITA.—If personal estate is bequeathed to a trustee for the use and benefit of a female relative during her life, and at her death the trust fund to be paid, transferred, and delivered to her issue then alive, the trust fund is to be distributed per capita among her children and grandchildren who were alive at her death. (*Pearce v. Rickard*, 755.)

DITCHES.

See Waters, 1.

DIVERSION.

See Waters.

DIVIDEND

See Corporations, 15.

DIVORCE.

See Husband and Wife, 10; Marriage and Divorce: Records, 2.

DOWER.

See Partnership, 1-2.

DUPLICITY.

See Fraud, 15.

DURESS.

1. **DEEDS, EXECUTED UNDER DURESS** of the grantor, are voidable only, and not void. (*Commercial Nat. Bank v. Wheelock*, 738.)

2. **DEEDS—DURESS OR FRAUD.**—A grantor in a deed regularly executed cannot assert rights contrary to its terms, on the ground that it was executed under duress, fraud, or undue influence, without first securing its reformation or cancellation by a decree in equity. (*Commercial Nat. Bank v. Wheelock*, 738.)

See Trial, 1.

EASEMENTS.

See Landlord and Tenant, 11.

ELECTIONS.

1. **ELECTIONS—LEGISLATURE MAY ADOPT REASONABLE REGULATIONS.**—The legislature, within the terms of the constitution, may adopt such reasonable regulations and restrictions for the exercise of the elective franchise as may be deemed necessary to prevent intimidation, bribery, and fraud, if the voting is by ballot and the voter is allowed to cast his vote in absolute secrecy. (*Taylor v. Bleakley*, 238.)

2. AUSTRALIAN BALLOT LAW.—PROVISIONS OF THE STATUTE AS TO THE MARKING OF BALLOTS are in their nature mandatory, but all statutes tending to limit the citizen in the exercise of his right of suffrage should be liberally construed in his favor. (Tebbe v. Smith, 68.)

3. ELECTIONS—AUSTRALIAN BALLOT LAW—PROVISION AS TO MARKING OF BALLOTS IS MANDATORY.—A provision of the Australian ballot law declaring that a ballot shall not be counted if the voter fails to mark it as required, is mandatory, and does not conflict with a constitution requiring all elections by the people to "be by ballot." (Taylor v. Bleakley, 233.)

4. ELECTIONS—AUSTRALIAN BALLOT LAW—BALLOTS NOT MARKED WITH A (X) SHOULD NOT BE COUNTED.—Ballots not marked with a cross (X) substantially in or upon the square or place designated by the Australian ballot law should not be counted. (Taylor v. Bleakley, 233.)

5. AUSTRALIAN BALLOT LAW.—If all the ballots cast at a precinct have on them the name of a candidate written by some person, and but one person in the precinct is lawfully assisted in the making of his ballot in the mode required by law, only the ballot of the voter thus lawfully assisted should be counted. (Tebbe v. Smith, 68.)

6. AUSTRALIAN BALLOT LAW—DISTINGUISHING MARKS.—The writing of a letter in a blank space left for the insertion of the name of a candidate, though such letter was probably written by the voter with the intention of making it part of a name, such intention being subsequently abandoned, is a distinguishing mark rendering the ballot void. (Tebbe v. Smith, 68.)

7. AUSTRALIAN BALLOT LAW.—THE FACT THAT THE VOTER PUTS A CROSS AT THE RIGHT of the name of the person voted for, instead of in the space at the right of such name, does not invalidate the ballot nor constitute a distinguishing mark, when the only direction of the statute upon the subject is that the clerk, in printing the ballot, shall place upon it a direction to the voter that, to vote for a person, stamp a cross in the space at the right of his name. (Tebbe v. Smith, 68.)

8. ELECTIONS—BALLOTS AND BALLOT-BOXES, AUTHORITY TO COMPEL PRODUCTION OF.—The courts cannot compel the production of ballot-boxes before a grand jury for the purpose of there allowing an inspection of ballots, where the constitution of the state declares that all elections by the people shall be by ballot, that the election officers shall be sworn not to disclose how any voter shall have voted, unless required to do so as a witness in a judicial proceeding, provided, that in all cases of contested elections, the ballots cast may be counted, compared with the list of voters, and examined under such safeguards and regulations as may be prescribed by law. The right to examine and open ballot-boxes is restricted to proceedings in election contests. (Ex parte Arnold, 557.)

9. ELECTION CONTEST.—BALLOTS, when their integrity is satisfactorily established, are the best evidence in an election contest of how the electors voted. (Tebbe v. Smith, 68.)

10. ELECTION CONTEST.—TO SHOW THAT THE BALLOTS ARE INTACT AND GENUINE it is sufficient to prove that the mode of preservation enjoined by the statute has been substantially pursued. (Tebbe v. Smith, 68.)

11. ELECTION CONTEST—QUESTION OF FACT.—Whether ballots which are offered in evidence in an election contest have been kept in substantial compliance with the law and remain so unchanged that they should be received in evidence by the jury or trial judge, is a

question of fact, the finding upon which the appellate court will not disturb, unless the evidence does not warrant it. (*Tebbe v. Smith*, 68.)

12. ELECTION CONTEST.—BURDEN OF PROOF AS TO BALLOTS, WHEN SHIFTS.—When a substantial compliance with the statute in respect to the preservation of ballots has been shown, the burden of proof shifts to the contestee to establish that, notwithstanding such compliance, the ballots had in fact been tampered with, or that they had been exposed under such circumstances that a violation of them might have taken place. This proof is not made by a naked showing that it was possible for one to have molested them. (*Tebbe v. Smith*, 68.)

13. ELECTION CONTEST, BURDEN OF PROOF RESPECTING BALLOTS.—One who relies upon overcoming the prima facie correctness of an official canvass by a resort to the ballots must first show that the ballots presented to the court are intact and genuine. (*Tebbe v. Smith*, 68.)

14. ELECTIONS—SECRECY OF BALLOTS.—If the constitution of the state declares that all elections by the people shall be by ballot, it means a secret ballot. (*Ex parte Arnold*, 557.)

15. ELECTIONS.—VOTERS WHO DO NOT CHOOSE TO PARTICIPATE in an election are not to be taken into consideration in declaring the result. Hence, if the law requires a question to be decided, or an officer to be elected, by the votes of the majority of the voters of the county, this does not require that the majority of all the persons in the county entitled to vote shall actually vote affirmatively, but only that the result shall be decided by a majority of the votes cast. (*Russie v. Brazzell*, 542.)

16. ELECTIONS.—FOR THE MISCONDUCT OF ELECTION OFFICERS IN NOT OPENING THE POLLS until 10 o'clock, when the law requires them to be open at sunrise, and the taking of the ballot boxes with them when they adjourned for dinner to a house some hundred yards distant, when the law required that such boxes must not be removed from the balloting places, or the presence of bystanders, is a departure from the provisions of the statute in so substantial a respect that the ballots must be rejected, though there is no evidence of fraud, or that the result of the election at the precinct had been altered by such misconduct. (*Tebbe v. Smith*, 68.)

See Religious Societies, 8.

ELECTRIC.

See Corporations, 8; Negligence, 1, 2.

ELEVATED RAILWAYS.

See Railroads, 2-5.

EMINENT DOMAIN.

1. EMINENT DOMAIN—TAKING RIGHT OF WAY.—Not only an absolute fee in land, but a right of way over land, or any easement or right connected with it, may be taken by eminent domain, and, of course, if so taken, must be paid for. (*Johnston v. Old Colony R. R. Co.*, 800.)

2. EMINENT DOMAIN—VALUE—EVIDENCE.—One element of the value of a house and lot in a city on a platted street is its accessibility by means of the street leading into public thoroughfares beyond the limits of the plat, and the lopping off of the owner's right of way or approach to the estate by permanently closing the street at one end. Hence, evidence as to the amount of travel on the street

before and after the condemnation is admissible, for the purpose of showing the extent to which the estate was isolated by closing up the street. (*Johnston v. Old Colony R. R. Co.*, 800.)

3. EMINENT DOMAIN—DAMAGES.—The measure of damages for taking, under condemnation proceedings, a private right of way or approach to one's premises, though such way is in a platted street used as a highway, is the difference between the market value of the estate before and after the condemnation, so far as directly affected thereby. (*Johnston v. Old Colony R. R. Co.*, 800.)

4. EMINENT DOMAIN—EVIDENCE—NEW TRIAL.—In an action by the owner of a house and lot in a city to recover damages for the taking of a right of way or approach to his premises under condemnation proceedings, the defendant has no ground for a new trial because of the admission of evidence as to the business done on the premises, introduced, without objection, for the purpose of showing what they were adapted for, where the jury was instructed not to estimate the damage to the plaintiff's business. (*Johnston v. Old Colony R. R. Co.*, 800.)

5. EMINENT DOMAIN—EXCESSIVE DAMAGES.—A verdict for six hundred dollars damages for taking a right of way appurtenant to property under condemnation proceedings is not excessive, where the jury took a view, where the property cost two thousand five hundred dollars, and where the diminution in the value thereof was put by the conflicting testimony of experts at all the way from five to fifty per cent of its value. (*Johnston v. Old Colony R. R. Co.*, 800.)

See Railroads, 1-5.

ENTIRETIES.

See Husband and Wife, 9-12.

ENTRY.

See Judgments, 1, 2.

EQUITY.

1. EQUITY—DECREES IN CHANCERY UNAIDED BY STATUTE, ARE IN PERSONAM only and do not execute themselves so as to transfer personality. (*Jelke v. Goldsmith*, 780.)

2. A CONVEYANCE TO A WIFE THEN LIVING IN SECRET ADULTERY, professing to be loyal and true to her marriage vows, made by her husband in consideration of love and affection, is procured by fraud, and will be canceled in equity and the title reverted in him. (*Byrd v. Byrd*, 932.)

See Corporations, 6, 7; Dures, 2; Specific Performance, 3.

ESTATES.

1. ESTATES FOR LIFE—RIGHTS OF TENANT.—If a person is given a life estate, by will, to enjoy the property in specie, and is also appointed executor, he is entitled to the possession of the property without giving a bond to the remainderman or anyone else to account for it. (*Langley v. Farmington*, 624.)

2. ALIENATION.—THERE IS UNLAWFUL RESTRAINT OF ALIENATION WHEN there are no persons in being who, by joining in a conveyance of their distinct interests, can pass an absolute interest in possession. (*In re Walkerly*, 97.)

3. ALIENATION.—THE LAW AGAINST SUSPENDING THE POWER OF ALIENATION APPLIES TO EVERY gift, conveyance, or devise, and to all trusts, whether created by will or deed, whether

providing for remainders or executory devises, or merely restraining the power to alienate for a fixed period of years, and then providing for a sale with a gift over. (*In re Walkerly*, 97.)

ESTOPPEL.

1. **EQUITABLE ESTOPPEL ARISES ONLY** when one, by his words or conduct, willfully causes another to believe in the existence of a certain state of facts, and induces him to act upon that belief so as to alter his previous position to his prejudice. (*De Berry v. Wheeler*, 538.)

2. **ESTOPPEL.**—One who tries on a dress made up wrong side out by the dressmaker is not estopped from recovering damages therefor by the fact that she tried it on and knew that it was being so made up, unless the misconduct or negligence of the dressmaker was induced by something that her customer said or did or omitted to say or do. (*Lincoln v. Gay*, 480.)

3. **MARRIED WOMEN ARE NOT ESTOPPED** from asserting title to their lands, except for fraud, and can be divested of their interest therein only in the mode prescribed by statute. (*Louisville etc. Ry. Co. v. Stephens*, 808.)

See *Contracts*, 9; *Husband and Wife*, 4; *Judgments*, 3; *Legacies*.

EVICTIION.

See *Covenants*, 1; *Landlord and Tenant*, 1-7.

EVIDENCE.

1. **EVIDENCE.—JUDICIAL NOTICE** is taken by the courts of the fact that natural gas does not explode spontaneously. (*McGahan v. Indianapolis Gas Co.*, 199.)

2. **EVIDENCE.—JUDICIAL NOTICE.**—The trial court will take judicial notice of all the proceedings, pleadings, and jurisdictional papers in a case on trial. Therefore, they need not be introduced in evidence. (*Searis v. Knapp*, 873.)

3. **DEEDS—EXTRINSIC EVIDENCE.**—THE WORDS OF A DEED, unambiguous in themselves, cannot be controlled by proof that the parties used them with a definite and limited meaning, for the purpose of that particular instrument. (*Armstrong v. Lake Champlain Granite Co.*, 683.)

4. **DEEDS—INTERPRETATION.**—THE WORDS "MINERALS AND ORES," in a deed, cannot be controlled, in an action to determine the rights of the parties under the instrument as written, by evidence of the grantee's purpose in acquiring the property, or of his statements, made contemporaneously with the deed, that he had purchased the iron ore on the premises. (*Armstrong v. Lake Champlain Granite Co.*, 683.)

5. **EVIDENCE OF OTHER CRIMES OR ACTS.**—Acts which are part of one general scheme or plan of fraud, designed or put in execution by the same person, are admissible to prove that an act which has been done by someone was in fact done by the person who designed and pursued the plan, if the act in question was a necessary part of the plan. Hence, where it is claimed that a party has been guilty of defrauding another by showing money, placing it in possession of the latter, and securing a loan thereon, after which the money was abstracted by some sleight of hand, evidence of such practices and fraud upon others is admissible. (*Fowle v. Child*, 451.)

See *Appeal*, 4-6; *Burglary*; *Instructions*, 4; *Larceny*, 5; *New Trial*, 3; *Trial*, 2.

EXCEPTIONS.

See Appeal, 7.

EXECUTION.

IF EXECUTIONS ARE ISSUED TO DIFFERENT COUNTIES ON THE SAME JUDGMENT, THE SATISFACTION OF ONE WITHOUT PAYING THE COSTS accrued upon the other does not divest the officer having it in his hands of the power to proceed thereon to sell property previously levied upon, and a purchaser having no notice of such satisfaction acquires title to the property purchased. (*Slater v. Alston*, 55.)

See Husband and Wife, 12.

EXECUTORS AND ADMINISTRATORS.

1. EXECUTORS AND ADMINISTRATORS—DIRECTORY STATUTE.—A statute providing that the refusal of the executor named in a will to accept his trust shall be communicated in writing to the probate court is merely directory. (*Kilton v. Anderson*, 751.)

2. EXECUTORS AND ADMINISTRATORS—DECLINING TO ACT.—If an executor neglects or refuses to file, in writing, a notice of his refusal of the executorship, as provided by statute, he cannot be compelled to do so, but his failure to comply with the statute does not deprive the court of the power to act, when such refusal has been clearly signified. (*Kilton v. Anderson*, 751.)

3. AN EXECUTOR WILL NOT BE PRESUMED TO HAVE POWER to contract for the purchase of real estate, though he has assumed to enter into such a contract. The presumption of regularity accorded to official acts does not aid his proceedings. (*Wilson v. Mason*, 162.)

4. EXECUTORS HAVE NO POWER TO PURCHASE REAL ESTATE, unless such power is expressly or impliedly conferred by the will. (*Wilson v. Mason*, 162.)

5. EXECUTORS AND ADMINISTRATORS.—There is no power to appoint an attorney for absent heirs, when the heirs are present or represented. (*Succession of Rabasse*, 483.)

6. EXECUTORS AND ADMINISTRATORS—SALES BY, WITHOUT ORDER OF COURT.—An executor or administrator, when unrestrained by statute, has power to sell the personal assets of the estate, including notes, accounts, bonds, and mortgages, without an order of court, and a purchaser who buys from him in good faith, for full value, without notice of any bad faith or fraudulent intention on the part of the executor or administrator, although such intention exists, acquires a good title and is not required to see to the application of the purchase money. (*Jelke v. Goldsmith*, 730.)

7. EXECUTORS AND ADMINISTRATORS.—PAYMENT TO AN EXECUTOR named in a will, who, without appointment of any court or without giving bond, has administered the estate according to the terms of the will, is a defense to an action for the same demand, brought by an administrator subsequently appointed for the same estate. (*Langley v. Farmington*, 624.)

8. AN ADMINISTRATOR DE BONIS NON may maintain an action to recover the assets of the estate wherever they may be found. (*Jelke v. Goldsmith*, 730.)

9. EXECUTORS AND ADMINISTRATORS.—AN ADMINISTRATOR WITH THE WILL ANNEXED is simply an executor under another name. (*Kilton v. Anderson*, 751.)

10. EXECUTORS AND ADMINISTRATORS.—THE OFFICE OF ADMINISTRATOR WITH THE WILL ANNEXED CEASES when

the will is set aside, in the same way that the office of an executor would cease. (*Kilton v. Anderson*, 751.)

11. EXECUTORS AND ADMINISTRATORS—FOREIGN SUCCESSION—REMISSION OF FUNDS.—The courts of one state have jurisdiction, whenever the rights of her citizens are not affected, to order the remission of funds belonging to a foreign succession to the representatives of such succession authorized to receive them by the courts of the domicile of the deceased. The exercise of such jurisdiction is a matter of discretion, depending on the circumstances, and is a consequence of comity prevailing between states in amity with each other. (*Succession of Gaines*, 324.)

12. EXECUTORS AND ADMINISTRATORS—FOREIGN SUCCESSION—REMISSION OF FUNDS.—The courts of one state have jurisdiction, provided her citizens are not affected, to order surplus funds in the hands of an administrator there to be remitted to the administrator at the foreign decedent's domicile, but if the legatees, creditors, and all other interested parties are before the domestic court requesting it to distribute such funds, the court may order them distributed there. (*Succession of Gaines*, 324.)

13. ADMINISTRATORS—FOREIGN—RIGHT TO SUE—DEMURRER.—The right of a foreign administrator to maintain suit in favor of his decedent for a tort may be reached by general demurrer, and objection to the maintenance of such action is not waived by failure to file a special demurrer. (*Louisville etc. R. R. Co. v. Brantley*, 291.)

14. ADMINISTRATORS—FOREIGN—RIGHT TO SUE.—A statute authorizing a foreign administrator to sue for debts due his decedent does not authorize him to maintain an action for a tort committed against such decedent. (*Louisville etc. R. R. Co. v. Brantley*, 291.)

15. ADMINISTRATORS—FOREIGN—RIGHT TO SUE.—An administrator appointed in one state can maintain no action in another unless authorized by a statute of that state. (*Louisville etc. R. R. Co. v. Brantley*, 291.)

See *Estates*, 1; *Specific Performance*, 8.

EXPERTS.

See *Witnesses*, 4.

FACTORS.

1. FACTORS—DEL CREDERE AGENT.—A factor who sells under a del credere commission is liable as a principal debtor to the consignee, and may be sued in *indebitatus assumpsit*, if he does not pay the sale debt when due. (*Balderston v. National Rubber Co.*, 772.)

2. FACTORS—DEL CREDERE AGENT.—If a factor, selling under a del credere commission, receives goods from his principal and makes monthly advances, pursuant to agreement, up to eighty per cent of the market value of the goods consigned for sale, he is not entitled, upon the principal becoming insolvent and making an assignment for the benefit of his creditors, to receive from the assignee a dividend upon the whole amount of the advances made and unpaid from the proceeds of goods sold, at the time of the assignment, but only on the balance, if any, that is due after crediting the net proceeds, when sold, of the goods on hand at the date of the assignment. (*Balderston v. National Rubber Co.*, 772.)

3. FACTORS.—ADVANCES ARE moneys paid by the factor to his principal on the credit of the goods consigned, and in anticipation of the debt which will become due to the principal upon the sale of such goods. (*Balderston v. National Rubber Co.*, 772.)

4. **FACTORS.—AN ADVANCE** by a factor does not have the effect of creating a present indebtedness against the consignor. (*Balderston v. National Rubber Co.*, 772.)

5. **FACTORS—LIEN—ADVANCES.**—A factor must enforce his lien for advances against the property in his hands before he can claim payment from his principal, the consignor of the property. (*Balderston v. National Rubber Co.*, 772.)

FALSE IMPRISONMENT.

1. **FALSE IMPRISONMENT** is an unlawful restraint of a person contrary to his will. Malice need not exist; though, if present, it may be considered in aggravation of damages. (*Rich v. McInerny*, 82.)

2. **FALSE IMPRISONMENT.**—To sustain an action for false imprisonment it is not necessary that the plaintiff should have been arrested and detained on a criminal charge preferred falsely, maliciously, and without probable cause. (*Rich v. McInerny*, 82.)

3. **FALSE IMPRISONMENT.**—Though the code promulgates a form of complaint in an action for false imprisonment, it is not to be construed as taking away a right of action existing under facts different from those disclosed by such form. (*Rich v. McInerny*, 82.)

4. **FALSE IMPRISONMENT.—IF AN IMPRISONMENT IS UNDER LEGAL PROCESS**, an action for false imprisonment cannot be sustained, and the remedy, if any exists, is by an action for malicious prosecution. (*Rich v. McInerny*, 82.)

5. **FALSE IMPRISONMENT.—FALSELY ACCUSING A PERSON OF A CRIME**, and giving the officers the facts upon which such accusation is based, maliciously and without probable cause, resulting in his arrest and imprisonment by such officers, will not sustain an action for false imprisonment against the informant, if the arrest was not based upon the command nor direction, and the officers acted upon their own volition. (*Rich v. McInerny*, 82.)

6. **FALSE IMPRISONMENT.—THE FACT THAT THE DEFENDANT COMMANDED** the police officers to arrest the plaintiff cannot entitle the latter to recover of the former, unless the arrest was in consequence of such command. (*Rich v. McInerny*, 82.)

7. **PROBABLE CAUSE FOR PROCURING AN ARREST** is such reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party arrested was guilty. (*Rich v. McInerny*, 82.)

8. **EVIDENCE—RES GESTÆ.—IN AN ACTION FOR FALSE IMPRISONMENT** it is not error to admit evidence that the officers, when making the arrest, said that the defendant had accused the plaintiff of stealing a ring, especially when there is evidence tending to prove that the arrest was made at the command and procurement of the defendant. (*Rich v. McInerny*, 82.)

9. **JURY TRIAL—INSTRUCTION AS TO DOUBT.**—In a civil action for false imprisonment, where the defendant denies causing the arrest of the plaintiff, it is not error for the court to refuse to instruct the jury that if their minds are in a state of doubt from the evidence whether the defendant ordered the police officers to arrest plaintiff, then their verdict should be for the defendant. (*Rich v. McInerny*, 82.)

10. **FALSE IMPRISONMENT—PLEADING.**—A plea that the plaintiff was arrested and imprisoned by a policeman having cause to believe him guilty of grand larceny is not sufficient where the complaint alleges such arrest to have been caused by the defendant acting maliciously and without probable cause. Though the circumstances were such that the officer might have lawfully made the arrest on his own volition, this will not exonerate the defendant if the officer did

not do so, but acted by the defendant's command and request. (*Rich v. McInerny*, 82.)

11. PLEADING IMMATERIAL FACTS MAY MAKE THEM MATERIAL.—If, in an action for false imprisonment, the plaintiff charges the defendant with causing an arrest maliciously and without probable cause, both these allegations must be supported by the evidence, though neither need have been averred in the complaint, and, if not averred, need not have been proved. (*Rich v. McInerny*, 82.)

FELLOW-SERVANTS.

See Master and Servant, 6-8.

FERRIES.

See Franchises, 2; Penalties; Railroads, 9.

FINDINGS.

See Appeal, 7, 8.

FIREMEN.

See Real Property, 2.

F. O. B.

See Carriers, 2; Sales, 2.

FORCIBLE ENTRY.

UNLAWFUL DETAINER.—THE FACT THAT A LANDLORD HAS BEEN DEPRIVED OF HIS TITLE since the making of a lease, by the foreclosure of a mortgage previously executed, is not available as a defense to an action of unlawful detainer, though the tenant has attended to the purchaser at the foreclosure sale. (*Pugh v. Davis*, 80.)

FORECLOSURE.

See Mortgages, 3.

FORFEITURE.

See Corporations, 3; Franchise, 1; Insurance, 5.

FORGERY.

1. FORGERY CONSISTS OF MAKING OR ALTERING a writing so as to make the alteration purport to be the act of another person. (*State v. Taylor*, 351.)

2. FORGERY—AGENCY.—An instrument showing on its face that the person who executed it signed as agent for the maker cannot be the subject of forgery, although such agent acted without authority. (*State v. Taylor*, 351.)

3. FORGERY—AGENCY.—One who falsely assumes to act as agent for the maker in the execution of a note or other writing is not guilty of the forgery thereof. (*State v. Taylor*, 351.)

See Banks, 6; Checks, 12-14.

FRANCHISES.

1. FRANCHISE, COMPELLING EXERCISE OF.—The forfeiture of a franchise is not the only remedy for a failure to exercise it. The legislature may impose a pecuniary penalty and authorize proceedings in the courts to enforce it. (*Brownell v. Old Colony R. R. Co.*, 442.)

2. FRANCHISE, ACQUIESCENCE IN NONUSE OF.—The fact that a corporation has failed to operate a ferry for a period of twenty years is not a waiver on the part of the state of the right to compel such operation. Such a waiver is not to be presumed without the use of language in some statute clearly expressing or implying it. (*Brownell v. Old Colony R. R. Co.*, 442.)

See *Municipal Corporations*, 22, 23, 25.

FRAUD.

1. DECEIT, ACTION FOR.—Fraud without damage, or damage without fraud, gives no cause of action for deceit, but when these two concur an action lies. (*Kountze v. Kennedy*, 651.)

2. DECEIT.—THE GRAVAMEN of an action for deceit is actual intentional fraud, and nothing less will sustain it. The representation upon which it is based must be shown not only to have been false and material, but that the defendant when he made it knew that it was false, or, not knowing whether it was true or false and not caring what the fact might be, made it recklessly, paying no heed to the injury which might ensue. (*Kountze v. Kennedy*, 651.)

3. DECEIT, ACTION FOR.—ACTUAL INTENTIONAL FRAUD, as distinguished from a mere breach of duty or the omission to use due care, is, in addition to proof of damage, an essential factor in an action for deceit. (*Kountze v. Kennedy*, 651.)

4. DECEIT—SALE OF STOCKS AND BONDS—CAVEAT EMP-TOR.—No action for deceit can be maintained against the seller of stocks and bonds for false and fraudulent representations as to their value, if the buyer, not knowing the same, can, by ordinary diligence, ascertain it; but if he has no ready means of ascertaining it, and purchases, trusting to the honesty of the seller, by whom he is deceived and cheated, the action does lie. (*Handy v. Waldron*, 794.)

5. DECEIT—REPRESENTATIONS AS TO VALUE.—Mere expressions of belief or opinion as to the quality or value of articles sold, though false, cannot be made the basis of an action for deceit, in the absence of either fraud or warranty. (*Handy v. Waldron*, 794.)

6. DECEIT—WARRANTY AS TO VALUE.—A warranty being a statement of fact as to an article sold, an action for deceit lies against a vendor for a false and fraudulent warranty of the value of bonds and stocks which the purchaser relies on to his injury. (*Handy v. Waldron*, 794.)

7. DECEIT—MISREPRESENTATION AS TO MATERIAL FACTS. One who effects a sale of stock upon a representation that it has always paid a dividend of ten per cent per annum in quarterly installments, when in fact it has never paid such a dividend, is liable in an action of deceit. (*Handy v. Waldron*, 794.)

8. DECEIT—NO INFERENCE THAT FACTS STATED ARE TRUE OF ONE'S OWN KNOWLEDGE EXISTS, WHEN.—If the purchaser of the stock and bonds of a corporation, which soon afterwards fails, is furnished with an incomplete written statement of the assets and liabilities of the corporation having affairs widely extended, and agencies in numerous cities throughout the country, the mere facts that the defendant, in an action for deceit, was president of the corporation, and that he furnished the statement as showing the entire assets and liabilities are not of themselves enough to warrant the inference that the defendant represented that the statement was true of his own knowledge. (*Kountze v. Kennedy*, 651.)

9. DECEIT—LACK OF FRAUDULENT INTENT.—If plaintiff is induced to purchase stock and bonds of a corporation, which fails

soon afterwards, upon the application of the defendant, who is president of the company, and who furnishes the buyer with a written statement purporting to contain the entire assets and liabilities of the company, but from which a claim in suit, finally resulting in a judgment against the company, is omitted, and the defendant contends that the claim was omitted because it was not regarded by the company and their counsel as a valid obligation, the defendant's fraudulent intent is lacking, and the charge of deceit must fail if the nondisclosure of the claim was attributable to an honest belief, upon reasonable grounds, that the claim was not valid and could not be enforced. (*Kountze v. Kennedy*, 651.)

10. DECEIT—FALSE ASSERTION AS TO PERSONAL KNOWLEDGE.—One who falsely asserts a material fact, susceptible of accurate knowledge to be true of his own knowledge, and thereby induces another to act upon the fact represented, to his prejudice, commits a fraud which will sustain an action for deceit. (*Kountze v. Kennedy*, 651.)

11. DECEIT—REPRESENTATIONS WITHOUT KNOWLEDGE—RECKLESS ASSERTIONS.—A man is presumed to warrant his own belief of the truth of that which he asserts. Hence he who makes a representation which he neither knows, nor cares, whether it is true or not, can have no real belief in the truth of what he asserts, and is justly guilty of deception. (*Kountze v. Kennedy*, 651.)

12. DECEIT—MISREPRESENTATIONS.—The man who intentionally deceives another to his injury should be legally responsible for the consequences; but if, through inattention, want of judgment, reliance upon information which a wiser man might not credit, misconception of the facts or of his moral obligation to inquire, he makes a representation designed to influence the conduct of another, and upon which the other acts to his prejudice, yet, if the misrepresentation was honestly made, believing it to be true, whatever other liability he may incur, he cannot be made liable in an action for deceit. (*Kountze v. Kennedy*, 651.)

13. DECEIT.—MISJUDGMENT, HOWEVER GROSS or want of caution, however marked, is not fraud. (*Kountze v. Kennedy*, 651.)

14. FRAUD—PLEADING.—A statement of facts in a pleading tending to show a fraudulent intent is not equivalent to an allegation of such intent. (*McKibbin v. Ellingson*, 499.)

15. DECEIT—PLEADING—DUPLICITY—SEPARATE CAUSES OF ACTION.—A count in a declaration for deceit in the sale of bonds and stocks, setting out that the defendant made false and fraudulent statements as to their value, and that he falsely and fraudulently represented that the stocks had always paid a dividend of ten per cent per annum in quarterly installments, is not bad for duplicity, nor does it set out two several and distinct causes of action. (*Handy v. Waldron*, 794.)

See Assignment for the Benefit of Creditors, 4; Banks, 4; Dures, 2; Equity, 2; Estoppel, 3; Husband and Wife, 2, 3; Infants.

FRAUDULENT CONVEYANCE.

A CHATTEL MORTGAGE IS VOID AGAINST A CREDITOR OF THE MORTGAGOR, though he has notice thereof, under a statute declaring that a mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value, unless it is acknowledged, or proved, certified, and recorded in like manner as grants of real property. The words "in good faith and for value" refer to

purchasers and encumbrancers, and not to creditors. (*Cardenas v. Miller*, 84.)

See Husband and Wife, 6; Specific Performance, 6, 7.

FREIGHT.

See Carriers, 9.

GARBAGE.

See Municipal Corporations, 4, 16-19.

GARNISHMENT.

See Receivers.

GAS.

See Municipal Corporations, 14, 15.

GIFTS.

See Husband and Wife, 1, 5.

GRAND JURY.

See Elections, 8.

GRANT.

See Boundaries, 6.

HABEAS CORPUS.

HABEAS CORPUS.—ONE IMPRISONED FOR VIOLATING an order or judgment in excess of the jurisdiction of the court rendering it can be discharged by writ of habeas corpus. (*Ex parte Arnold*, 557.)

See Municipal Corporations, 15; Prohibition.

HEALTH.

See Adulteration, 2, 3; Municipal Corporations, 2, 4; Police Power, 2.

HEIRS.

See Specific Performance, 6-8; Treaties, 2, 3.

HIGHWAYS.

1. BICYCLES—NEGLIGENCE—LIABILITY FOR.—A person cannot be held liable for his acts, unless done in such manner and at such time as to show that he is acting in disregard of the rights of others. This rule applies to a bicycle rider lawfully travelling upon a public highway. (*Thompson v. Dodge*, 533.)

2. BICYCLES—RIGHTS ON HIGHWAY.—A bicycle is a vehicle, and the riding of one upon the public highway, in the ordinary manner, is neither unlawful nor prohibited by any principle of law. (*Thompson v. Dodge*, 533.)

3. BICYCLES—RIGHTS ON HIGHWAY.—It is not the duty of a person lawfully traveling upon a public highway on a bicycle, when he sees a horse and carriage approaching, to stop and inquire whether the horse is likely to be frightened, nor to anticipate that such horse will be frightened, in the absence of any apparent reason for so doing. (*Thompson v. Dodge*, 533.)

4. BICYCLES—RIGHTS OF RIDERS IN HIGHWAY.—A person riding a bicycle upon the public highway has the same rights in so

doing as persons on horseback or using other vehicles thereon. (Thompson v. Dodge, 533.)

HOMESTEAD.

PROBATE HOMESTEAD, TESTATOR HAS NO TESTAMENTARY POWER OVER.—If the statute provides for the selection by the court sitting in probate of property to be used as a homestead by the family of the decedent, and that if such selection be from the separate estate of the decedent, the court can set it aside for a limited period only, to be designated in such order, and the title vests in the heirs subject to such order, the order excludes the property so selected from the testamentary power of the husband, and it descends to his heirs, regardless of any devise he may have made. (In re Walkerly, 97.)

HOMICIDE.

1. HOMICIDE—ADMISSIBILITY OF DECLARATIONS AS TO THREATS.—The declaration of one indicted for homicide, made shortly prior to the killing, that he would put fourteen buckshot into the deceased, being complete as to the purpose, is admissible in evidence, where there is nothing to indicate that it was subject to any qualification, though the witness cannot recollect all that was said. (State v. Vallery, 363.)

2. HOMICIDE—EVIDENCE AS TO DANGEROUS CHARACTER OF DECEASED—PROOF OF OVERT ACT.—Testimony, in a murder case, to show the dangerous character of the deceased is admissible only when self-defense is set up and the accused proves a hostile demonstration on the part of the deceased menacing the life of the accused. Whether such overt act of the deceased was proved must be determined by the appellate court from the bill of exceptions and the qualifying statement of the trial judge. (State v. Vallery, 363.)

3. HOMICIDE—INTOXICATION AS DEFENSE—BURDEN OF PROOF.—A plea of drunkenness of such degree as to render the accused incapable of entertaining malice toward the deceased at the time of killing him is a special defense, and must be proved by the party urging it to the satisfaction of the jury beyond a reasonable doubt. (State v. Hill, 316.)

4. HOMICIDE—INTOXICATION—EVIDENCE.—The prosecution must establish the malicious homicide of the deceased by the accused beyond a reasonable doubt, and if, in making this proof, the drunkenness of the accused at the time of the killing is developed, it is to be considered by the jury, in determining the felonious intent of the homicide; but it is not the duty of the state to prove a negative by showing, beyond a reasonable doubt, that the accused was not so intoxicated as to render him incapable of entertaining malice against the accused. On the contrary, the defense must prove that he was so intoxicated. (State v. Hill, 316.)

HORSE STEALING.

See Larceny, 6.

HUSBAND AND WIFE.

1. HUSBAND AND WIFE—ALIENATION OF HUSBAND'S AFFECTION.—A wife may maintain an action against another woman for seducing her husband and alienating his affections, provided the wife is allowed, by statute, to sue for her own benefit for personal wrongs suffered by her. (Seaver v. Adams, 597.)

2. HUSBAND AND WIFE—GIFTS BY HUSBAND IN FRAUD OF WIFE.—A transfer of personal property, which is a mere device or contrivance by which the husband, not parting with the absolute

dominion over the property during his life, seeks at his death to deprive his widow of her distributive share of his estate, is fraudulent and void as to her. (*Walker v. Walker*, 616.)

3. **HUSBAND AND WIFE.—CONVEYANCES OF REAL ESTATE MADE BY A HUSBAND** during coverture for the purpose of defeating the wife's marital rights are fraudulent and void as against her. (*Walker v. Walker*, 616.)

4. **ESTOPPEL.—A WIFE IS NOT, AS AGAINST CREDITORS OF HER HUSBAND**, estopped from claiming that lands standing in his name were purchased with her separate estate, and with the intention of then vesting the title in her, and that the conveyance to him was made by inadvertence or mistake, if he was not engaged in any hazardous undertakings or in any business prosecuted on credit. (*De Berry v. Wheeler*, 538.)

5. **HUSBAND AND WIFE—GIFTS BY HUSBAND.**—A husband has power to dispose of his personal property in good faith, by gift or otherwise, during coverture, free from all postmortem claims thereon by his widow. (*Walker v. Walker*, 616.)

6. **HUSBAND AND WIFE.—A CONVEYANCE BY A HUSBAND** to his wife is not fraudulent, as against his creditors, if the property so conveyed was purchased with her separate estate, and she then intended to take title in her own name, though the deed, through inadvertence and mistake, was taken in the name of her husband. In subsequently making the conveyance to her he but performed his duty. (*De Berry v. Wheeler*, 538.)

7. **MARRIED WOMEN—VOID CONVEYANCE—ESTOPPEL.**—A deed executed by husband and wife, not acknowledged nor recorded, granting to a railway company a strip of the wife's land as a right of way, does not divest her title nor estop her from asserting title thereto, though without fraud she may have thus induced the company to build its road along the route taken. (*Louisville etc. Ry. Co. v. Stephens*, 303.)

8. **MARRIED WOMEN—VOID CONVEYANCE BY—ESTOPPEL.**—If, after a husband and wife have granted a railway company a right of way across her land by a conveyance void because not acknowledged or recorded, she stands by and allows the road to be built upon her land without objection, she cannot require the company to tear up its track and quit the occupancy of the premises, but she is entitled to recover damages. (*Louisville etc. Ry. Co. v. Stephens*, 303.)

9. **ENTIRETIES.—A CONVEYANCE TO A HUSBAND AND WIFE**, providing that, in the event of her surviving him, she shall have the use of the property, and at her death an estate in remainder is to go to her children by such husband, vests the fee in the estate by the entireties in the grantees, but the wife's fee is determinable upon her outliving her husband and subsequently dying leaving children by him. (*Cole Mfg. Co. v. Collier*, 921.)

10. **ENTIRETIES, ESTATE BY.—A DIVORCE CONVERTS** an estate which the purchasers held by entireties into a tenancy in common. (*Donegan v. Donegan*, 53.)

11. **ENTIRETIES, ESTATE BY.—IF A STATUTE INVESTS MARRIED WOMEN** with capacity to acquire and hold estates, a conveyance to a husband and wife vests title in them as tenants in common, and not as tenants by the entireties. (*Donegan v. Donegan*, 53.)

12. **ENTIRETIES—EXECUTION SALE.**—Though a sale under an execution against the husband of property held by him and his wife by the entireties divests his interest, and vests it in the purchaser at the sale, the rights of such purchaser are subordinate to those of the wife, and if the statute declares that the interest of the husband in

the real estate of his wife shall not be sold or disposed of by virtue of any judgment, nor shall the husband and wife be ejected from such real estate by virtue of any judgment, such purchaser is not, as against the wife, entitled to be put in possession of any part of such property, nor to receive any of the rents or profits thereof. (*Cole Mfg. Co. v. Collier*, 921.)

See Equity, 2.

IMPEACHMENT.

See Witnesses, 3.

INCEST.

1. INCEST WITH RELATIVES OF THE HALF-BLOOD.—The term "sister," as used in the statute defining incest, includes half-sister, and if such statutes make it incest for a man to have sexual intercourse with the daughter of his sister, they will sustain his conviction on a charge of such intercourse with a daughter of his half-sister. (*Shelly v. State*, 926.)

2. CRIMINAL LAW—ACCOMPLICE IN INCEST.—A WOMAN WHO CONSENTS to the crime of incest knowingly, voluntarily, and with the same intent which actuated the man, is his accomplice; otherwise, if she was the victim of force, threats, fraud, or undue influence. (*Shelly v. State*, 926.)

3. INCEST—ACCOMPLICE, TESTIMONY OF.—A conviction for incest cannot be sustained if based on the uncorroborated testimony of the woman who, if such testimony be true, was an accomplice, voluntarily yielding herself to the incestuous intercourse. (*Shelly v. State*, 926.)

INDEBTEDNESS.

See Corporations, 11-17; Municipal Corporations, 35; States.

INDICTMENT.

1. INDICTMENT—JOINDER OF OFFENSES.—At common law, several felonies or misdemeanors could be joined in several counts of the same indictment, but a felony and misdemeanor could not be so joined. (*State v. Fitzsimon*, 766.)

2. INDICTMENT—JOINDER OF FELONY AND MISDEMEANOR. By virtue of statutory provisions, two offenses committed by the same person, though one is a felony and the other a misdemeanor, may be included in the same indictment, where they are of the same general nature, and belong to the same family of crimes, and where the mode of trial and nature of punishment are also the same. (*State v. Fitzsimon*, 766.)

3. INDICTMENT—BURGLARY AND ASSAULT TO RAPE—JOINDER.—The offenses of burglary and an assault with an intent to commit rape are not cognate offenses, and cannot be joined by separate counts in the same indictment. (*State v. Fitzsimon*, 766.)

See New Trial, 1; Criminal Law.

INDORSEMENT.

See Checks, 10.

INFANTS.

CONTRACTS TAINTED WITH FRAUD—EFFECT ON MINOR. If heirs make an illegal contract regarding the estate of their ancestor, and one of them afterwards dies, his minor child claiming under

the contract by right of representation, has no greater rights than those possessed by his deceased parent. (*Milhaus v. Sally*, 884.)

See Master and Servant, 2, 3; Negligence, 11-15; Railroads, 80, 36; 38-40.

INJUNCTIONS.

1. A MANDATORY INJUNCTION to compel the abatement of a nuisance will not issue ex parte before the trial of the cause, or be used to oust a party in possession. (*State v. King*, 374.)

2. INJUNCTION—STATUE OF DECEASED PERSON, RIGHTS OF RELATIVES.—Persons concerned in getting up a proposed statue or bust in honor of a deceased woman cannot be restrained by her surviving relatives from so doing, upon the ground that the persons so acting were not friends of the deceased, and did not know her, if the motive of the act is to do honor to her, and the work is to be done in an appropriate manner. (*Schuyler v. Curtis*, 671.)

3. INJUNCTION—MENTAL INJURY OR DISTRESS.—The erection of a statue to the honor of a deceased woman will not be enjoined because of any alleged mental injury or distress to a surviving relative, grounded upon the idea that the action proposed in honor of his ancestress would have been disagreeable to that ancestress during her life. The plaintiff must show some right of his own violated, and that proof is not made by evidence that the proposed action of the defendant would have caused the deceased pain if she were living. (*Schuyler v. Curtis*, 671.)

4. INJUNCTION—MENTAL INJURY OR DISTRESS.—The erection of a statue to a deceased person will not be restrained merely because a living relative's feelings may be injured. There must, in addition, be some reasonable and plausible ground for the existence of this mental distress and injury. It must not be the creation of mere caprice nor of pure fancy, nor the result of a supersensitive and morbid mental organization, dwelling with undue emphasis upon the exclusive and sacred character of the right of privacy. (*Schuyler v. Curtis*, 671.)

5. INJUNCTION—ERECTION OF IDEAL STATUE.—The erection of an ideal statue, not intended as a likeness, for exhibition as the statue of a deceased woman who is chosen as the representative of a class of woman philanthropists, is not a fraud upon the public, and its exhibition will not be enjoined at the suit of surviving relatives, upon the ground that it is a fraud. (*Schuyler v. Curtis*, 671.)

6. INJUNCTION—ERECTION OF STATUE—JUXTAPOSITION OF STATUES.—The erection of a statue to the honor of a deceased woman as a representative of women philanthropists, will not be enjoined at the suit of her surviving relatives because an association of women propose to place the statue in the same room of a building on public grounds with that of a representative of women reformers, as this does not tend to show that the deceased philanthropist was in sympathy with or believed in the "woman's rights" movement. (*Schuyler v. Curtis*, 671.)

7. INJUNCTION—ERECTION OF STATUE—MISTAKE IN CIRCULARS.—The erection of a statue or bust of a deceased woman by an association of individuals will not be enjoined, on the ground that the association, in a circular issued by it, represented the deceased to have been the founder of the Mount Vernon Association, formed to secure the preservation of the home of Washington, when, in fact, she was only a vice-regent from her state, if there is nothing to show that the misstatement was intentional and would not be corrected if attention were called to it. (*Schuyler v. Curtis*, 671.)

8. INJUNCTION—ERECTION OF STATUE—CONSENT OF DESCENDANTS.—If the object of erecting a statue is to do honor to, the memory of a deceased person, and is to be carried out in an appropriate and orderly manner, by reputable individuals and for worthy ends, the consent of the descendants of such deceased person is not necessary, and they have no right to prevent, for their own personal gratification, any action of the nature described. (*Schuyler v. Curtis*, 671.)

See Contracts, 10; Prohibition.

INSOLVENCY.

1. INSOLVENCY—DISCHARGE AS BAR TO ACTION BY CITIZEN OF ANOTHER STATE.—A discharge in insolvency granted by a court of one state to one of its citizens is not a bar to an action in that state by a citizen of another state, who has not voluntarily submitted himself to the jurisdiction of the court in the insolvency proceedings. (*Stirn v. McQuade*, 623.)

2. INSOLVENCY—ASSIGNMENT IN—EFFECT IN OTHER STATES.—An assignment in insolvency made under the law of one state is not a bar to a subsequent attachment of the insolvent's property situated in another state by a citizen thereof, or of a third state. (*Sturtevant v. Armsby Co.*, 627.)

See Corporations, 24-28.

INSTRUCTIONS.

1. JURY TRIAL.—AN INSTRUCTION GIVEN AT THE REQUEST OF A PARTY cannot be complained of by him. (*Louisville etc. R. R. Co. v. Markee*, 21.)

2. JURY TRIAL.—AN ABSTRACT INSTRUCTION inapplicable to any evidence in the case is likely to be misleading, and should not be given. (*Louisville etc. R. R. Co. v. Markee*, 21.)

3. NEGLIGENCE—ERRONEOUS INSTRUCTIONS.—If, under the pleadings, the plaintiff is entitled to recover only for gross negligence, it is error to instruct the jury that he may recover upon proof of ordinary negligence, and a verdict based upon such negligence is not sufficient to support a judgment for damages. (*Louisville etc. R. R. Co. v. Brantley*, 291.)

4. JURY TRIAL.—INSTRUCTIONS AS TO PARTICULAR PHASES OF THE TESTIMONY may be denied if the judge gives full and sufficient instructions which will enable the jury to understand the law applicable to all branches of the case. He need not take up each fragment of the testimony and state the conclusions applicable to a possible finding upon each. (*Hicks v. New York etc. R. R. Co.*, 471.)

5. JURY TRIAL—DRAWING ATTENTION OF JURY TO ONE QUESTION.—An instruction directing the attention of the jury to the question whether the motorman might have stopped the car in time to prevent an accident cannot be regarded as prejudicial to the plaintiff, as taking away from the jury the question whether the accident might have been averted by an increase in the speed of the car, when there is no evidence tending to show that by such increase the accident might have been avoided. (*Bamberger v. Citizens' etc. Ry. Co.*, 909.)

See False Imprisonment, 2.

INSURANCE.

1. INSURANCE.—IN ORDER TO BIND THE PARTIES by a contract of insurance, all the essential elements of the contract must or-

dinarly be agreed upon, but if it is at the time impossible to obtain important facts affecting the subject of their dealing, they may make a general agreement to accomplish their purpose as well as they can. (*Scammell v. China etc. Ins. Co.*, 462.)

2. INSURANCE, CONTRACT . FOR WHEN BECOMES COMPLETE.—The fact that the amount of premium is not fixed does not necessarily prove that the contract of insurance had not become operative. Therefore, a memorandum stating in general terms the amount of insurance desired on chartered freight of a designated vessel, "Premium, open for particulars," marked "binding" before the signature of the parties, and "Send policy to Walker & Hughes, 63 Wall street, New York," is an obligatory policy of insurance. It is equivalent to an agreement that the insurance shall be upon a reasonable rate of premium until the assured shall have an opportunity to furnish further particulars, and that he will furnish them within a reasonable time. His failure to do so avoids the contract. (*Scammell v. China etc. Ins. Co.*, 462.)

3. INSURANCE—PRESUMPTION IN FAVOR OF ASSURED.—An unexpired policy of fire insurance, regularly issued and remaining uncanceled, is presumed to be valid. The insured is *prima facie* entitled to recover if a loss occurs and the steps necessary to establish it have been taken. The conditions precedent in such policy, performance of which plaintiff is required to plead, include only those affirmative acts necessary to perfect his right of action on the policy, such as giving notice and making proof of loss, furnishing the certificate of a magistrate, or other steps of like nature required by the terms of the policy. (*Moody v. Insurance Co.*, 699.)

4. INSURANCE—CONSTRUCTION OF POLICY.—Conditions usually contained in policies of insurance, providing that they shall be suspended, or the insurer relieved wholly or partially from liability, upon the happening of some event, or the doing or omission to do some act, are not conditions precedent, but matters of defense, which, together with their breach, must be pleaded and proved by the insurer. (*Moody v. Insurance Co.*, 699.)

5. INSURANCE, FORFEITURE FOR FAILURE TO FURNISH PARTICULARS.—Where a contract is made in the absence of definite particulars, it is the duty of the assured to furnish them within a reasonable time, and a breach of this duty annuls the contract. (*Scammell v. China etc. Ins. Co.*, 462.)

6. INSURANCE.—A VOLUNTARY ASSIGNMENT FOR THE BENEFIT OF CREDITORS executed in the mode prescribed by statute is a breach of a condition in a policy of insurance providing that if the property or any interest therein be sold or transferred, or any change takes place, other than by the death of the assured, in the interest, title, or possession, whether by legal process or judicial decree, or voluntary transfer by the assured, then in such case the policy shall be void. (*Orr v. Hanover etc. Ins. Co.*, 146.)

7. INSURANCE—LIMITATION OF ACTION FOR LOSS.—A condition in a fire insurance policy requiring the bringing of an action for a loss within one year after such loss occurs, is waived if the insurer makes an assignment for the benefit of creditors within such year, and the claim is not barred as to the fund in court, although not filed with the assignee until more than a year after the loss. (*In re St. Paul etc. Ins. Co.*, 497.)

8. INSURANCE—VACANT PREMISES.—To constitute occupancy of a dwelling-house within the meaning of a fire insurance policy, it need not be used continuously. The family may be absent for health, pleasure, business, or convenience for reasonable periods. (*Moody v. Insurance Co.*, 699.)

9. INSURANCE—VACANT PREMISES.—Conditions avoiding a policy of fire insurance because the premises become vacant or unoccupied should receive a strict construction, and, when ambiguous, be construed most strongly against the insurer. (*Moody v. Insurance Co.*, 699.)

10. INSURANCE — OCCUPANCY, WHAT CONSTITUTES. — A dwelling is not unoccupied, within the meaning of a fire insurance policy, merely because it has ceased to be used as a family residence, if household goods remain in it ready for use, and it continues to be occupied by one or more members of the family, or a tenant having access to the entire building for the purpose of caring for it, and it is cared for and some use made of it as a place of abode. (*Moody v. Insurance Co.*, 699.)

11. INSURANCE—VACANT PREMISES—INCREASE OF RISK. Under a statute regulating contracts of fire insurance, and providing "that, in the absence of any change increasing the risk without the consent of the insurer, and also of intentional fraud on the part of the insured," the insurer shall be liable for the loss suffered and named in the policy, the insurer, to avoid liability for loss on the ground of a breach of a condition in the policy that he shall not be liable for "loss or damage in or on vacant or unoccupied buildings, unless consent for such vacancy or nonoccupancy be indorsed" on the policy, must allege and prove that such breach of condition has increased the risk, when there is no question of intentional fraud on the part of the insured. (*Moody v. Insurance Co.*, 699.)

12. INSURANCE—VACANT PREMISES.—The risk under a fire insurance policy is not necessarily, or *prima facie*, increased, by the property becoming vacant or unoccupied. (*Moody v. Insurance Co.*, 699.)

13. INSURANCE—PROOFS OF LOSS.—APPARENT AUTHORITY on the part of local agents to receive proofs of loss is implied from a custom among insurance corporations to prepare proofs of loss and send them to the officers. (*Harnden v. Milwaukee etc. Ins. Co.*, 467.)

14. INSURANCE — PROOFS OF LOSS.—THE DELIVERY OF PROOFS TO A LOCAL AGENT constitutes a delivery to the company, if the commission of such agent gives him "full power to receive proposals for insurance against loss or damage by fire, to receive moneys and countersign, issue, renew, and consent to the transfer of policies, subject to the rules and regulations of the company, and to such other instructions as may, from time to time, be given by its officers." Especially is this true if the agent had apparent authority by custom to receive such proofs. (*Harnden v. Milwaukee etc. Ins. Co.*, 467.)

15. INSURANCE—"FORTHWITH" STATEMENT OF LOSS, WHEN RENDERED.—Whether a statement of loss is rendered "forthwith" depends on all the circumstances, and is a question of fact for the jury. A failure to render such statement until about two months after the loss occurred is not necessarily a failure to render it "forthwith" within the meaning of the policy, if the delay is accounted for by the ill-health of the assured, the confusion attending the fire, and other obstructions encountered by him. (*Harnden v. Milwaukee etc. Ins. Co.*, 467.)

16. LIFE INSURANCE—SUICIDE.—PROOFS OF LOSS under a policy of life insurance showing that the death was caused by suicide, are admissible, but not conclusive, against the insured. (*Leman v. Manhattan etc. Ins. Co.*, 348.)

17. LIFE INSURANCE—SUICIDE—BURDEN OF PROOF.—If suicide is relied upon as a defense to an action to recover on a life insur-

ance policy, the burden of proof is upon the insurer to establish the suicide, and, if circumstantial evidence alone is relied upon, it must be of such character as to exclude, with reasonable certainty, any other cause of death. (*Leman v. Manhattan etc. Ins. Co.*, 348.)

See Witnesses, 4.

INTEREST.

See Usury.

INTERMENT.

See Burial Rights.

INTOXICATION.

See Homicide, 3, 4.

JOINDER.

See Indictment, 1-3.

JUDGES.

See New Trial, 2.

JUDGMENTS.

1. JUDGMENTS.—OFFICE OF NUNC PRO TUNC ENTRY is to record some act of the court done at a former term, which was not then carried into the record, but it cannot be employed to secure, at a subsequent term, a performance by the court of some act which the applicant failed to have the court do at the term in which final judgment was rendered and entered. (*Cleveland Leader Printing Co. v. Green*, 725.)

2. JUDGMENTS—NUNC PRO TUNC ENTRY—JURISDICTION.—If the record of a court fails to show that it has acquired jurisdiction of the person of the defendant and the plaintiff has neglected at the hearing of the case to require the court to inquire into and adjudicate that question, the court cannot, at a subsequent term, inquire into its jurisdiction over the defendant, and, by a nunc pro tunc order, cause the record to state that the inquiry was made at the term when final judgment was rendered. (*Cleveland Leader Printing Co. v. Green*, 725.)

3. JUDGMENTS AS ESTOPPEL—SEPARATE CAUSES OF ACTION.—If a plaintiff sets up two causes of action in his complaint and the defendant fails to require him to separate them, or to elect upon which to proceed, he is estopped after judgment on his complaint from separating the causes of action, and bringing a separate suit thereon. (*Cartin v. South Bound R. R. Co.*, 829.)

4. RES JUDICATA.—THE PLAINTIFF HAS NO ABSOLUTE RIGHT TO WITHDRAW one of the claims sued upon, and, if his application for leave to withdraw it is refused by the court, the defendant may treat the claim as still proper for consideration, but it is, nevertheless, not res judicata, if the evidence shows that it was not presented nor considered by the court. (*Nashua etc. R. R. Corp. v. Boston etc. R. R. Corp.*, 454.)

5. RES JUDICATA.—A DEMAND OR CLAIM IS NOT RES JUDICATA, THOUGH IT WAS INTERPOSED in a prior suit along with other claims and leave to withdraw it was denied by the court, if the final judgment of the court appeared to be upon the other claims, and there is no evidence that the claim, the right to withdraw which was

refused, was in fact argued, considered, or determined by the court. (*Nashua etc. R. R. Corp. v. Boston etc. R. R. Corp.*, 454.)

6. **RES JUDICATA—OVERRULED DEFENSE.**—A means of defense overruled in a past litigation does not, except under peculiar circumstances, preclude the facts passed on in the previous litigation from use in a future suit. (*Williams v. Hewitt*, 394.)

7. **JUDGMENTS—NONSUIT—RES JUDICATA.**—Nonsuit granted, not for a failure of evidence, but on the merits, and because plaintiff has no cause of action, is *res judicata* and binding in a subsequent suit between the same parties based upon the same cause of action. (*Cartin v. South Bound R. R. Co.*, 829.)

8. **A JUDGMENT OF NONSUIT BASED UPON THE CONSTRUCTION OF A DEED** is *res judicata* in a subsequent action between the same parties based upon the same deed. (*Cartin v. South Bound R. R. Co.*, 829.)

9. **A JUDGMENT OF ACQUITTAL IN A CRIMINAL PROSECUTION IS NOT ADMISSIBLE** in favor of the accused in a civil action to prove that he was not guilty of the crime with which he was charged. (*Fowle v. Child*, 451.)

See Appeal, 8, 9; Partnership, 4.

JUDICIAL NOTICE.

See Carriers, 1; Evidence, 1, 2.

JURY TRIAL.

See Trial.

LACHES.

See Checks, 4, 7, 14.

LANDLORD AND TENANT.

1. **LANDLORD AND TENANT.—TO CONSTITUTE EVICTION** there must be something of a grave and permanent character done by the landlord for the purpose and with the intention of depriving the tenant of the enjoyment of the leased premises. (*Barrett v. Boddie*, 172.)

2. **LANDLORD AND TENANT.—NO EVICTION SUCH AS ENTITLES** a tenant to resist an action to recover rents exists unless the premises are rendered useless by the positive act of the landlord, or the tenant has been deprived in whole or in part of the possession or enjoyment of the premises, actual or constructive, by the landlord. (*Barrett v. Boddie*, 172.)

3. **LANDLORD AND TENANT—EVICTION.**—The fact that a flue in a building leased for use as a restaurant becomes filled up with brick and other materials so that the building can no longer be used for the purposes of the lease, and that the landlord or his agents did not clear out such flue, does not constitute an eviction where the tenant, by the terms of the lease, accepts the premises in the condition they were then in, and agrees that the landlord shall not be liable for any failure to keep them in repair. (*Barrett v. Boddie*, 172.)

4. **LANDLORD AND TENANT—EVICTION—AUTHORITY.**—A landlord cannot be bound by the acts of his agent amounting to a constructive eviction if he was not present when those acts were done, and neither authorized nor ratified them. (*Barrett v. Boddie*, 172.)

5. **LANDLORD AND TENANT—WAIVER OF EVICTION.**—Possession retained after an alleged constructive eviction is a waiver of the

right of abandonment. Liability for rent therefore continues according to the terms of the lease. (*Barrett v. Boddie*, 172.)

6. LANDLORD AND TENANT—EVICTION.—A physical eviction is not necessary to exonerate the tenant from payment of rent. He is justified in abandoning the premises and refusing to pay rent, if the landlord's acts, though not amounting to a physical expulsion, are of so pronounced and offensive a character as to create a nuisance, thereby preventing the tenant's reasonable use of the premises. (*Sully v. Schmitt*, 659.)

7. LANDLORD AND TENANT—CONSTRUCTIVE EVICTION.—If the tenant of a ground room in a building, without a previous opportunity for examination, discovers, after the execution of his lease and taking possession, an open sewer under the leased premises, into which offensive matter drops from closets in the adjacent portion of the building occupied as a hotel by his landlord, and which is insufficient to carry off the deposit, giving out a disagreeable stench, creating a nuisance, and rendering the occupation of the leased premises dangerous to life, and the tenant cleans out the sewer from time to time, but the landlord continues to maintain it in an offensive condition by suffering it to be refilled from the adjacent premises as often as the tenant cleans it, without any effort to change its construction, these facts constitute an eviction at law, which warrants an abandonment of the premises and exonerates the tenant from thereafter paying rent. (*Sully v. Schmitt*, 659.)

8. A LANDLORD IS NOT LIABLE FOR THE FREEZING AND BURSTING OF WATER-PIPES in the upper part of a building owned by him, whereby the lower part occupied by his tenant is flooded and his goods therein injured, there being no claim that the pipe itself was defective or not put in in a proper manner, and the fact being that the tenant had as much power to avoid the injury as the landlord. (*Buckley v. Cunningham*, 42.)

9. LANDLORD AND TENANT.—A landlord is not answerable to the tenant for injuries resulting from water-pipes or from the mode of constructing the building or appurtenances, there being no latent defect, fraud, nor concealment. (*Buckley v. Cunningham*, 42.)

10. LANDLORD AND TENANT—LEASE—COVENANTS BY TENANT.—The tenant's covenants in a lease, obligating him to maintain the leased premises in good repair and in a cleanly condition, do not require him to keep them clear of a nuisance caused by a stench from sewage coming from the landlord's adjacent premises by reason of the latter's neglect. (*Sully v. Schmitt*, 659.)

11. LANDLORD AND TENANT—EASEMENT IN SEWER.—A landlord has a right, in the nature of an easement, to continue the use of a sewer running from premises occupied by him to and under adjacent premises leased by him to another, but he does not have a right to maintain it in a defective condition, injuriously affecting the tenant's possession and making it impossible or unsafe for him to continue in occupation. (*Sully v. Schmitt*, 659.)

12. LANDLORD AND TENANT—PURCHASER OF LEASEHOLD INTEREST, LIABILITY OF FOR RENT.—If the tenant's leasehold interest in property is sold by a receiver, under direction of the court, the purchaser does not become answerable for the rent which would subsequently fall due according to the terms of the lease, but the amount thereof remains a debt due from the original lessee. (*Tradesman Pub. Co. v. Car Wheel Co.*, 943.)

13. LANDLORD AND TENANT—ABANDONMENT—EVIDENCE. In an action for rent, the defense of abandonment and surrender of the premises, upon the ground that they were untenable and dan-

gerous to life and health, is made out, without any showing that the tenant was induced to enter into the lease by the misrepresentation or fraud of the landlord, by evidence that during the tenant's occupation the landlord was guilty of affirmative acts causing a nuisance dangerous to life or health, and against which the tenant was remediless by the performance of any acts called for by his own covenants. (*Sully v. Schmitt*, 659.)

14. LANDLORD AND TENANT—RECEIVER OF TENANT, LIABILITY OF FOR RENT.—If a receiver is appointed for a tenant and takes possession of the leased premises, he does not thereby become the assignee of the term in any proper sense of the word. Unless he elects to accept the lease, the lessor is not entitled to hold him liable for the rent stipulated for in the lease, nor to an order that such rent accruing after his appointment shall be paid as a preferred claim out of funds which may come into his hands. Such rents are not chargeable against such funds as operating expenses, when it does not appear that the receiver either carried on business on the leased premises, or rented them out, or made any use of them other than for the protection and preservation of the property. (*Tradesman Pub. Co. v. Car Wheel Co.*, 943.)

See Forcible Entry, etc.

LARCENY.

1. LARCENY.—OBTAINING MONEY UNDER THE PRETENSE THAT IT IS TO BE BET ON A RACE, and with the intent at the time to convert it to the bailee's own use, the race being a mere sham to aid this purpose, is larceny. (*Doss v. People*, 180.)

2. LARCENY.—IF POSSESSION OF PROPERTY IS LAWFULLY obtained, a subsequent appropriation of it is not larceny unless the intent to appropriate it existed in the mind of the taker at the time it came into his hands. (*Smith v. Commonwealth*, 287.)

3. LARCENY.—FELONIOUS CONVERSION.—One who, under an agreement to renovate and return goose feathers, procures them from the owner with the felonious intention of converting them to his own use, and returns other feathers in their place worth comparatively nothing, is guilty of larceny. (*Commonwealth v. Williamson*, 285.)

4. LARCENY.—FELONIOUS CONVERSION.—If the owner of goods parts with their possession for a particular purpose, and he who receives such possession avowedly for that purpose has a fraudulent intention to make use of the possession as a means of converting the goods to his own use, and does so convert them, it is larceny. In such case the question of intent is for the jury. (*Commonwealth v. Williamson*, 285.)

5. LARCENY.—EVIDENCE.—On a trial for larceny of goose feathers, by obtaining them under an agreement to renovate and return them, and returning worthless feathers in their place, evidence that defendants were guilty of other similar transactions is not admissible; but evidence that about the time of such transaction the defendants were shipping large lots of goose feathers, and receiving worthless feathers in return, is admissible. (*Commonwealth v. Williamson*, 285.)

6. LARCENY.—HORSE STEALING.—One who obtains possession of a horse as bailee is not guilty of larceny in afterward selling it and converting the proceeds to his own use, unless the attempt to thus appropriate it existed at the time he obtained possession. (*Smith v. Commonwealth*, 287.)

LEASE.

See Landlord and Tenant, 3.

LEGACIES.

ESTOPPEL AGAINST ASSERTING LAW AGAINST PERPETUITIES.—The fact that the widow and other heirs have accepted legacies bequeathed to them in a will cannot estop them from urging that the disposition of property made by it is offensive to the law against perpetuities, and should therefore be disregarded. (*In re Walkerly*, 97.)

LEGISLATURE.

See Adulteration, 1; Elections, 1; Franchise, 1; Limitations of Actions, 4; Police Power; Railroads, 8, 9; States, 2, 4.

LETTERS.

See Contracts, 4.

LIBEL.

1. **LIBEL—GOOD MOTIVES.**—The publication of a libel is a wrongful act, presumably injurious to those persons to whom it relates, and, in the absence of legal excuse, gives a right of recovery, irrespective of the intent of the defendant who published it, notwithstanding he had reason to believe the statement to be true, and was actuated by an honest or even commendable motive in making the publication. (*Holmes v. Jones*, 646.)

2. **LIBEL—DAMAGES.**—In an action for libel the amount of damages is peculiarly within the province of the jury, and may be either compensatory or punitive. (*Holmes v. Jones*, 646.)

3. **LIBEL—MITIGATION OF DAMAGES.**—A defendant cannot show, in mitigation of damages for a specific libel, other and disconnected immoralities on the part of the plaintiff, and must confine himself to attacking only the plaintiff's general character. But if two charges relate to the same subject matter, are not disconnected and independent, and only one is submitted to the jury, although the other was counted on and justified in the answer, it is reversible error not to permit the defendant, in mitigation of damages on the charge submitted, to give evidence supporting the other charge. (*Holmes v. Jones*, 646.)

LICENSE.

LICENSE—REVOCATION—CONVEYANCE OF TREES—STATUTE OF FRAUDS.—A written instrument, in form a deed, conveying all of the standing wood on certain premises for two years, does not pass any interest in the land, but is a mere parol license, or executory contract for trees to be severed from the land, is not within the statute of frauds, and is revocable by a conveyance of the land during the term. If so conveyed, trespass quare clausum fregit may be maintained against the licensees who afterward cut and remove trees from the land under such contract. (*Fish v. Capwell*, 807.)

See Railroads, 17.

LICENSEES.

See Real Property.

LIENS.

See Factors, 5; Mechanic's Lien; Trespass, 1.

LIMITATIONS OF ACTIONS.

1. **LIMITATIONS OF ACTIONS—ASSIGNMENTS FOR THE BENEFIT OF CREDITORS** are for the benefit of all creditors whose

claims are not barred by limitation at the date of the assignment, and if not then barred, are not afterward barred as to the fund in court during the pendency of the insolvency proceedings. (*In re St. Paul etc. Ins. Co.*, 497.)

2. STATUTE OF LIMITATIONS—VESTED RIGHTS.—The vested right to the defense of the statute of limitations after it has become a bar is protected against subsequent changes in the limitation law by a constitutional provision that all "rights" shall continue valid. (*Lawrence v. Louisville*, 809.)

3. STATUTE OF LIMITATIONS—VESTED RIGHTS.—The right to plead the statute of limitations after it has run and become a bar to a demand arising either *ex contractu* or *ex delicto* is a vested right, and cannot be taken away by a subsequent repealing statute. (*Lawrence v. Louisville*, 809.)

4. STATUTE OF LIMITATIONS—POWER TO ALTER OR CHANGE.—The legislature has power to pass limitation laws, and to alter or change them, by extending the time for their enforcement, or to shorten the time, by giving a reasonable time for asserting the right, provided such laws do not affect cases to which the bar of the existing statute of limitations has attached. (*Lawrence v. Louisville*, 809.)

5. LIMITATIONS OF ACTIONS.—STATUTE OF LIMITATIONS must be pleaded to be available on the trial. (*Valz v. First Nat. Bank*, 806.)

6. LIMITATIONS—STATUTE, WHEN SUFFICIENTLY PLEADED.—An answer stating that the cause of action alleged in the complaint did not accrue within six years of the commencement of the action sufficiently pleads the statute of limitations. Upon proof of the fact alleged, the burden of proof is upon the plaintiff to relieve himself from the operation of the statute. (*Searls v. Knapp*, 878.)

7. LIMITATIONS OF ACTIONS—PLEA OF STATUTE OF LIMITATIONS OF ANOTHER STATE is not available, unless its terms and provisions are so pleaded as to show that by it the action is barred. (*Valz v. First Nat. Bank*, 806.)

8. LIMITATION OF ACTIONS—STATUTE OF ANOTHER STATE. In the absence of a plea showing that the action is barred by the statute of limitations of another state where the cause of action accrued, the statute of limitations of the state where the action is brought must control. (*Valz v. First Nat. Bank*, 806.)

9. STATUTE OF LIMITATIONS.—Absence from the state as a disability under the statute of limitations ends when the personal presence of the party in the state begins; and once ended by such presence, though for a temporary purpose only and of short duration, does not revive by subsequent absence, however permanent or long continued. (*Powell v. Koehler*, 705.)

10. STATUTE OF LIMITATIONS.—EXCEPTIONS in statutes of limitation in favor of persons laboring under disability are strictly construed, and cannot be enlarged from considerations of apparent inconvenience or hardship. (*Powell v. Koehler*, 705.)

11. WILLS—STATUTE OF LIMITATIONS—REMOVAL OF DISABILITY.—If a person entitled to contest a will is under the two disabilities of infancy and absence from the state at the time his right of action accrues, his subsequent temporary presence in the state while he is yet an infant has the effect of removing his disability of absence from the state. (*Powell v. Koehler*, 705.)

See Discovery; Insurance, 7.

LIVESTOCK.

See Carriers, 5, 7.

LOTTERY TICKETS.

See Municipal Corporations, 8, 20.

MALICE.

See False Imprisonment, 1; Slander.

MALICIOUS PROSECUTION.

See False Imprisonment, 4.

MANDAMUS.

MANDAMUS TO ENFORCE ORDER OF RAILROAD COMMISSIONERS.—If a railroad company running an exclusive passenger train, as well as a freight train, each way every day over one of its branches, finds the revenues from the service insufficient to meet the expense of maintenance and operation, and withdraws the passenger train, thereafter running only a daily train each way carrying both passengers and freight, a court has no authority, by mandamus, to specifically enforce an order of the board of railroad commissioners directing the company to restore and operate the passenger train, as such order is not final or conclusive. (*State v. Missouri Pac. Ry. Co.*, 278.)

MANDATORY.

See Injunctions, 1.

MARRIAGE AND DIVORCE.

1. DIVORCE—CRUELTY.—Under a statute authorizing divorce for "treatment injuring health or endangering reason," any behavior by one of the spouses affecting the other physically or mentally is within the meaning of the statute, without regard to the intent of such behavior. The practice of Christian Science as a doctor by a wife who believes it to be her duty, is ground for divorce by a husband who is abnormally sensitive. (*Robinson v. Robinson*, 632.)

2. DIVORCE—CRUELTY.—In an action for divorce for treatment injuring health and endangering reason the question is not whether the treatment reasonably ought, or could be expected seriously to injure the health or endanger the reason of a person of ordinary intelligence and mental strength, but whether it has in fact had that effect upon the health or reason of the party complaining. (*Robinson v. Robinson*, 632.)

3. DIVORCE—CRUELTY—QUESTION OF FACT.—In an action for divorce for "treatment injuring health and endangering reason," the question whether husband or wife has been so treated by the other as to seriously injure health or endanger reason is one of pure fact. It cannot be declared as matter of law that any particular treatment may not have that effect. (*Robinson v. Robinson*, 632.)

4. MARRIAGE AND DIVORCE—RECRIMINATION.—A divorce will not be granted, when it appears that the petitioner, although otherwise entitled to a decree, has been guilty of conduct that is cause for a divorce. Hence, if a man deserts his wife and enlists in the military service, writing but once or twice soon afterward to her, after which she hears nothing more from him for twenty-seven years, and she, in the mean time, believing him to be dead by reason of common report that he has been killed in war, marries again, after which the first husband appears with a wife and

several children, but she continues to live with her second husband for over two years, when she ceases to cohabit with him, and prefers a petition for a divorce from her first husband, she is not entitled to such a divorce, because she was guilty of conduct authorizing a divorce in continuing to live with her second husband after she knew that her first husband was alive. (*Mathewson v. Mathewson*, 782.)

5. DIVORCE—DUTY OF MOTHER TO SUPPORT CHILD AWARDED TO HER.—If, at the time a divorce a vinculo is granted to the husband on account of the misconduct of the wife, the custody of their minor children is awarded to her without any order providing for their maintenance, he is not thereafter liable to her for necessities furnished by her for the support of such children, in the absence of proof of a request by him that such support should be provided, or of a promise by him to pay therefor. (*Fulton v. Fulton*, 720.)

MARRIED WOMEN.

See *Estoppel*, 3; *Husband and Wife*, 7, 8.

MASTER AND SERVANT.

1. TORTS—EMPLOYER HAS NO RIGHT TO INFLUENCE EMPLOYEE NOT TO DEAL WITH THIRD PERSON.—If the plaintiff, engaged in a lawful business, is earning his livelihood by the patronage of others, it is unlawful for a railroad corporation and its foreman, having the power of employing and discharging large numbers of persons, by threats of nonemployment or discharge without justifiable cause, but prompted solely by a malicious and wanton intent and design to injure the plaintiff, to so use their power of employment and discharge upon persons seeking employment from them, or already in their employ, as to cause those who are already dealing with the plaintiff to desist from further doing so, or to prevent those who are inclined to deal with the plaintiff from doing it. (*Graham v. St. Charles etc. R. R. Co.*, 366.)

2. MASTER AND SERVANT.—INFANT EMPLOYEES are entitled at the hands of their employers to instruction as to the danger of their employment and how to avoid it, and, therefore, do not, in the absence of such instructions, assume all the usual dangers incident to the employment, nor take upon themselves the hazards of the use of defective tools and machinery. (*Norton v. Volzke*, 167.)

3. STATUTORY NEGLIGENCE.—The employment of a minor under twelve years of age, when forbidden by statute, is an act of negligence on the part of the employer, rendering him liable for any injury received by the minor while in such employment and as a consequence thereof, but the employer is not precluded from asserting the defense of contributory negligence on the part of the child. (*Queen v. Dayton Coal etc. Co.*, 935.)

4. NEGLIGENCE, CONTRIBUTORY.—THOUGH AN EMPLOYER HAS VIOLATED A STATUTE intended for the protection of his employees, and is therefore guilty of negligence per se, such negligence does not give an injured employee a right of action, where his own negligence directly contributed to the injury. (*Queen v. Dayton Coal etc. Co.*, 935.)

5. MASTER AND SERVANT.—THE MERE FACT THAT CERTAIN CONTRIVANCES, if on a machine, might have prevented its starting is not enough to charge the master with negligence, though from the sudden starting of such machine while being cleaned the servant is injured, and the placing of such contrivance on the machine would have prevented such injury. (*Ross v. Pearson Cordage Co.*, 459.)

6. MASTER AND SERVANT—GROSS NEGLIGENCE OF CO-EMPLOYEE.—An employee may recover for an injury received through the gross negligence of another employee of a higher grade in the same service, but he cannot recover for his ordinary negligence. (*Louisville etc. R. R. Co. v. Brantley*, 291.)

7. MASTER AND SERVANT—FELLOW-SERVANTS, WHO ARE NOT.—A coal passer at the boilers in a factory is not a fellow-servant with the chief engineer in charge thereof. (*Mattise v. Consumers' Ice Mfg. Co.*, 356.)

8. MASTER AND SERVANT.—THE RISK OF AN ACCIDENT FROM THE PREVIOUS NEGLIGENCE OF SERVANTS in their own field is one of the necessary risks which an employee assumes on entering service. If, therefore, when one enters upon a contract of service, an employee has already been guilty of negligence which afterward results in injury to one who must have been regarded as a fellow-servant had he been in the employment when the negligence occurred, he cannot recover of the master therefor. (*O'Connor v. Rich*, 483.)

9. MASTER AND SERVANT.—THE DUTIES WHICH THE MASTER CANNOT ASSIGN include the exercise of reasonable care to see that tools, appliances, and machinery, and the place where the servant works, are reasonably safe, and that the servant is informed of special dangers of his situation and of the appliances and machinery with and upon which he is employed. (*Norton v. Volzke*, 167.)

10. MASTER AND SERVANT—LIABILITY FOR NEGLIGENCE OF VICE-PRINCIPAL.—A master is liable to an inferior servant for injuries received from an explosion of a boiler in his factory caused by the failure of his chief engineer to immediately extinguish the fire and disconnect such boiler after notice of a defect therein, when such failure is the immediate and proximate cause of the accident. (*Mattise v. Consumers' Ice Mfg. Co.*, 356.)

11. MASTER AND SERVANT.—KNOWLEDGE OF VICE-PRINCIPAL that machinery under his control is dangerously defective is the knowledge of the principal. (*Mattise v. Consumers' Ice Mfg. Co.*, 356.)

12. MASTER AND SERVANT—VICE-PRINCIPAL—LIABILITY FOR NEGLIGENCE OF.—A chief engineer who is in charge and has the management of his employer's factory with full control of the firemen and coal passers employed therein, and full authority to provide for their safety, is a vice-principal, who, in the absence of his employer, must supply safe machinery and keep it in repair. His failure to perform this duty renders his employer liable to an inferior employee injured thereby. (*Mattise v. Consumers' Ice Mfg. Co.*, 356.)

See Railroads, 15-17, 23.

MECHANIC'S LIEN.

1. MECHANIC'S LIEN—SPACE TO BE ALLOWED AROUND DWELLING.—Under a statute extending a mechanic's lien upon a building to the land necessary for the convenient use and occupation thereof, the court cannot set aside forty acres with a dwelling on the ground that that amount of land is necessary for its convenient use. The statute does not contemplate that the dwelling shall include lands sufficient to support the owner while living therein. (*Cowen v. Griffith*, 82.)

2. MECHANICS' LIENS—RIGHTS OF ASSIGNEE OF CLAIM FOR.—The transfer of a claim enforceable under the provisions of the mechanics' lien law operates as an assignment of the right to a lien, including the right of the transferee to file the lien statement

in his own name and to include more than one claim or demand in the same lien statement. (*Kinney v. Duluth Ore Co.*, 528.)

MENTAL SUFFERING.

See *Telegraph Companies*, 2.

MERGER.

See *Partnership*, 5.

MINES.

1. **MINES AND MINING—MEANING OF "MINERALS."**—The word "minerals" within a grant or reservation of mines and minerals includes not only metals and metal-bearing rock, but anything mineral in character which can be got by mining, and this would embrace granite. (*Armstrong v. Lake Champlain Granite Co.*, 683.)

2. **MINES AND MINING.—GRANITE IS NOT A MINERAL ORE**, and does not pass under a conveyance of "mineral ores." (*Armstrong v. Lake Champlain Granite Co.*, 683.)

3. **MINES AND MINING—CONVEYANCE OF MINERALS.**—If one deed conveys the "mineral ores" in a certain lot, and a second deed conveys the "minerals and ores" therein, the necessary inference from a comparison of the two deeds is that the latter deed was intended to convey rights not included in the prior grant. (*Armstrong v. Lake Champlain Granite Co.*, 683.)

4. **DEEDS—MINES AND MINING—CONVEYANCE OF GRANITE.**—The term "minerals and ores," standing alone in a deed conveying "all the minerals and ores" on certain premises, includes the granite thereon. (*Armstrong v. Lake Champlain Granite Co.*, 683.)

5. **DEEDS—MINES AND MINING—CONVEYANCE OF GRANITE.**—If the words "minerals and ores," in a deed purporting to convey "all the minerals and ores" on certain premises do not stand alone, but are connected with a context clearly indicating that the parties had in view only such minerals as are to be got by mining in the ordinary sense of that term, that is, by underground and not by open workings, granite on the premises does not pass, as it is not obtained by underground working. Hence, granite is not included in a grant of all the "minerals and ores [on premises] with the right to mine and remove the same; the right to sink shafts and sufficient surface to erect suitable buildings for machinery and other buildings necessary and usual in mining and raising ores; also the right of ingress and egress for mining purposes, and to make explorations for minerals and ores." (*Armstrong v. Lake Champlain Granite Co.*, 683.)

6. **MINES AND MINING.—CUSTOM IN A MINING CASE** must be collected, not from what witnesses say they think the custom is, but from what is publicly done throughout the district. (*Armstrong v. Lake Champlain Granite Co.*, 683.)

See *Custom*.

MINORS.

See *Infants*.

MINUTES.

See *Corporations*, 10, 20.

MISCONDUCT.

See *New Trial*, 2.

MISDEMEANOR.

See Criminal Law; Indictment, 1, 2.

MISJOINDER.

See Banks, 15; New Trial, 1.

MISREPRESENTATION.

See Fraud, 7, 12.

MITIGATION.

See Libel, 3.

MONOPOLIES.

See Contracts, 6.

MORTGAGES.

1. **MORTGAGES—DESCRIPTION OF DEBT.**—A mortgage to be valid must in some way describe and identify the indebtedness it is intended to secure. Literal accuracy is not required, but the description of the debt must be correct, so far as it goes, and full enough to direct attention to the sources of correct information in regard to it, and be such as not to mislead or deceive as to the nature or amount of it. (*Bowen v. Ratcliff*, 208.)

2. **MORTGAGES—DESCRIPTION OF DEBT.—RENEWAL NOTES** given for notes not described in a mortgage, or notes given for an indebtedness not secured by mortgage, are not secured by such mortgage. (*Bowen v. Ratcliff*, 208.)

3. **MORTGAGES—DESCRIPTION OF DEBT—FORECLOSURE.**—If the amount of the debt secured is not specified in the mortgage, the mortgagor can recover on foreclosure only so much as he shows affirmatively to be due. (*Bowen v. Ratcliff*, 208.)

4. **ESTATES.—THE EQUITY OF REDEMPTION** is a creature of the courts of chancery, and is impliedly reserved by the mortgagor. This reserved estate belongs to the mortgagor, is regarded as an estate distinct from the right vested in the mortgagee, and is indefinite in its duration. (*Beverly v. Barnitz*, 257.)

MUNICIPAL CORPORATIONS.

1. **MUNICIPAL CORPORATIONS—DISCRETION IN EXERCISE OF DELEGATED POWER.**—If power is conferred upon a municipal corporation by statute silent as to the method of its exercise, the municipality is clothed with all reasonable discretion to determine the methods of exercising such power. (*Walker v. Jameson*, 222.)

2. **MUNICIPAL ORDINANCES.—COURTS DO NOT INQUIRE INTO THE REASONABLENESS** of city ordinances when power exists to pass them. The inquiry must be confined to the existence of such power. (*Skaggs v. Martinsville*, 209.)

3. **MUNICIPAL CORPORATIONS—HEALTH ORDINANCES MAY BE ADOPTED WITHOUT EXPRESS AUTHORITY.**—A city has implied power to adopt ordinances to protect the community against the offensive and unwholesome smell of decaying vegetable and animal substances. (*State v. Payssan*, 390.)

4. **MUNICIPAL CORPORATIONS—HEALTH ORDINANCE DOES NOT CREATE MONOPOLY OR DIVEST VESTED RIGHTS.**—An ordinance adopted under legislative authority, authorizing the removal and destruction of garbage, is not unreasonable nor oppressive,

and does not create a monopoly nor divest any one of vested rights. (*State v. Payaman*, 390.)

5. CONSTITUTIONAL LAW—FORBIDDING OFFENSIVE TRADES.—The operation of a steam shoddy machine or steam carpet-beating machine within a hundred feet of any church, schoolhouse, or residence may be prohibited by municipal ordinance. (*Ex parte Lacey*, 93.)

6. MUNICIPAL CORPORATIONS, POWERS OF.—Under a constitution providing that any city may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with the general laws, a city may enact and enforce an ordinance prohibiting the conducting of any steam shoddy machine or steam carpet-beating machine within one hundred feet of any church, schoolhouse, or residence. (*Ex parte Lacey*, 93.)

7. MUNICIPAL CORPORATIONS—POWER TO DECLARE NUISANCES.—A municipal corporation has no power to treat a thing as a nuisance which cannot be one, but it has the power to treat as a nuisance a thing that, from its character, location, and surroundings, may or does become such, and in doubtful cases, when a thing may or may not be a nuisance, depending upon a variety of circumstances, and requiring judgment and discretion to determine the action of the municipal authorities in declaring it a nuisance, in the exercise of their legislative functions under a general delegation of power, is conclusive and binding on the courts. (*Walker v. Jameson*, 222.)

8. MUNICIPAL ORDINANCE making it unlawful for a person to have a lottery ticket in his possession, unless that possession is shown to be innocent or for a legal purpose, is void, because it attempts to impose upon the person accused of the crime the burden of establishing his innocence. (*In re Wong Hane*, 188.)

9. CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS—ORDINANCES.—A city ordinance providing penalties against owners or occupants of lots for permitting water from any flowing well or spring to flow upon any of the streets or alleys of the city does not constitute a taking of property, but is a simple requirement that every property owner shall so control it as not to impair the usefulness of the public streets and jeopardize the public health. (*Skaggs v. Martinsville*, 209.)

10. MUNICIPAL CORPORATIONS—PAWNBROKERS, RIGHT TO REGULATE.—Under a charter giving a city power to license, regulate, tax, or suppress hawkers, peddlers, and pawnbrokers, no one has the right to pursue such an occupation within the limits of such city without first obtaining a license. The business is a privilege, not a right, and he who avails himself of it, and derives its benefits, must bear its burdens by conforming to the laws in force regulating the occupation. Pawnbrokers may, therefore, by ordinance, be required to keep books showing the details of their business, and to exhibit them, when demanded, to the inspection of the mayor or any police officer of the municipality. (*St. Joseph v. Levin*, 577.)

11. MUNICIPAL ORDINANCE THROWING UPON DEFENDANT THE BURDEN OF PROVING HIS INNOCENCE of a crime is void. (*In re Wong Hane*, 188.)

12. MUNICIPAL CORPORATIONS.—PENAL ORDINANCES are not always construed literally, but the courts make necessary exceptions in certain cases. (*Indianapolis v. Consumers' Gas etc. Co.*, 183.)

13. CRIMINAL LAW.—A COMPLAINT FOR VIOLATING A MUNICIPAL ORDINANCE need not state the facts upon which it is founded with the same strictness required in an indictment.

Hence, a complaint charging defendant with refusing to exhibit books kept by him as a pawnbroker is sufficient, though it shows the keeping of such book inferentially, rather than directly. (*St. Joseph v. Levin*, 577.)

14. MUNICIPAL CORPORATIONS—EXERCISE OF POWERS—SUPPLY OF GAS.—A city of the third class can exercise only such powers as are granted in express terms or by necessary implication. Hence, in the absence of legislative authority, it has no power to regulate the price at which natural gas shall be furnished to private consumers. (*In re Pryor*, 280.)

15. MUNICIPAL CORPORATIONS—THIRD CLASS—INVALIDITY OF ORDINANCE ATTEMPTING TO REGULATE PRICE OF GAS—HABEAS CORPUS.—If a company contracts with a city of the third class to supply it with gas, no rate being fixed, further than that it shall not charge the city more than one dollar per one thousand cubic feet of gas for lighting public buildings, and it afterwards, with the consent of the city, assigns its contract, upon condition that private families shall be furnished at not to exceed two dollars and fifty cents per stove per month, and forty cents per burner for illuminating purposes, a subsequent ordinance, making it unlawful for any person, firm, or corporation to charge anything for natural gas in excess of the prices therein fixed, they being much lower than those named in the assignment, and lower than those collected from consumers, is inoperative and void as to such assignees, so far as it purports to establish prices for gas furnished by them to private consumers. Hence, if the assignees are imprisoned for violating such an ordinance, they are entitled to discharge on habeas corpus. (*In re Pryor*, 280.)

16. MUNICIPAL CORPORATIONS—GARBAGE, COMPELLING REMOVAL OF.—The power to adopt ordinances to compel cleanliness includes the authority to have garbage moved away and destroyed. (*State v. Payssan*, 390.)

17. MUNICIPAL CORPORATIONS MAY CONTRACT FOR THE REMOVAL OF GARBAGE.—A city has power to decide in what way garbage, or other nuisances, shall be removed. Hence, an ordinance authorizing the removal of garbage by contract is unobjectionable. (*State v. Payssan*, 390.)

18. MUNICIPAL CORPORATIONS—GARBAGE ORDINANCES.—Under a statute authorizing it, a municipal ordinance requiring all householders in the city to place all garbage, not destroyed by them on the premises, in proper receptacles convenient for removal by a public contractor, at the expense of the householder, and forbidding any person other than the contractor to interfere with or remove such garbage, is valid as a health and sanitary regulation. (*Walker v. Jameson*, 222.)

19. MUNICIPAL CORPORATIONS—GARBAGE ORDINANCES—COST OF REMOVAL—ASSESSMENT.—A statute authorizing a city to provide for the removal of all garbage or other offal therefrom by contract or otherwise, empowers it to fix by ordinance the price of such removal by a public contractor, and the price or cost of removal thus fixed is not an assessment upon the premises from which the garbage is removed. (*Walker v. Jameson*, 222.)

20. MUNICIPAL ORDINANCE CONTAINING A VOID PROVISION MUST BE ADJUDGED WHOLLY VOID when to give it effect independent of such provision is to make the municipal legislature enact confessedly what it never meant. Therefore, an ordinance making it unlawful for a person to have in his possession a lottery ticket, unless it be shown that his possession is innocent or for a lawful purpose, cannot be sustained by disregarding this limitation

and enforcing such ordinance only in cases in which the prosecution shall first show that the possession was neither innocent nor lawful. (*In re Wong Hane*, 138.)

21. MUNICIPAL CORPORATIONS—CONTROL OF STREETS—IMPAIRMENT OF CONTRACT.—A grant to a city of exclusive power to regulate and control the use of its streets does not carry with it the right to prohibit, annul, or destroy rights arising out of a valid contract in relation to the use of such streets. (*Indianapolis v. Consumers' Gas etc. Co.*, 183.)

22. MUNICIPAL CORPORATIONS—CONTROL OF STREETS AND EASEMENTS THEREIN.—A city may, in granting to a gas company a franchise to use its streets, prescribe and impose terms and conditions which become, when accepted and complied with, a binding contract. By granting such franchise the city does not part with or bargain away its rights under the police power to protect the public health, morals, and safety. (*Indianapolis v. Consumers' Gas etc. Co.*, 183.)

23. MUNICIPAL CORPORATIONS—CONTROL OF STREETS—IMPAIRMENT OF FRANCHISE.—A grant of a franchise by a city to a company to lay and repair gas mains in its streets cannot be rescinded on the ground that new methods of improving streets have been adopted by the city subsequent to the grant. Nor can the city, by a subsequent ordinance, require such company to first obtain permission to lay or repair mains, when it has such right, without permission, under its franchise. (*Indianapolis v. Consumers' Gas etc. Co.*, 183.)

24. MUNICIPAL CORPORATIONS.—EXCLUSIVE POWER TO REGULATE AND CONTROL the use of its streets vested in a city is not restricted to transit alone, but extends to the laying of gas and water-pipes and to the promotion of the public health and convenience. (*Indianapolis v. Consumers' Gas etc. Co.*, 183.)

25. MUNICIPAL CORPORATIONS—EASEMENT IN STREETS—IMPAIRMENT OF CONTRACT.—A grant by a city to a company to lay and repair gas mains in its streets is a legislative contract investing the company with the right of property in the franchise thus granted, which the city cannot take away or impair, without the company's consent, by any subsequent act, unless such right is reserved. (*Indianapolis v. Consumers' Gas etc. Co.*, 183.)

26. MUNICIPAL CORPORATIONS—CONTROL OF STREETS.—Power expressly given to a city to control its streets and enforce sanitary regulations necessarily implies power to require the citizen to so control the uses of his property as not to impair or defeat the powers so expressly given. Such incidental powers are implied when essential to the accomplishment of the purposes for which municipal corporations are created. (*Skaggs v. Martinsville*, 209.)

27. MUNICIPAL CORPORATIONS—DEFECTS IN STREETS—TRANSFER OF LIABILITY.—In the absence of an express grant of power, a city has no authority to change the general law, and transfer the liabilities for injury resulting from defects in its streets from the public to an individual who is not directly responsible for their existence. (*Betz v. Limingi*, 344.)

28. MUNICIPAL CORPORATIONS—DEFECTS IN STREETS—LIABILITY.—Although a city may have imposed upon lotowners the public duty to keep the sidewalks in front of their premises in repair, or to raise or lower them to an established grade, yet the city, and not the owner, remains answerable in a private action for injuries resulting from his negligence, or his own omission to act. (*Betz v. Limingi*, 344.)

29. MUNICIPAL CORPORATIONS—DEFECTS IN STREETS—LIABILITY OF ABUTTING OWNER.—If statutes impose a mere public duty upon a lotowner in a city to keep the banquettes in front of his

premises in repair, or to raise or lower them to an established grade, a failure or neglect to perform such duty does not render him liable in a private action to an individual injured by reason of such failure or neglect. (*Betz v. Limingi*, 344.)

30. MUNICIPAL CORPORATIONS—LIABILITY FOR FAILURE TO REPAIR STREETS.—A municipal corporation charged by its charter with the duty of keeping its streets in proper repair is not liable to a civil action for damages at the suit of an individual who has sustained an injury either in person or property by reason of the failure of the corporation to perform such duty. (*Dunn v. Barnwell*, 843.)

31. MUNICIPAL CORPORATIONS—LIABILITY FOR UNSAFE CONDITION OF STREETS.—A statute giving a right of action against a municipal corporation to any person receiving injury to his person or property through a defect in any street, by reason of defect or mismanagement of any thing under the control of such corporation within its limits, and providing that it shall not be liable unless such defect is caused by its neglect or mismanagement, does not give a right of action for any nonfeasance or misfeasance on its part, except such as is connected with the keeping of its streets in proper repair. (*Dunn v. Barnwell*, 843.)

32. MUNICIPAL CORPORATIONS—LIABILITY FOR OBSTRUCTION IN STREETS.—If a municipal corporation is liable only for defects in the repair of its streets, it is not liable for injury to a horse resulting from his becoming frightened at a booth erected in the street, if the horse could have safely passed along the street but for his fright. (*Dunn v. Barnwell*, 843.)

33. STREETS, SPECIAL DAMAGES FOR VACATING.—If a viaduct is constructed along the line of the street opposite the plaintiff's land, and part of the same street is vacated at a point just west of this land, whereby all access to the south and west is shut off, he suffers such special damages, of a character differing from that sustained by the general public, as entitle him to maintain an action against the city to recover compensation. (*Chicago v. Burcky*, 142.)

34. STREETS.—THE RIGHT TO RECOVER SPECIAL DAMAGES FOR VACATING A STREET OPPOSITE PLAINTIFF'S PREMISES is not lost by his subsequently opening streets upon his lands by means of which access to and from them may be had. The right to damages becomes perfect when the street is vacated, and cannot be diminished by any act which the plaintiff may, in the future, take for the purpose of mitigating the injuries done to him. (*Chicago v. Burcky*, 142.)

35. MUNICIPAL CORPORATIONS—FUTURE INDEBTEDNESS If a city is prohibited from making any contract whereby liability is incurred exceeding the revenues of any fiscal year, a contract made by it for the lighting of its streets for a term of five years is void, unless the revenue on hand at the time the contract is made is sufficient to cover all the liability incurred under the contract and payable during the five years, together with the current expenses and existing liabilities for the year in which the contract is made. (*Kilchli v. Minnesota etc. Electric Co.*, 523.)

See Adulteration; Nuisance; Police Power, 2.

MUTES.

See Railroads, 33.

MUTUALITY.

See Specific Performance, 1.

NAMES.

See Corporations, 4.

NATURAL GAS.

See Evidence, 1.

NEGLIGENCE.

1. NEGLIGENCE.—ONE TOUCHING AN ELECTRIC WIRE where the insulating material is worn off cannot be adjudged guilty of negligence as a matter of law, where it appears that he did not know that the wire was damaged nor that it was an electric wire. (*Griffin v. United Electric Light Co.*, 477.)

2. NEGLIGENCE IN THE MAINTENANCE OF AN ELECTRIC WIRE MAY BE INFERRED by the jury from the fact that its insulation was gone, and that it had been in this condition so long that the defendant ought to have known of it. (*Griffin v. United Electric Light Co.*, 477.)

3. PLEADING WANTON NEGLIGENCE.—UNDER A COMPLAINT AVERRING SIMPLE NEGLIGENCE, the plaintiff should not be permitted to prove willful injury or wanton negligence. (*Louisville etc. R. R. Co. v. Markee*, 21.)

4. NEGLIGENCE—PROXIMATE CAUSE—PLEADING.—A complaint to recover for injury caused by the escape and explosion of natural gas through negligence, without alleging what brought about such explosion, does not state facts sufficient to constitute a cause of action, and is bad on demurrer. (*McGahan v. Indianapolis etc. Gas Co.*, 199.)

5. NEGLIGENCE—PROXIMATE CAUSE—INTERVENING AGENT.—A responsible agent, intervening between the original negligence and the injury, cuts off the line of causation, and relieves the originally negligent party from liability. (*McGahan v. Indianapolis etc. Gas Co.*, 199.)

6. NEGLIGENCE, CONTRIBUTORY, WHAT IS.—If the custodian of a child permits it to stray away from her control so that, in the exercise of ordinary care and prudence, she could not prevent it from going into a place of danger, which she might reasonably apprehend it would do, then she is, as a matter of law, guilty of contributory negligence. (*Bamberger v. Citizens' etc. Ry. Co.*, 909.)

7. NEGLIGENCE, CONTRIBUTORY, BURDEN OF PROVING.—It is not error to instruct the jury that the plaintiff must prove want of contributory negligence, where the circumstances are not such as to raise any presumption of due care on his part. (*Bamberger v. Citizens' etc. Ry. Co.*, 909.)

8. NEGLIGENCE—PLEADING.—A PLEA OF CONTRIBUTORY NEGLIGENCE IS NO ANSWER to a complaint charging willful and wanton negligence. (*Louisville etc. R. R. Co. v. Markee*, 21.)

9. NEGLIGENCE, CONTRIBUTORY—JURY TRIAL.—Though contributory negligence is generally a question of mixed law and fact, it is the duty of the court to tell the jury what facts, if proved, constitute such negligence. (*Bamberger v. Citizens' etc. Ry. Co.*, 909.)

10. PLEADING—CONTRIBUTORY NEGLIGENCE.—A plea that the plaintiff was himself guilty of negligence in and about the discharge of his duties, which negligence contributed to his injury, is too general, and a demurrer to it should be sustained. (*Louisville etc. R. R. Co. v. Markee*, 21.)

11. NEGLIGENCE.—A CHILD ONLY THREE YEARS OLD IS INCAPABLE, PER SE, of contributory fault. (*Barnes v. Shreveport etc. R. R. Co.*, 400.)

12. CONTRIBUTORY NEGLIGENCE ON THE PART OF A MINOR is to be measured by his age and his ability to discern and apprehend circumstances of danger. He is required to exercise only such prudence as one of his age may be expected to possess. (*Queen v. Dayton Coal etc. Co.*, 935.)

13. NEGLIGENCE—INFANTS.—The law does not require one of tender years to exercise the same degree of care as a person of mature years. A child is only required to exercise that degree of care which one of his age would naturally and reasonably use in the same situation and under like circumstances. (*Norton v. Volzke*, 167.)

14. NEGLIGENCE AS TO CHILD, WHAT CONSTITUTES—DUTY TOWARDS CHILDREN.—Although a child of tender years may be in the highway through the fault or negligence of its parents, and so be improperly there, yet, if it is injured through the negligence of the defendant, it is not precluded from redress. If the defendant knows that such a person is in the highway, he is bound to a proportionate degree of watchfulness—to the utmost circumspection; and what is but ordinary neglect in regard to one whom he supposed to be a person of full age and capacity is gross neglect as to a child, or one known to be incapable of escaping danger. (*Barnes v. Shreveport etc. R. R. Co.*, 400.)

15. THE NEGLIGENCE OF A PARENT OR CUSTODIAN OF A CHILD is not imputable to it, so as to bar its right to recover for injuries resulting from the negligence of another. (*Bamberger v. Citizens' etc. Ry. Co.*, 900.)

16. NEGLIGENCE—DEATH RESULTING THEREFROM.—An administrator cannot maintain an action for the death of his intestate, under the statute of Massachusetts, resulting from the negligence of the defendant or its agents, unless such negligence was gross. (*Hicks v. New York etc. R. R. Co.*, 471.)

17. NEGLIGENCE CAUSING DEATH—RIGHT TO MAINTAIN ACTION.—At common law a civil action does not lie for causing the death of a human being. In an action by a father to recover for negligently causing the death of his child in another state, it is presumed that the common law prevails in that state. (*Jackson v. Pittsburgh etc. Ry. Co.*, 182.)

See Conflict of Laws; Counties; Damages, 5, 6; Instructions, 3; Master and Servant, 3-6, 8, 10, 12; Parent and Child; Railroads, 10-43; Real Property; Trial, 3; Witnesses, 1.

NEGOTIABLE INSTRUMENTS.

NOTE PAYABLE WHEN THE PARTIES AGREE.—A promissory note promising on demand to pay a sum designated, payable when payor and payee mutually agree, is collectible on demand, if the payor does not agree within a reasonable time that it shall be paid. (*Page v. Cook*, 449.)

See Usury.

NEW TRIAL.

1. NEW TRIAL—INDICTMENT—MISJOINDER OF COUNTS.—On petition for a new trial, a defendant charged with crime may insist both that the court erred in its rulings of law and that the verdict was against the evidence. He may, therefore, take advantage of the misjoinder of counts in the indictment against him. (*State v. Fitzsimon*, 766.)

2. NEW TRIAL FOR MISCONDUCT OF JUDGE.—If the judge, on a trial before a jury, uses offensive language towards counsel for the defendant, such as to imply that he is an intruder in court, and the verdict goes against him, a new trial should be granted, on the ground of irregularity in the proceedings of the court, as the jury may have been influenced unfavorably to the defendant by the bearing of the judge and his prejudice against counsel. (*Walker v. Coleman*, 254.)

3. NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—As the granting of new trials in criminal cases rests largely in the discretion of the trial judge, a new trial upon the ground of newly discovered evidence will not be allowed, unless the bill of exceptions shows clearly the requisite basis for the application. (*State v. Vallery*, 263.)

NUNC PRO TUNO.

See Judgments, 1, 2.

NONSUIT.

See Judgments, 7, 8.

NONUSER.

See Franchise, 1.

NOTICE.

See Railroads, 11.

NUISANCE.

NUISANCE—POWER OF LOCAL LEGISLATURE TO DETERMINE WHAT IS.—As to those classes of businesses in the conducting of which police and sanitary regulations are made in a greater or less degree by every city, the determination of the municipal legislature that they are hostile and should be regulated is conclusive. Hence, one prosecuted for conducting a steam carpet-beating machine within one hundred feet of a church, schoolhouse, or dwelling cannot escape conviction by proving that his business was not in fact so conducted as to constitute a nuisance. (*Ex parte Lacey*, 93.)

See Injunctions, 1; Landlord and Tenant, 6, 7; Municipal Corporations, 7.

OBSTRUCTIONS.

See Municipal Corporations, 32.

ORDINANCES.

See Adulteration, 2, 3; Appeal, 1; Municipal Corporations, 2-12.

ORIGINAL PACKAGE.

See Definitions; Taxes.

OUSTER.

See Cotenancy.

OVERDRAFTS.

See Checks, 7-9.

PARENT AND CHILD.

1. PARENT AND CHILD—ACTION FOR LOSS OF SERVICE—INJURY CAUSING DEATH.—At common law a parent may recover

damages from a wrongdoer for depriving him of the services of his child, and when the act causes death he may recover for the services of the child from the time of the injury until its death, together with any incidental damages he may have suffered, such as medical attendance, care and nursing up to that time, but when the death is instantaneous or practically so, no redress is possible. Funeral expenses are recoverable in this class of cases only by virtue of statute. (*Jackson v. Pittsburgh etc. Ry. Co.*, 192.)

2. PARENT AND CHILD.—THE CONTRIBUTORY NEGLIGENCE OF A PARENT PRECLUDES HIS RECOVERING, WHEN SUING AS ADMINISTRATOR OF HIS CHILD, for injuries resulting in its death, if he is the sole heir of his child, and the recovery must therefore be for his benefit, though the circumstances were such that the child, had he survived the injuries, might have recovered therefor. (*Bamberger v. Citizens' etc. Ry. Co.*, 909.)

See Adoption; Negligence, 17.

PARTIES.

See Banks, 15.

PARTITION.

1. PARTITION SHOULD BE BY A SALE OF THE PROPERTY AND A DIVISION of the proceeds when it consists of land principally valuable for its timber and minerals, and they are almost exclusively in one end of the tract and the minerals are undetermined in extent and value. (*Wilson v. Bogle*, 929.)

2. PARTITION, WHEN SHOULD BE BY SALE.—If by a partition in kind the value of all the shares will be much less by reason of the partition than the value of the whole tract, partition otherwise than by sale is manifestly inequitable and should be denied. (*Wilson v. Bogle*, 929.)

3. PARTITION BY SALE IS A MATTER OF ABSOLUTE RIGHT, when the conditions prescribed by the statute to authorize a sale are found to exist. (*Wilson v. Bogle*, 929.)

4. PARTITION—SALE AND DIVISION OF PROCEEDS.—If specific property bequeathed by will cannot be conveniently divided among those entitled thereto, as where eighteen shares of bank stock are to be divided among eleven children, it should be sold and the proceeds distributed. (*Pearce v. Rickard*, 755.)

5. PRACTICE IN CHANCERY.—THE CONCURRENT FINDING OF THE MASTER AND chancellor upon the facts is entitled to the same weight as the verdict of a jury. When such finding is that a partition cannot be made advantageously to the parties, otherwise than by a sale, it is error for the chancery court of appeals to remand the cause for the appointment of commissioners to examine the premises and report upon the practicability of a partition in kind. (*Wilson v. Bogle*, 929.)

PARTNERSHIP.

1. PARTNERSHIP REAL ESTATE—DOWER IN.—Partnership capital, invested in lands for the benefit of the partnership, is to be treated as personalty until it has performed all its functions to the partnership, and thereby ceased to be partnership property, and until then it is not subject to either dower or inheritance, but, after all of the purposes of the partnership have been accomplished, whatever of such land remains in specie is to be regarded as real estate, subject to dower or inheritance. (*Woodward-Holmes Co. v. Nudd*, 503.)

2. PARTNERSHIP REAL ESTATE—DOWER IN.—If, in an action to dissolve a partnership, and wind up its affairs, the partnership

land is sold and converted into money, and such money is distributed among the firm creditors and partners according to law, such land in the hands of the purchaser is not subject to any inchoate dower interests of the wives of the partners, although it was not necessary to sell all of the land to pay the firm debts, and its sale brought a price in excess of the amount of such debts. (*Woodward-Holmes Co. v. Nudd*, 503.)

3. **PARTNERSHIP REAL ESTATE—DOWER IN.**—When a partnership is dissolved, and its affairs wound up and completely ended by judgment or agreement, and partnership land remains in specie unconverted, it is no longer a part of the partnership assets, and then, and not until then, it is subject to the dower rights of the wives of the partners. (*Woodward-Holmes Co. v. Nudd*, 503.)

4. **PARTNERSHIP—JUDGMENT AS ESTOPPEL—LIABILITY OF PARTNER AFTER DISSOLUTION OF FIRM.**—If one partner, after the dissolution of the partnership, gives a firm note for a partnership debt, and judgment is rendered against him in an action thereon, in which a plea of non est factum is sustained in favor of the other partner, such judgment does not bar an action against the latter to recover the debt for which the note was given. (*Valz v. First Nat. Bank*, 306.)

5. **PARTNERSHIP—ACTIONS—MERGER.**—An action against all of the partners upon an account for a firm debt is not merged in an action on a note for a partnership debt executed by one of the partners in the firm name after the dissolution of the partnership. (*Valz v. First Nat. Bank*, 306.)

See Banks, 9; Corporations, 4.

PAWNBROKERS.

See Municipal Corporations, 10, 13; Statutes, 6.

PAYMENT.

See Executors and Administrators, 7.

PENALTIES.

STATUTORY PENALTY, WHO MAY ENFORCE.—A statute requiring a corporation to operate a ferry, and imposing a penalty of one hundred dollars per day for a failure to operate it, and declaring that the court shall have jurisdiction in equity, upon the petition of ten or more citizens, to enforce performance of the act, does not entitle the court to impose a penalty in such suit in equity. The jurisdiction conferred by the statute is limited to compelling the corporation to provide and operate a suitable ferry. (*Brownell v. Old Colony R. R. Co.*, 442.)

PERPETUITIES.

See Definitions; Devise, 1, 2; Legacies; Trusts, 6, 7; Wills, 1-4.

PERSONAL RIGHTS.

See Privacy.

PLEADING.

1. **PRACTICE.—IF ISSUE IS FORMED UPON A PLEA**, the defendant, if it is sustained, is generally entitled to a verdict, though it is an insufficient plea. (*Louisville etc. R. R. Co. v. Markee*, 21.)

2. **PLEADING—VARIANCE.**—If a pleading avers that a party removed certain personal property from the land of another under a

license, while the proof shows that he was a mere trespasser, there is a material variance between the pleading and proof. (*Downs v. Finnegan*, 488.)

3. PLEADING—VARIANCE—WAIVER.—A variance between the pleading and proof is waived by a failure to object to the evidence on that ground. (*Downs v. Finnegan*, 488.)

See Appeal, 2, 3; False Imprisonment, 10, 11; Fraud, 14, 15; Limitations of Actions, 5-7; Negligence, 4, 8, 10; Railroads, 41.

PLEDGE.

COLLATERAL SECURITIES.—UNTIL THE INDEBTEDNESS IS EXTINGUISHED, the right to retain collateral pledged as security for its payment remains. Such indebtedness may, therefore, be given in evidence though it has been pleaded as a setoff in an action still pending. (*Fowle v. Child*, 451.)

POLICE POWER.

1. POLICE POWER—EXERCISE OF, DISCRETIONARY.—It rests solely within legislative discretion, inside of constitutional limits, to determine when public safety or welfare requires the exercise of the police power. Courts can interfere only when such exercise conflicts with the constitution; with the wisdom, policy, or necessity of such enactment they have nothing to do. (*Walker v. Jameson*, 222.)

2. POLICE POWER—MUNICIPAL CORPORATIONS—HEALTH AND SANITARY REGULATION.—It is within the general power of the state to preserve and promote the public welfare and health, even at the expense of private rights, and this power may be delegated to municipal corporations. (*Walker v. Jameson*, 222.)

PREFERENCES.

See Corporations, 24, 28.

PRESENTMENT.

See Checks, 1-6.

PRESUMPTION.

See Appeal, 7-9.

PRIVACY (RIGHT OF).

1. RIGHT OF PRIVACY—DEATH.—A person's individual right of privacy dies with him, and any rights which survive pertain to the living only. (*Schuyler v. Curtis*, 671.)

2. RIGHT OF PRIVACY—PROTECTING MEMORY OF DECEASED.—A privilege may be given the surviving relatives of a deceased person to protect his memory, but the privilege exists for the benefit of the living to protect their feelings and to prevent a violation of their own rights in the character and memory of the deceased. The right of privacy protected is that of the living, not that of the dead. (*Schuyler v. Curtis*, 671.)

PROBABLE CAUSE.

See False Imprisonment, 7.

PROCESS.

See Corporations, 29-32.

PROHIBITION (WRIT OF).

PROHIBITION—CONTEMPT IN VIOLATING MODIFIED INJUNCTION.—If an original order of injunction is modified, one imprisoned after such modification for violating the original order will be discharged on habeas corpus, and prohibition will issue to restrain further proceedings. (*State v. King*, 696.)

PROMISSORY NOTES.

See Negotiable Instruments.

PROOFS OF LOSS.

See Insurance, 13-16.

PROXIMATE CAUSE.

See Negligence, 4, 5.

PUBLIC POLICY.

See Contracts, 7, 11.

RAILROADS.

1. EMINENT DOMAIN—TAKING PRIVATE RIGHT OF WAY IN PUBLIC STREET.—One who owns a house and lot in a city purchased with reference to a recorded plat having an adjoining street marked out thereon is the owner of a right of way in such street, although it has been made a public highway. If, therefore, such right of way is taken, under proceedings condemning a portion of the highway for railroad purposes, by permanently closing the street at one end, thus throwing the house and lot into a cul de sac, the owner is entitled to compensation therefor. (*Johnston v. Old Colony R. R. Co.*, 800.)

2. RAILROADS—ELEVATED, WHEN DAMAGES ARE PROPERLY DENIED.—If an elevated street railroad enters a vacant and uninhabited locality which normal city growth has not effectively reached, which improvement has not seriously touched, which remains to be developed, and which has no element of growing value except such as lies in hope and expectation, and thereupon and thereby population and growth, tending elsewhere, are diverted to the new line of rapid transit, creating a steady increase of values, both directly on the line, and in the side streets near by, the only reasonable and sensible inference is that the increased values are the sole and substantial product of the newly opened line, and courts, under such circumstances, are justified in refusing to award damages to an abutting property owner, for there is no injury, and none can be proved. (*Bookman v. New York etc. R. R. Co.*, 684.)

3. RAILROADS—ELEVATED STREET RAILWAYS—DAMAGES—FAILURE OF PROOF.—In an action by an abutting property owner against a street railway company, to restrain the operation and maintenance of its elevated road, and for damages caused thereby, a judgment for the plaintiff should be reversed, if the finding of the trial court that plaintiff's property was injured by the railroad over and above all benefits conferred is wholly unsupported by proof and contradicted by specific findings that the locality was previously substantially vacant and unimproved, or at the most only partially built up, while soon after the construction of the road it was compactly built up; that both the rental and fee values of the property had largely increased after the construction of the road; that the presence of the road with its stations near by had brought multitudes to the locality, increased business, and benefited the fee and rental

values, a benefit in which the adjacent side streets had also shared; that the increased accessibility had induced the settlement and building; that the same improvement would not have occurred in the absence of rapid transit; and that the road had been one of the great and efficient factors in building up the locality; as the fact that there may have been a greater increase of value in the side streets than in the avenue occupied by the road, due in part, at least, to the influence of the defendant's road, does not prove or even indicate damage in such a situation. (*Bookman v. New York etc. R. R. Co.*, 664.)

4. RAILROADS—RULE FOR ESTIMATING DAMAGES CAUSED BY CONSTRUCTION OF ELEVATED STREET RAILWAY.—In an action by an abutting property owner against an elevated street railway for damages caused by the construction of its road, no damages should be awarded, and the complaint should be dismissed, if the proof shows that that particular locality before the coming of the road was substantially or mainly vacant, and that after the road came the building and improvement swiftly followed, accompanied by steady and serious increases of value, although the side streets increased in value more rapidly than the avenue occupied by the road. But if the proof shows that the road has occupied a locality already substantially built up, in which a normal city growth is operating and seriously increasing values, but as a consequence of the road the natural advance has halted or palpably lessened, while in the adjacent side streets it continues, there is possibly an inference of fact that the abutter has been injured. (*Bookman v. New York etc. R. R. Co.*, 664.)

5. RAILROADS—INCREASE OF VALUES IN IMPROVED LOCALITIES PENETRATED BY ELEVATED STREET RAILWAYS. If an elevated street railway enters an area already substantially built up and improved, where normal city growth has come, and there has been an increase of values with which the rapid transit line has had nothing whatever to do, the average rate of the observed increase in such locality can be approximately ascertained, and if the rate continues, after the construction of the road, in the side streets, but a less rate of increase is found on the avenue occupied by the cars, and facts are shown explaining such loss by evil effects of the new line, it is possible to infer that the avenue property has not shared as it should in the normal and independent increase of value to the extent to which it was entitled. (*Bookman v. New York etc. R. R. Co.*, 664.)

6. SURFACE WATER—OWNER MAY PROTECT HIMSELF AGAINST—RAILROAD EMBANKMENT—DAMNUM ABSQUE INJURIA.—An owner of land has the right to obstruct and hinder the flow of mere surface water upon his land from the land of other proprietors, and may even turn the same back upon his neighbor without incurring liability. Hence, a railroad company may protect its right of way by building an embankment without openings or waterways to prevent surface water from lands above crossing its right of way, and any injury caused by the accumulation of such water is *damnum absque injuria*. (*Missouri Pac. Ry. Co. v. Keys*, 249.)

7. CORPORATIONS—ULTRA VIRES.—If the manager of two railway corporations uses their joint funds for the improvement of the road of one, the latter is liable to an action to recover such part of the funds of the other as was thus expended. This right is not impaired by the fact that the corporations may have entered into an ultra vires traffic contract. (*Nashua etc. R. R. Corp. v. Boston etc. R. R. Corp.*, 454.)

8. A RAILWAY CORPORATION HAS NO ABSOLUTE POWER TO DETERMINE WHAT PARTS OF ITS LINE IT WILL OPERATE.—Its franchises were granted for the public good, and in exercising them it is largely subject to the control and discretion of the legislature. (*Brownell v. Old Colony R. R. Co.*, 442.)

9. CONSTITUTIONAL LAW—RAILWAY CORPORATIONS.—The legislature may, by statute, require a railway corporation to operate a public ferry which constitutes part of its line, although such operation has become unprofitable. (*Brownell v. Old Colony R. R. Co.*, 442.)

10. RAILROADS—FEEBLE PASSENGER.—A railroad passenger in feeble health, carried beyond the station of her destination, is not guilty of contributory negligence, in attempting, with the assistance of the train employees, to alight from the cars at an unsuitable place and from a dangerously high step, without informing them of her feeble condition. If, in such case, the employees fail to assist her from the car without injury, they are guilty of negligence and she may recover. (*Foss v. Boston etc. R. R.*, 607.)

11. RAILROADS—DUTY TO FEEBLE PASSENGER—NOTICE TO CONDUCTOR, NOTICE TO COMPANY.—Notice to a railroad conductor of the feeble health of a passenger on his train is notice to the company, and the failure of such passenger to repeat such notice to another conductor who takes charge of the train is not contributory negligence. The failure of the first conductor to repeat such notice to his successor on the train is negligence for which the company is liable. (*Foss v. Boston etc. R. R.*, 607.)

12. RAILROADS—DUTY TO SICK PASSENGER.—A railroad company is bound to take such reasonable care of passengers who become sick after entering its cars as is fairly practicable with the facilities at hand, without unreasonable delay of the train or discomfort to the other passengers. (*Railway Co. v. Salzman*, 745.)

13. RAILROADS—DUTY TO PASSENGER ASSISTING SICK PASSENGER.—A railway passenger who is assisting in the care of a sick person on the train, by direction or permission of those in charge, is entitled to at least ordinary care on their part for his protection from injury. (*Railway Co. v. Salzman*, 745.)

14. RAILWAYS—NEGLIGENCE.—An instruction that, if the platform steps used by a railway at its station to enable passengers to alight were such as are ordinarily provided for similar cars by similar roads, the corporation has satisfied the requirements of the law, is erroneous. It cannot excuse itself, unless the appliances used by it were reasonably safe, though they were such as had been adopted and used by other railways. (*Dougherty v. Kansas City etc. Ry.*, 536.)

15. RAILROAD COMPANIES—NONLIABILITY FOR INJURY TO ANOTHER'S LAWFUL BUSINESS, OCCASIONED BY FOREMAN—SCOPE OF EMPLOYMENT.—If the functions of the foreman of a railroad company are simply to employ and discharge laborers when necessary, the company is not liable for his act in injuring a grocer by language and conduct which has the effect of diverting other employees from dealing with the grocer, as such act is not within the scope of the foreman's employment. (*Graham v. St. Charles etc. R. R. Co.*, 436.)

16. RAILROADS—YARD EMPLOYEES, DUTY OF TO LOOK AND LISTEN.—The rule that one who attempts to cross or who places himself upon a railroad track without looking and listening when, by so doing, he might discover the danger from an approaching train, is guilty of negligence per se, is not to be applied to one who is employed in a railroad yard, and whose duties frequently make it neces-

nary for him to go upon the tracks. His failure to look and listen may be negligence or not according to the circumstances, of which the jury are to judge. (*Jordan v. Chicago etc. Ry. Co.*, 486.)

17. **RAILROADS—LICENSE TO USE TRACK.**—A custom among the employees in the yard of one railroad company to go upon the track of another company in the same yard when performing their duties creates a license from the latter company to thus use its tracks. (*Jordan v. Chicago etc. Ry. Co.*, 486.)

18. **RAILROADS—NUMBER OF TRAINS.**—In the absence of statutory regulations, a railroad company may run as many trains, regular and special, as its interests demand. (*Schexnadrye v. Texas etc. Ry. Co.*, 321.)

19. **RAILROADS—RATE OF SPEED OF TRAINS.**—In the absence of statutory regulations as to the rate of speed of trains, greater caution is required of a railroad company in running its trains in the country while passing places where it is known that persons are in the habit of crossing the track in necessarily going from one place to another, than is required while running in unfrequented and scantily populated sections. (*Schexnadrye v. Texas etc. Ry. Co.*, 321.)

20. **RAILWAYS—NEGLIGENCE.—IF TRAINS ARE TO BE RUN WITH GREAT SPEED** through the streets of a thickly settled town, and where the view of the track is obstructed by houses, proper precautions must be taken for the protection of travelers at particularly dangerous crossings. (*Hicks v. New York etc. R. R. Co.*, 471.)

21. **RAILWAYS—NEGLIGENCE.—THE SPEED** at which a train may be run without negligence depends upon the dangers incident to the running of it. In thickly settled towns, where there are frequent grade crossings of streets at which the view of the track on each side is obstructed by houses, it is negligence to run rapidly. (*Hicks v. New York etc. R. R. Co.*, 471.)

22. **RAILROAD COMPANIES—CONTRIBUTORY NEGLIGENCE IN CROSSING TRACK—OMISSION TO GIVE TRAIN SIGNALS.**—A traveler with a wagon approaching a railroad track with the intention of crossing must exercise reasonable care to avoid collision with an approaching train, and if its near approach is ascertainable by the usual precautions, but which are not observed by him, he cannot recover damages if he is struck by the locomotive and injured while attempting to cross, though the train signals are not given. (*Blackwell v. St. Louis etc. R. R. Co.*, 371.)

23. **NEGLIGENCE, CONTRIBUTORY.—IF THE RULES OF A RAILWAY COMPANY REQUIRE ITS EMPLOYEES**, in running hand-cars over the road, to flag curves and other dangerous places, a foreman who neglects this duty and is run over and injured in consequence thereof is guilty of contributory negligence. (*Louisville etc. R. R. Co. v. Markee*, 21.)

24. **RAILWAYS.—THE FAILURE OF AN ENGINEER TO BLOW A WHISTLE BEFORE** entering a cut or curve, if required to do so by the rules of the corporation, is simple negligence and no more, when he has no knowledge of the presence of a person in or beyond such curve or cut to whom the blowing might have operated as a warning of danger. (*Louisville etc. R. R. Co. v. Markee*, 21.)

25. **RAILWAYS.—THE REQUIREMENT THAT A WHISTLE BE BLOWN AT THE HIGHWAY CROSSING** is intended to provide for the warning and protection at such crossing, and an omission to comply with this requirement cannot constitute negligence entitling an employee to recover for injuries received while operating a hand-car at a point nearly a half mile distant from such crossing. (*Louisville etc. R. R. Co. v. Markee*, 21.)

26. RAILWAYS—NEGLIGENCE.—THE FAILURE OF THE ELECTRIC BELLS TO RING AT A CROSSING, when they would have rung had they been in proper condition when a train approached, is some evidence of negligence on the part of the corporation and its agents. (*Hicks v. New York etc. R. R. Co.*, 471.)

27. NEGLIGENCE OR WANTONNESS.—The failure of the engineer of a railway train, after seeing a person on the track or in a position of danger, to do the act which if done would have avoided the injury, is not necessarily equivalent to an intentional wanton wrong. Such rule would require infallibility in selecting the best means to avoid an injury, while all the law requires is the adoption in good faith of the means believed by the person called upon to act to be the best adapted to prevent injury. (*Louisville etc. R. R. Co. v. Markee*, 21.)

28. RAILROAD COMPANIES—MOVING TRAIN—PASSING STATION WITHOUT SLOWING UP.—A passenger on a railroad train, with a ticket for a station at which it is not customary for the train to stop, but to slow its movement, so as to allow passengers to alight, if called to the platform by the announcement of the station, where he is thrown from the steps of the car and injured by a sudden increase of the speed of the train, which should be slowed or stopped, is entitled to damages, though he is thrown from the car on the side opposite to his station, the train having passed it and the passenger having crossed to the other side of the train under the reasonable expectation that it would be slowed at his destination, a few feet beyond the station. (*Brashear v. Houston etc. R. R. Co.*, 382.)

29. RAILROAD COMPANIES—SIDETRACK.—THE RISK OF PASSING from one side of a spur railroad track, or switch, to the other, by going through freight-cars standing thereon, is apparent and should not be taken. (*Bollinger v. Texas etc. Ry. Co.*, 379.)

30. RAILROAD COMPANIES ARE NOT LIABLE FOR INJURIES RECEIVED WHILE PASSING THROUGH FREIGHT-CARS ON SIDETRACK.—Though it is customary for persons, without objection on the part of a railway company, to pass from one side of a spur railroad track, or switch, to the other, by going through freight-cars standing thereon, the company is not liable for damages, when a boy, eleven years old, in attempting so to pass, was fatally injured by the violent closing of a side door of one of the freight-cars, caused by its being pulled out to be coupled with a passing freight train, after warning by the bell of the locomotive, and its lurching suddenly to one side on account of a defect in the track, especially where his presence was unknown to the railroad employees, and it did not appear that the switch was, at the time of the accident, impassably blocked by standing cars. The company owed him no duty. (*Bollinger v. Texas etc. Ry. Co.*, 379.)

31. RAILROADS—DUTY OF PERSONS CROSSING TRACK—NEGLIGENCE.—Persons whose business or pleasure takes them across a railroad track must, before attempting to cross, exercise prudence and care, and look and listen for approaching trains. If they do this, it is not negligence on their part to go upon the track when no approaching train is in sight. (*Schexnadrye v. Texas etc. Ry. Co.*, 321.)

32. RAILROADS—PARTY USING TRACK AS HIGHWAY—NEGLIGENCE.—A person who goes upon a railroad track for the purpose of using it as a highway to a certain extent assumes all risks, and it requires gross negligence, amounting to malice, to make the railroad company liable for an injury to him, especially when he has a safer mode of travel by a public highway. (*Schexnadrye v. Texas etc. Ry. Co.*, 321.)

33. RAILROADS—DEAF MUTE ON TRACK—NEGLIGENCE.—Greater care, caution, and prudence are required of a deaf mute who

goes upon or uses a railway track as a highway than is required from one in the full possession of all his senses. It is negligence on the part of such mute to so use the track and fail to use his sense of sight to detect the approach of a train, and the railroad company, if exercising due diligence, is not liable for an injury to him. (*Schexnadrye v. Texas etc. Ry. Co.*, 821.)

34. NEGLIGENCE—PRESUMPTION IN FAVOR OF EXERCISE OF CARE.—A person traveling upon a highway, in full possession of all of his faculties, who is killed by a railroad train at a level crossing, is presumed to have been exercising ordinary care, in the absence of evidence of his negligence. (*Huntress v. Boston etc. R. R.*, 600.)

35. RAILROADS—NEGLIGENCE AT CROSSINGS.—Whether a railroad company, with knowledge of the dangers at level crossings, should guard against accidents by stationing flagmen there, or by slackening the speed of its trains, in the exercise of ordinary care, is a question of fact for the jury. (*Huntress v. Boston etc. R. R.*, 600.)

36. RAILWAYS—NEGLIGENCE.—IF A BOY TEN YEARS OF AGE IS DRIVING A TEAM CLOSE BEHIND AN ADULT, AND THE CIRCUMSTANCES ARE SUCH AS TO WARRANT THE INFERENCE THAT HE WAS EXPECTED TO BE GOVERNED TO SOME EXTENT BY THE MANAGEMENT OF THE TEAM JUST AHEAD OF HIM, AND THAT THE DRIVER OF THE LATTER EXERCISED DUE CARE, AND THE BOY WAS A SUITABLE PERSON TO BE INTRUSTED WITH THE TEAM JUST BEHIND THE OTHER, THE JURY IS JUSTIFIED IN FINDING THAT THE BOY WAS IN THE EXERCISE OF SUCH CARE IN DRIVING AS AN ORDINARILY CAREFUL BOY OF HIS AGE WAS ACCUSTOMED TO EXERCISE UNDER LIKE CIRCUMSTANCES. (*Hicks v. New York etc. R. R. Co.*, 471.)

37. RAILROAD COMPANIES—CONTRIBUTORY NEGLIGENCE—CROSSING TRACK.—A railroad company is not liable for damages caused by a locomotive striking a traveler crossing the track with a wagon, if the evidence shows that the usual signals of the approaching train were given and should have been heard and heeded. (*Blackwell v. St. Louis etc. R. R.*, 371.)

38. STREET RAILWAYS — NEGLIGENCE, CONTRIBUTORY, PRESUMPTION OF.—If a child is upon the tracks of a street railway, where it ought not to be at the time, and an injury occurs, in consequence of which it is killed, it is incumbent on the father suing as administrator of the child to recover compensation to show that its presence upon the track, or in a dangerous and exposed situation, was without negligence on its part or that of its custodian. (*Bamberger v. Citizens' etc. Ry. Co.*, 909.)

39. STREET RAILWAYS—DUTY OF STREET-CAR DRIVER.—It is the duty of the motorman in charge of an electric street-car, not only to see that the railroad track is clear, but also to exercise constant watchfulness and care for persons who may be approaching the track. (*Barnes v. Shreveport etc. R. R. Co.*, 400.)

40. STREET RAILWAYS—NEGLIGENCE IN MANAGEMENT OF CAR.—In an action against a street railway company for negligence in running an electric street-car over a child of tender years, the proper inquiry is whether the motorman failed to observe or do something which he ought to have seen or done, and which he would have seen or done with ordinary care or vigilance. (*Barnes v. Shreveport etc. R. R. Co.*, 400.)

41. PLEADING—NEGLIGENCE.—AN AVERMENT that the engineer in charge of the defendant's train ran it without care, and negligently, through a cut and around a curve and upon John S. M., and thereby killed him, and that his death was the result of the negligence of such engineer, sufficiently states the negligence of the defendant. (*Louisville etc. R. R. Co. v. Markee*, 21.)

42. NEGLIGENCE IN CROSSING RAILWAYS—QUESTION OF FACT.—If a person stops as he approaches a railway crossing and

looks and listens for a train, but neither hears nor sees any, and knows that the crossing is equipped with electric bells to warn travelers of the approach of trains, he cannot be adjudged guilty of contributory negligence as a matter of law, though it does not appear that he looked for a train afterward, and it further appears that he was driving a team, the care of which occupied his attention somewhat, and that he was struck at the crossing by a train running about forty miles an hour. (*Hicks v. New York etc. R. R. Co.*, 471.)

43. RAILROADS—TORTS WHILE IN HANDS OF RECEIVER.—A railroad company is liable for torts committed by the negligent operation of trains on its line while in the hands of a receiver of its lessee, appointed in an action to which it is not a party. (*Parr v. Spartanburg etc. R. R. Co.*, 828.)

See Carriers; Corporations, 5, 7; Damages, 8, 4; Dedication, 2; Husband and Wife, 7, 8; Instructions, 5; Mandamus; Receivers.

RAPE.

RAPE—EVIDENCE AS TO CHASTITY.—In a prosecution for an assault with intent to commit rape, the character of the woman as to chastity may be attacked, but specific acts of unchastity with other men than the defendant cannot be shown. (*State v. Fitzsimon*, 766.)

See Assault; Indictment.

REAL ESTATE.

See Partnership, 1-3.

REAL PROPERTY.

1. REAL PROPERTY—DUTY OF OWNER AS TO LICENSEES.—One who owns a building must keep it reasonably safe for the use of persons who enter it at his invitation, but he owes no such duty to a licensee. (*Beehler v. Daniels*, 790.)

2. REAL PROPERTY—LICENSEE—FIREMAN.—A member of the fire department of a city, injured by falling into an unguarded elevator well in a building while extinguishing a fire therein, cannot recover of the owner, without showing that he has violated some statute, or proving facts which amount to an invitation to enter therein. The action cannot be grounded on negligence in failing to guard the well, or in so packing the merchandise on the premises as to conduct one to the well. (*Beehler v. Daniels*, 790.)

See Vendor and Purchaser.

RECEIVERS.

RECEIVERS—GARNISHMENT.—A debt due from receivers of a railway company appointed by a federal court may be garnished in a state court, but no executory process can issue on the judgment rendered in the state court; that judgment can be satisfied only by an application to the court appointing the receivers for an order directing its payment in the due order of the settlement of the affairs of the railway company. (*Irwin v. McKechnie*, 495.)

See Banks, 2; Landlord and Tenant, 14; Railroads, 43.

RECORDS.

1. PUBLIC RECORDS, RIGHT TO EXAMINE.—THE JUDICIAL RECORDS OF THE STATE SHOULD ALWAYS BE ACCESSIBLE to the people for all proper purposes, under reasonable restrictions as to the time and mode of examining the same, but no one has a right to examine, or obtain copies of, public records from mere curiosity,

or for the purpose of creating public scandal. (In re Caswell's Request, 814.)

2. COURTS—POWER AS TO IMPROPER USE OF RECORDS.—In the absence of a statute allowing any person to examine public records and take memoranda thereof, the court has power to prevent the use of its records to gratify private spite or to promote public scandal. (In re Caswell's Request, 814.)

3. COURTS—COPIES OF RECORD.—It is not the duty of a clerk of the court to furnish a copy of the proceedings in a divorce case to the reporter of a newspaper, who requests it "for publication or otherwise." (In re Caswell's Request, 814.)

RECRIMINATION.

See Marriage and Divorce, 4.

REDEMPTION.

See Mortgages, 4; Statutes, 7, 8.

RELIGIOUS SOCIETIES.

1. RELIGIOUS ASSOCIATIONS AND SOCIETIES.—Though a constitution formed for a religious society was not submitted to, nor ratified by, the people to be governed by it, and its force was never fully recognized by the entire body of the church, yet, if it was accepted and remained unchanged for forty years, and every person who joined the society accepted its provisions, and was entitled to demand all the rights it guaranteed, it should be held to constitute the permanent law of the society so long as it continues unchanged and unrepealed. (Russie v. Brazzell, 542.)

2. RELIGIOUS ASSOCIATIONS.—A CHANGE IN THE CONFESSION OF FAITH of a religious association does not amount to a misuse or perversion of the trust upon which its property is held, if the substantial theological doctrine and general polity are retained, though there is a change in the church policy, or an alteration in the expressed form of faith. (Russie v. Brazzell, 542.)

3. RELIGIOUS ASSOCIATION—FAITH, CHANGE OF CONFESSION OF.—Though the constitution of a church provides that no rule or ordinance shall be passed at any time to change, or do away with, the confession of faith, it does not prohibit changes in such confession in the interest of clearness of expression or fullness of statement of the established doctrines of the church. (Russie v. Brazzell, 542.)

4. RELIGIOUS ASSOCIATIONS—FAITH, CHANGE OF CONFESSION OF.—If a revised confession of faith is proposed and adopted by a religious association, and the question is one of doctrine alone, the courts are inclined to treat the decision of the general conference of the association as final, in so far as it determines that the revised confession does not so change the distinguishing doctrine of the church as to destroy its identity or operate as a perversion of the trust under which its property is held. (Russie v. Brazzell, 542.)

5. RELIGIOUS ASSOCIATIONS.—THE MODE OF SUBMITTING PROPOSED AMENDMENTS to the constitution of a religious association may be devised and proclaimed by its general officers, if not contrary to the laws of the land nor to the provisions of the old constitution. (Russie v. Brazzell, 542.)

6. RELIGIOUS ASSOCIATIONS—CONSTITUTION, NUMBER OF VOTES REQUIRED TO CHANGE.—If the constitution of a religious association declares that it shall not be altered, unless by the request of two-thirds of the whole society, yet, if amendments

are submitted and voted upon, and more than two-thirds of the votes cast are in favor of such amendments, they are adopted by a sufficient vote, though the persons so voting for the alteration are less than two-thirds of all the members of the society, if the rules and customs of the society accord with this construction of its constitutional law. (*Russie v. Brazzell*, 542.)

7. RELIGIOUS ASSOCIATIONS—CONSTITUTION OF, HOW MAY BE CHANGED.—A constitution which declares that it shall not be altered, except by the request of two-thirds of the whole society, merely requires that no alteration shall be made without the consent of two-thirds of the members. Therefore, such a constitution may be changed by the formulation, by a committee appointed for that purpose, of a new constitution, its submission to the members for their approval, and the casting in favor thereof of the votes of the requisite number of members. (*Russie v. Brazzell*, 542.)

8. RELIGIOUS ASSOCIATION—ELECTION—UNFAIRNESS OF BALLOTS.—Though, on submitting amendments to the constitution of a religious association, the ballots are all printed in favor of the amendments, and persons desiring to vote against them must strike out the word "yes" and insert "no," and the votes are received and counted by the tellers, and the result declared by the general conference, such result will not be set aside by the courts in a collateral attack. (*Russie v. Brazzell*, 542.)

REMAINDERS.

See Devise, 7; Estates.

REMISSION.

See Executors and Administrators, 11, 12.

REMOVAL OF CAUSES.

REMOVAL OF CAUSE TO FEDERAL COURT—WHAT WILL NOT JUSTIFY.—The mere fact that the defendant in a state court is a United States marshal, justifying under a writ of attachment issued from a federal court having jurisdiction in the locality of the suit, does not confer upon him any right to have the cause removed to that court. (*Walker v. Coleman*, 254.)

RENEWAL NOTES.

See Mortgages, 2.

RENTS.

See Landlord and Tenant, 2, 5, 6, 12, 14.

REPRESENTATIONS.

See Fraud, 5, 11.

RESCISSION.

See Contracts, 18; Vendor and Purchaser.

RES GESTÆ.

See Assault; False Imprisonment, 8.

RES JUDICATA.

See Judgments, 4-8.

RESTRAINT OF TRADE.

See Contracts, 6-10.

REVOCATION.

See Licensee.

RIGHT OF WAY.

See Eminent Domain, 1; Husband and Wife, 7, 8.

RIPARIAN RIGHTS.

See Waters.

SALES.

1. SALES—QUALITY OF ARTICLE CONTRACTED FOR.—If parties make a contract on the tenth day of January for the sale of prime crude cotton-seed oil, to be thereafter manufactured and to be delivered as made, the quality of oil contracted for is necessarily that kind which can be manufactured at that late season by the seller. (Standard Cotton Seed Oil Co. v. Excelsior Refining Co., 886.)

2. SALE OF CHATTELS, WHEN COMPLETE.—If goods are sold to be delivered f. o. b. at a place designated, and they are so delivered, consigned to the purchaser, property therein at once vests in him, and the vendor cannot maintain an action for injuries subsequently occurring to the goods through the negligence of the carrier. (Capehart v. Furman Farm etc. Co., 60.)

See Executors and Administrators, 6; Fraud, 4, 7; Partition, 1-4; Specific Performance, 2; Vendor and Purchaser.

SAVINGS BANKS.

See Trusts, 2-5.

SEALS.

See Corporations, 23.

SECRECY.

See Elections, 14.

SETOFF.

See Pledge.

SEWERS.

See Landlord and Tenant, 11.

SHORES.

See Boundaries.

SIDEWALKS.

See Municipal Corporations, 28.

SIGNALS.

See Railroads, 23-26.

SLANDER.

SLANDER—MALICE, WHEN IMPLIED.—Under the Louisiana law malice may be implied from any kind or form of words slanderous

in their nature, and damages may be allowed therefor without express proof of malice. (*Tarleton v. Lagarde*, 353.)

See Apothecaries, 2.

SMART-MONEY.

See Damages, 2.

SPECIFIC PERFORMANCE.

1. SPECIFIC PERFORMANCE—MUTUALITY OF REMEDY.—Plaintiff's right to specific performance does not depend upon the defendant's right to that remedy. (*Hickey v. Dole*, 614.)

2. SPECIFIC PERFORMANCE—PERSONALTY.—A court of equity will not, as a general rule, order the specific performance of a contract for a sale of personal property. (*Manton v. Ray*, 811.)

3. SPECIFIC PERFORMANCE—PERSONALTY.—Equity will decree the specific performance of a contract to convey personal property, if like property cannot be obtained elsewhere, or if loss cannot be adequately compensated by damages in an action at law. (*Manton v. Ray*, 811.)

4. SPECIFIC PERFORMANCE—CONVEYANCE OF STOCK.—Equity will decree the specific performance of a contract to convey corporate stock if it cannot be obtained elsewhere than from the respondent and its value is uncertain and not easily to be ascertained. (*Manton v. Ray*, 811.)

5. SPECIFIC PERFORMANCE—CONVEYANCE OF STOCK—DEMURRABLE BILL.—A court of equity will not order one to transfer stock which he does not have. A bill to compel the specific performance of a contract to convey stock must, therefore, allege that the respondent had the stock at the time of the contract. (*Manton v. Ray*, 811.)

6. SPECIFIC PERFORMANCE OF FRAUDULENT CONTRACT BETWEEN HEIRS.—A contract between all of the heirs and the widow of an insolvent ancestor, in fraud of his creditors, whereby a portion of the heirs are to purchase the estate, without paying any money on their bid, when the land is sold under a judgment in favor of the widow, and are to hold the property for the benefit of the widow during her life, and distribute it among all of the heirs after her death, and under which such heirs purchase the estate for much less than its market value, under representations that they are bidding for the benefit of the family is against public policy, and cannot be specifically enforced against the purchasing heirs having title and in possession after the death of the widow, in the absence of a showing that all of the parties are not in pari delicto. (*Milhaus v. Sally*, 834.)

7. SPECIFIC PERFORMANCE OF FRAUDULENT AGREEMENT.—A complaint alleging that all of the heirs of an insolvent estate are tenants in common, and setting up a contract between them in fraud of the creditors of the estate, whereby certain of the heirs were to obtain a certain part of the estate which they agreed to convey to the other heirs, does not entitle the latter to a specific performance of the contract. (*Milhaus v. Sally*, 834.)

8. SPECIFIC PERFORMANCE—PARTIES.—The administrator and heirs of one of the parties to a contract for the conveyance of land are properly made parties defendant to a suit for specific performance, when their joinder is necessary to a decree that will leave no part of plaintiff's title open to controversy or doubt. (*Hickey v. Dole*, 614.)

STATES.

1. **CONSTITUTIONAL LAW—STATE INDEBTEDNESS.**—Under a statute directing the secretary of state, as ex officio commissioner of public printing, to advertise for bids therefor and to make contracts with the best and lowest bidders for doing such printing as the state may require, a contract made by him for such purpose does not incur an indebtedness on the part of the state, within the meaning of a constitutional provision prohibiting the incurring of state indebtedness, "except in pursuance of an appropriation for the specific purpose first made." (*Carter v. Thorson*, 893.)

2. **CONSTITUTIONAL LAW—STATE INDEBTEDNESS.**—The legislature has supreme power to make appropriations of state money for the payment of state indebtedness, except as prohibited by the constitution of the state. (*Carter v. Thorson*, 893.)

3. **CONSTITUTIONAL LAW—STATE INDEBTEDNESS.**—A constitutional provision prohibiting the incurring of state indebtedness, "except in pursuance of an appropriation for the specific purpose first made," simply confines the creation of such indebtedness to such subjects and to such amounts as are expressly approved by that department of the government which is required to provide for its payment. (*Carter v. Thorson*, 893.)

4. **CONSTITUTIONAL LAW—STATE INDEBTEDNESS.**—A constitutional provision prohibiting the incurring of state indebtedness, "except in pursuance of an appropriation for the specific purpose first made," does not prevent the legislature from incurring, or directing the immediate incurring of a state indebtedness for the usual and current administration of state affairs, without a specific appropriation first being made therefor. (*Carter v. Thorson*, 893.)

See Conflict of Laws; Constitutions; Corporations, 29-33.

STATUES.

See Injunctions, 2-3.

STATUTE OF FRAUDS.

See Brokers, 4; Contracts, 4; License; Wills, 10.

STATUTE OF LIMITATIONS.

See Limitations of Actions, 1.

STATUTES.

1. **IN INTERPRETING A STATUTE** the words used should be construed with reference to the subject matter. (*Cardenas v. Miller*, 84.)

2. **STATUTES, INTERPRETATION OF.**—General language used in a chapter of the code relating to real property cannot control other sections of the same code relating to personal property. Therefore, a general statement to the effect that an unrecorded instrument is valid between the parties thereto and those who have notice thereof does not control nor vary the provisions of the same code upon the subject of chattel mortgages. (*Cardenas v. Miller*, 84.)

3. **STATUTES—CONSTRUCTION.**—Words of a statute ought not to be given a retrospective operation, unless they are so clear, strong, and impressive that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise satisfied. (*Lawrence v. Louisville*, 309.)

4. **CONSTITUTIONAL LAW.—AN ACT WILL NOT BE PRO-
NOUNCED UNCONSTITUTIONAL,** unless it is clearly so. A doubt

of the constitutionality of an act is not sufficient to warrant its judicial condemnation. (*Beverly v. Barnitz*, 257.)

5. **CONSTITUTIONAL LAW—CLASS LEGISLATION.**—A statute authorizing a union or association of workmen to adopt a trademark or label to be used only on goods prepared by members of that association does not conflict with the provisions of the state constitution inhibiting the granting to any corporation, association, or individual of any special or exclusive right, privilege, or immunity. (*State v. Bishop*, 569.)

6. **CONSTITUTIONAL LAW—PAWNBROKERS.**—A statute requiring all pawnbrokers to keep a book in which shall be entered a description of all property pawned to, or purchased by, them, with the names and residences of the persons by whom they were left, the amount of the purchase money or the loan, the interest charged, and the time when the loan falls due, is constitutional. It does not violate the provisions of the state constitution prohibiting the compelling of any person to bear witness against himself. (*St. Joseph v. Levin*, 577.)

7. **STATUTES—CHANGE OF REMEDY.—EQUITY OF REDEMPTION.**—As the reserved estate of an equity of redemption is indefinite in its duration, the legislature has power to regulate it, within reasonable bounds, so as to protect the interests and equities of both debtor and creditor. (*Beverly v. Barnitz*, 257.)

8. **CONSTITUTIONALITY OF "REDEMPTION LAW."**—Chapter 109 of the Laws of Kansas, of 1893, concerning the sale and redemption of real estate, commonly known as the "redemption law," whether applied to existing or future contracts, is not in conflict with section 10, article 1, of the constitution of the United States, providing that no state shall pass any law impairing the obligation of contracts, as such statute merely regulates the procedure upon the foreclosure of mortgages so as to define and make more certain the equity of redemption, that indefinite estate impliedly reserved by every mortgagor of real property, and called into active existence only by the foreclosure. (*Beverly v. Barnitz*, 257.)

9. **STATUTES—IMPAIRING OBLIGATION OF CONTRACT—CHANGE OF REMEDY.**—The obligation of a contract cannot be impaired by the legislature, though it may alter the remedy to enforce it at will. If the effect of legislative action is to impair the obligation, it is void, as it is immaterial whether such result is accomplished by acting on the remedy, or directly on the contract itself. (*Beverly v. Barnitz*, 257.)

10. **STATUTES—IMPAIRING OBLIGATION OF CONTRACT—CHANGE OF REMEDY.**—The remedy provided by law for the enforcement of a contract is no part of its obligation, and whatever pertains merely to the remedy may be changed, modified, or abrogated by the legislature, in its discretion and to any extent, provided a substantive remedy be still left to the creditor, and such changes may constitutionally apply to existing contracts. (*Beverly v. Barnitz*, 257.)

See Corporations, 11-15; Counties; Elections, 2; Executors and Administrators, 1; Master and Servant, 3, 4; Penalties.

STOCK.

See Corporations, 18, 19, 21; Fraud; Specific Performance, 4, 8.

STREET RAILWAYS.

See Railroads, 38-40.

STREETS.

See Eminent Domain, 2, 3; Municipal Corporations, 23-34; Railroads, 1-5.

SUICIDE.

See Insurance, 16, 17.

SURFACE WATERS.

See Railroads, 6; Waters, 4.

TAXES.

TAXATION OF IMPORTED GOODS IN ORIGINAL PACKAGES.—Imported goods in the hands of the importer in original packages stored by him and kept for sale cannot be subjected to taxation by the state until the packages are broken or the goods sold. (State v. Board of Assessors, 318.)

TELEGRAPH COMPANIES.

1. TELEGRAPH COMPANIES.—CONDITIONS IN BLANKS furnished by a telegraph company, stating that it is not liable for mistakes or delays in the transmission or delivery, or for the non-delivery of a message beyond the sum paid for sending it, unless the message is ordered repeated, and that it is not liable for damages in any case, if the claim is not presented within sixty days after the message is filed with the company for transmission, are unreasonable, and inapplicable when applied to a case in which the company has failed and neglected to transmit the message at all. (Francis v. Western Union Tel. Co., 507.)

2. DAMAGES CANNOT BE RECOVERED FOR MENTAL SUFFERING caused by the failure of a telegraph company to transmit and deliver a message. This, under the rule that damages cannot be recovered for mental suffering resulting from breach of a contract. (Francis v. Western Union Tel. Co., 507.)

THREATS.

See Homicide, 1.

TORTS.

See Actions; Assumpsit, 3, 4; Executors and Administrators, 13, 14; Master and Servant, 1; Railroads, 43.

TRADEMARKS.

1. TRADE NAMES OR MARKS.—THE LABEL OF THE CIGAR-MAKERS' INTERNATIONAL UNION is protected from use by persons who are not members of that union by the statutes of Missouri, and the use of a counterfeit label is punishable thereunder. (State v. Bishop, 569.)

2. TRADEMARK OF A UNION OR ASSOCIATION.—The state may authorize a union or association of workmen to adopt any term or device as their trademark to distinguish goods prepared by persons who are members of such union or association, and may prohibit other persons from using such trademark or device, and impose a penalty upon persons who do not respect such prohibition. (State v. Bishop, 569.)

3. TRADEMARKS.—THE LABEL OF THE INTERNATIONAL UNION OF CIGARMAKERS, which does not indicate that the cigars are owned or manufactured by the union as an organization,

or that it has any interest or property therein, or by what particular person or firm the cigars to which it may be attached were manufactured, is not a valid common-law trademark. (*State v. Bishop*, 569.)

4. TRADE NAME—IMITATION OF MANUFACTURER'S GOODS. Where a manufacturer, for the purpose of presenting his goods to the market, has adopted a particular combination of features, in part old and in part new, he is entitled to protection against a palpable imitation. (*Hildreth v. McDonald*, 440.)

5. TRADEMARK OR NAME, GUILTY KNOWLEDGE OF PERSON UNLAWFULLY USING.—To sustain a conviction for selling cigars upon which are a counterfeit label of the Cigarmakers' International Union, it is necessary to produce evidence tending to show that the person making such sale had guilty knowledge that the label was counterfeit. (*State v. Bishop*, 569.)

6. TRADE NAME—FORM AND STYLE OF PACKAGES.—If a manufacturer of candy puts it up in packages of a particular size and shape, with a word in red script letters upon the middle and ends of the wrappers, another person may be restrained from putting up packages in the same form and size with another word printed upon the middle of the wrappers in Roman letters, if it is found that the public is thereby deceived into believing that the defendant's goods are the plaintiff's goods and that the resemblance is not accidental. (*Hildreth v. McDonald*, 440.)

See Statutes, 5.

TRADE UNIONS.

See Trademarks, 1-3.

TREATIES.

1. A TREATY IS THE SUPREME LAW OF THE LAND, binding all courts state and federal. (Succession of Rabasse, 433.)

2. TREATY AND ITS EFFECT—PROPER SUBJECT OF TREATY MAKING POWER.—A provision in a treaty between this country and France giving French heirs the right to be represented here by the consul of their country relates to a subject within the treaty making power, and must prevail if in conflict with a state law. (Succession of Rabasse, 433.)

3. TREATY DISPLACES POWER OF COURT TO APPOINT ATTORNEY FOR FOREIGN HEIRS, WHEN.—Under the treaty between this country and France providing that, upon the death of a citizen of France in the United States without any testamentary executor by him appointed, the consul shall have the right to appear, personally or by delegate, in all proceedings on behalf of the absent or minor heirs, a delegate appointed by the French consul in Louisiana to represent the interests of French heirs in a succession there is an agent of such heirs. In such a case there is no necessity to appoint an attorney to represent them, and a court has no power to do so. (Succession of Rabasse, 433.)

TRESPASS.

1. LIENS—CONVERSION.—Although the action of trespass on the case has been abolished by statute, the holder of an agricultural lien may maintain such action against one who, with knowledge of the lien, has purchased from the lienor and induced him to turn over the subject matter of such lien, thus removing it beyond the reach of the lien process, and converting it to his own use. (*Michalson v. All*, 857.)

2. TRESPASS—RIGHT OF COTENANT TO MAINTAIN.—One of several cotenants in possession, holding by separate contracts, may maintain an action in trespass, when the damage for which he seeks to recover is to his own individual property, rightfully in the close by virtue of his contract. (*Morgan v. Hudnell*, 741.)

3. TRESPASS—RIGHT OF COTENANT TO MAINTAIN ACTION. A cotenant of a pasture field may, without making his cotenants parties, maintain trespass against the owner of an animal which breaks into the pasture and injures an animal belonging to such cotenant, and rightfully therein. (*Morgan v. Hudnell*, 741.)

See Animals, 2; Assumpsit, 1-3.

TRESPASS QUARE CLAUSUM FREGIT.

See License.

TRIAL.

1. JURY TRIAL.—NEITHER PARTY ENTITLED TO, WHEN.—In an action raising the issue as to whether a deed in controversy was executed under duress of the grantor, neither party is entitled to demand a jury trial. (*Commercial Nat. Bank v. Wheelock*, 738.)

2. PRACTICE.—AN ERROR IN THE ADMISSION OF EVIDENCE IS CURED by its withdrawal from the jury, if, when admitted, the court expected it to be followed up by other evidence making it competent, and, upon ascertaining that this expectation was not to be realized, informed both parties that the evidence was withdrawn from the jury, and the arguments were made with the understanding that it was not in the case. (*Hicks v. New York etc. R. R. Co.*, 471.)

3. NEGLIGENCE—VERDICT INSUFFICIENT TO SUPPORT JUDGMENT.—If, under the pleadings, the plaintiff is entitled to recover only for gross negligence, a verdict based upon a finding of ordinary negligence against the defendant, and assessing damages, is insufficient to support a judgment therefor. (*Louisville etc. R. R. Co. v. Brantley*, 291.)

4. TRIAL, WHEN NOT "FULL, FAIR, AND IMPARTIAL."—A party who has been forced to defend himself, on the same indictment, against two inconsistent and widely different offenses, can hardly be said to have had a "full, fair, and impartial trial." (*State v. Fitzsimon*, 766.)

5. CRIMINAL PRACTICE.—THE AGE OF THE DEFENDANT need not be stated in a verdict finding him guilty of an offense charged, though, to his guilt of such offense, it is necessary that he should have been twenty-one years of age when it was committed. (*Doss v. People*, 180.)

See Instructions.

TRUSTEES.

See Corporations, 16, 17.

TRUST FUNDS.

See Banks, 1, 2; Distribution.

TRUSTS.

1. A TRUST TO MANAGE PROPERTY and apply the proceeds to the use of persons designated, and to sell the property and distribute the proceeds among the nephews and nieces of the testator and the descendants of those who may have died, is a valid trust under the statutes of California, provided it does not restrain the power of

alienation for a period which may be beyond the duration of lives in being. (In re Walkerly, 97.)

2. TRUSTS.—A DEPOSIT of moneys in the bank by A, and the taking of a pass-book headed "A & B, payable to either or survivor," does not give B any title to such moneys, though A has died, if the book was never in the possession of B and she had no knowledge of the deposit until after the death of A. (*Noyes v. Institution for Savings*, 484.)

3. TRUSTS—SAVINGS BANK—DEPOSIT IN TRUST FOR ANOTHER.—The act of depositing one's own money in a savings bank, to the depositor's own credit, in trust for another, retaining possession of the pass-book, making no disclosure or publication of the trust, treating it apparently as a mode of transacting his own business, does not create a trust, where the depositor survives the proposed beneficiary, especially if the depositor is alive, claiming the money as his own, and denying that he ever had any intention of divesting himself of ownership. (*Cunningham v. Davenport*, 641.)

4. SAVINGS BANK—DEPOSIT IN TRUST FOR ANOTHER.—One who opens an account in a savings bank in trust for a third party is not bound to disclose his reasons for so doing. (*Cunningham v. Davenport*, 641.)

5. SAVINGS BANK—DEPOSIT IN TRUST FOR ANOTHER.—The act of a depositor in opening an account in a savings bank in trust for a third party, the depositor retaining possession of the bank-book, and failing to notify the beneficiary, creates a trust, if the depositor dies before the beneficiary, leaving the trust account open and unexplained. (*Cunningham v. Davenport*, 641.)

6. ALIENATION, SUSPENSION OF POWER OF, WHAT IS.—The fact that all the beneficiaries under a trust have estates which are alienable does not prevent the suspension of the power of alienation if the trustees cannot join therein without acting in contravention of the trust, if the statute has declared that all their acts in contravention of the trust are void. (In re Walkerly, 97.)

7. PERPETUITIES—TRUSTS.—A perpetuity will no more be tolerated when covered by a trust than when it displays itself undisguised in the settlement of a legal estate. (In re Walkerly, 97.)

8. A TRUST CANNOT BE DESTROYED by the joint act or conveyance of the trustees and of the beneficiaries if the instrument creating the trust has provided a fixed period for its existence, which has not terminated. (In re Walkerly, 97.)

See Devise, 6.

ULTRA VIRES.

See Corporations, 5, 6; Railroads, 7.

UNITED STATES.

See Constitutions.

UNLAWFUL DETAINER.

See Forcible Entry.

USURY.

1. USURY.—NOTE FOR PURCHASE PRICE OF LAND, stipulating for a rate of interest from its date greater than that allowed by statute on any "contract for the hiring, lending, or use of money or other commodity," is usurious. (*People's Bank v. Jackson*, 823.)

2. USURY—RIGHT OF JOINT MAKER OF NOTE TO PLEAD.—One of three joint makers of a note for the purchase price of land, who, by purchase of the interests of his comakers, becomes liable for the whole debt, may set up the defense of usury to the whole note. (*People's Bank v. Jackson*, 823.)

3. USURY—LOAN BY AGENT.—If a money lender intrusts the entire management of his business to a general agent, with unlimited authority to conduct it according to his own discretion, and with the understanding that he is to obtain compensation for his services and expenses as agent by way of commissions or bonuses from borrowers, and the agent exacts usury in making a loan by retaining a commission which, together with the interest reserved, amounts to more than the rate allowed by law, the case stands precisely as if it had been done by the principal personally, and he cannot shield himself behind the pretext that he gave the agent no authority to exact more than legal interest, and that he had no actual knowledge that he was so doing. (*Hall v. Maudlin*, 492.)

VACANT AND UNOCCUPIED.

See Insurance, 8-12.

VACATING.

See Municipal Corporations, 33, 34.

VARIANCE.

See Pleading, 2, 3.

VENDOR AND PURCHASER

1. VENDOR AND VENDEE—RESCISSION OF CONTRACT TO PURCHASE—EVIDENCE.—In an action to rescind a contract for the purchase of land, on the ground of material mistake as to quantity, evidence is not admissible to show that the quantity contained in the tract, though materially less than represented, is worth as much as the sum agreed to be paid for the tract as represented. (*Newton v. Tolles*, 598.)

2. VENDOR AND VENDEE—RESCISSION OF CONTRACT TO PURCHASE.—An executory contract for the purchase of a tract of land may be rescinded by the vendee when he enters into possession, relying upon the erroneous, though not fraudulent, representation of the vendor that it contains a certain number of acres, and finds, upon a survey of the premises, that it contains a number of acres materially less than thus represented. (*Newton v. Tolles*, 598.)

VESTED RIGHTS.

See Limitations of Actions, 2-4.

VICE-PRINCIPAL.

See Master and Servant, 10-12.

WAIVER.

See Assumpsit, 3, 4; Franchise, 2; Landlord and Tenant, 5; Pleading, 2.

WARRANTY.

See Covenants; Fraud, 5, 8.

WATERS.

1. **WATERS—DITCH AS A WATERCOURSE.**—If a landowner, for the purpose of straightening a stream, cuts a ditch through his land, and over and along a highway, with the acquiescence and common consent of all, it is governed, in the matter of interference and obstruction, by the same rules as a watercourse. (*Missouri Pac. Ry. Co. v. Keys*, 249.)

2. **RIPARIAN OWNER'S RIGHT TO RESTORE STREAM TO ITS FORMER CHANNEL.**—If, by natural causes, such as extraordinary freshets, the channel of a watercourse is changed so that it ceases to flow upon or through the lands of a riparian proprietor, he has no right to enter upon the lands of another for the purpose of restoring such stream to its former channel. (*Wholey v. Caldwell*, 64.)

3. **A RIPARIAN OWNER'S RIGHT TO WATER** is not confined to having it enter his land by its accustomed channels without regard to the quantity which they are wont to carry. As against any wrongful act of another proprietor, he has the right to have each channel carry its due amount of water. (*Wholey v. Caldwell*, 64.)

4. **SURFACE WATER IS AN OUTLAW—PROTECTION AGAINST.** Water which has overflowed the banks of a stream during a freshet, on account of the channel not being large enough to hold and carry it off, is surface water, to be regarded as an outlaw, and against which any landowner affected may protect himself. (*Missouri Pac. Ry. Co. v. Keys*, 249.)

5. **WATERS—RIGHT TO DIVERT IF RETURNED.**—A landowner has a right to change the channel and divert the water in a stream flowing through his land, if he returns it to the original channel before it reaches the land of the proprietor below. (*Missouri Pac. Ry. Co. v. Keys*, 249.)

6. **WATERS—OWNER CANNOT DIVERT AND PRECIPITATE ON ADJOINING OWNER TO HIS INJURY.**—A landowner has no right to divert the water of a stream flowing through his land from its channel and precipitate it in a body upon the adjoining land to the injury of the owner. (*Missouri Pac. Ry. Co. v. Keys*, 249.)

See *Boundaries; Municipal Corporations*, 9.

WILLS.

1. **WILL—INTENTION, LANGUAGE OF WILL CONTROLS.**—A finding by the trial court from extrinsic evidence showing the testator's intention, though such evidence is received without objection, cannot have effect as against the language of his will, nor prevent the court from disregarding such provisions of the will as violate the law against perpetuities, though to do so violates his intention as thus found by the court. (*In re Walkerly*, 97.)

2. **WILLS.—THE WORD "ISSUE"** in a will, if there is nothing to restrict the meaning of the word to children, is a word of purchase and not of limitation, and includes all descendants in being at the time the terms of the will become operative. (*Pearce v. Rickard*, 755.)

3. **WILLS, ATTESTING IN PRESENCE OF TESTATOR, WHAT IS.**—A will may be regarded as attested in the presence of the testator, though the attestation did not take place in the room in which he then was, and was not actually seen by him, if it took place within the range of his vision and might have been so seen considering his position and state of health at the time. (*Witt v. Gardiner*, 150.)

4. **A WILL IS NOT ATTESTED IN THE PRESENCE OF THE TESTATOR**, however close he may be to the witnesses at the time, if his position is such that he cannot possibly see them sign, or where his position is such that he cannot readily change it, and the witnesses are out of his sight. The true test is not whether the testator

saw the witnesses sign, but whether, considering his mental condition and his posture at the time, he might have seen them do so. (*Witt v. Gardiner*, 150.)

5. A WILL IS NOT ATTESTED IN THE PRESENCE OF THE TESTATOR, though he was physically able to have gotten out of bed, if he did not do so, and could not have done so without peril and in violation of the orders of his attending physician. (*Witt v. Gardiner*, 150.)

6. PERPETUITIES.—THE COURT CANNOT ALTER A WILL SO AS TO FREE IT FROM OBJECTION arising from its offending the law against perpetuities, though such alteration puts it in that form in which it would doubtless have been put had the testator been advised that otherwise it would be disregarded as creating a perpetuity. (*In re Walkerly*, 97.)

7. WILLS—DISABILITIES TO CONTEST.—If, when a will is admitted to probate, the person entitled to contest is under two or more disabilities, his right to contest is not barred until the longest continuing disability is removed. (*Powell v. Koehler*, 705.)

8. WILLS.—IF ONE HEIR IS UNDER DISABILITY AND THE OTHERS ARE NOT, and the former, because of such disability, remains entitled to contest a will, and brings a proceeding for that purpose, a judgment in his favor operates in favor of all the other heirs. (*Powell v. Koehler*, 705.)

9. WILLS—AGREEMENT TO MAKE.—One who adopts a child by legal proceedings, and, in order to induce the child's mother to consent to such adoption, orally agrees that the child shall inherit and be entitled to a share of the adopter's property as his heir, cannot deprive such child of his rights as such heir by fraudulently and without consideration disposing of his property in his lifetime or by will for that purpose, after the child has performed his part of the contract and remained in the adopter's family until he has attained his majority. (*Quinn v. Quinn*, 875.)

10. WILLS—AGREEMENT TO MAKE—STATUTE OF FRAUDS.—An oral agreement between the mother of a child and one who adopts such child by legal proceedings, to the effect that the child shall inherit and be entitled to a share of the adopter's property as his heir, does not relate to a sale or transfer of real estate, or an interest therein, and is not affected by the statute of frauds. (*Quinn v. Quinn*, 875.)

See Limitations of Actions, 11; Deeds, 1, 2.

WITNESSES.

1. WITNESSES—FAILURE TO CALL.—It is defendant's duty, in an action for negligence, to call and examine a witness whose fault caused the injury, and if he fails to do so, all legal presumptions are unfavorable to his testimony. (*Barnes v. Shreveport etc. R. R. Co.*, 400.)

2. WITNESSES AS AGAINST DECEDENT.—Defendants are not competent witnesses on their own behalf, by the law of Illinois, to testify to facts occurring in the lifetime of the ancestor of the plaintiffs who are suing to recover lands which they claim to have descended to them, but which the defendants claim were conveyed to them by such ancestor. (*Wilson v. Wilson*, 176.)

3. EVIDENCE.—AN IMPEACHING QUESTION without foundation as to time, place, or circumstance for the inquiry is insufficient (*Skaggs v. Martinsville*, 209.)

4. INSURANCE.—TESTIMONY OF EXPERTS will not be received for the purpose of affecting the interpretation which the law gives to a contract of insurance. (*Seammell v. China etc. Ins. Co.*, 462.)

See Constitutions.

